

Chapter XXXXX

Suggestions toward Commonwealth Companies: Sharing Prosperity with Worker Stakeholders

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“Democracy is, among other things, the ability to say 'no' to the boss. But a man cannot say 'no' to the boss, unless he is sure of being able to eat when the boss's favor has been withdrawn.”

Aldous Huxley, *Themes and Variations* (1950)

For over three decades, progressive investment policy leaders have been saying that the owners of workers’ capital--the workers--must prevent the misuse of their hard-earned retirement savings and other assets by irrational short-term Wall Street schemes that would harm them. In *Working Capital: The Power of Labor’s Capital* (2001: Cornell University Press), we labeled that harmful process “collateral damage.”¹ In this paper, we call for stronger actions by workers as shareholders (who own a large chunk of the capital markets) and by workers as stakeholders (who are crucial, after all, to the success of any enterprise) to invest responsibly² and reclaim their power to participate in the governance of companies. Both are calls to make the boss more accountable and to move toward a “commonwealth company” framework. We start by offering two distinct stories of how the roles of working people were ignored and disparaged.

Canton, Ohio. In June 2014, Timken Steel, a profitable, modernized manufacturer of steel and bearings was forced to split into two following a shareholders' campaign. Led by the California State Teachers’ Retirement System (CalSTRS), a signatory to the UN’s Principles for Responsible Investment (PRI), the breakup was a product of Relational Investors, an activist hedge fund founded by protégés of corporate raider T. Boone Pickens. The break-up was forced to “unlock value.”

However, multiple news accounts relayed the fears of the Timken family, workers, and local citizens that the split was unnecessary. The firm, a good community neighbor whose workers were represented by the United Steelworkers (USW), was reportedly well structured, had low debt, and a healthy pension fund. Soon after the split, Relational Investors sold its interests and walked away with a profit of \$188 million, in just over two years as a shareholder.³ But, three years later, stock prices for Timken Steel have fallen from the \$49 range in September 2014 to \$14.81, a loss of 70%, and for Timken Company from \$67 range in June 2014 to \$48 mid-September, 2017, according to Motley Fool.⁴ They have badly lagged the trend line for the S&P. So, despite the opposition of Teachers' Union trustees (on CalSTRS board) and the USW, the decision enriched short-term players, resulted in the loss of long-term share value, destroyed synergies (as feared), and will probably make the company more vulnerable to hostile takeovers in a challenging economic environment.

Chattanooga, Tennessee. In February 2014, the United Auto Workers (UAW) lost a crucial organizing vote at a Volkswagen (VW) automotive plant. The VW Corporation, based in Germany, pledged neutrality in the organizing campaign, and through their Works Council structure had committed to establishing a codetermination system at the VW plant.

Codetermination is a legislative framework in many countries of Europe by which workers are elected by their peers to boards or supervisory boards of companies, and also participate in corporate decisions through works councils. Works councils are joint labor-management systems that facilitate shop-floor participation and long-term strategy. As Rainald Thannisch, policy officer at the Department of Co-determination of the Executive Board at the Confederation of German Trade Unions, said, "Co-determination creates the conditions—especially in global companies—for democratic (and independent) control of economic power."

Losing by a close margin -- 712 to 629 -- the loss was a setback for workers' rights, which were thwarted by a massive, third-party anti-union campaign waged by Republican U.S. Senator Bob Corker, the Governor, and the local Chamber of Commerce.⁵ As a result of the loss, the Chattanooga plant is VW's only plant worldwide without a Works Council. When the UAW won a subsequent election in a smaller unit at the plant, VW turned against the union (as the massive VW emissions scandal was unfolding).⁶

The above examples are proxies for the systemic short-termism plaguing America's capital markets and its productive economy. It is no secret that workers' pension assets, the assets and savings of teachers, steelworkers, firefighters, pilots, engineers -- everyday working people -- represent the largest shares of global financial stock. In 2016, pension assets were valued at US \$36.4 trillion across 22 major pension markets globally. The U.S. pension assets market -- at US \$22.5 trillion and representing 121% of the nation's Gross Domestic Product (GDP)⁷ -- is the largest among the global markets.

Isn't it perverse then that workers' assets are so often deployed in ways that work against their long-term wellbeing? In *Working Capital*, Dr. Tessa Hebb, one of the thought leaders in responsible investing, succinctly described this dichotomy: "The earnings that workers defer for a secure retirement inform financial decisions that, in turn, determine the quality of employment and the character of goods and services they enjoy. Yet the institutions and individuals that manage pension funds often pursue narrow goals whose consequences undermine workers who provide the savings they tend."⁸

As we pointed out in *The Responsible Investor Handbook* (2016: Routledge/Greenleaf Publishing), the increasing misalignment of incentives between the owners and managers of corporate wealth, coupled with the decline of unions, has resulted in greater separation between

the long-term interests of the beneficiaries of retirement funds and those that oversee and manage those assets. The result has been:

- Investment of pension assets into approaches that ignore long-term risks and that are focused on market timing and short-term gains.
- Preference for quick, short-term profits for shareholders and unsustainable bonuses for CEOs at the expense of sustainable, long-term value creation that benefits core stakeholders.
- Loss of worker representation and voice in the management of the workplace.
- The dual crisis of job insecurity and the malignant use of temporary contract employees.
- Stagnated wages (even as productivity and corporate profits have soared) and rising income inequality.
- Little accountability for the negative Environmental, Social and Governance (ESG) impacts often generated in the pursuit of short-term gains.

The tectonic changes in the American corporate landscape, marked by an epic struggle between labor and capital, led to the rise of the dominant corporate business model in the US, which has prioritized the sole maximization of shareholder value -- a focus on short-term profit over longer term strategy. This approach, as economist William Lazonick has pointed out, has meant an approach dominated by *value extraction* for returns to financial resources, rather than *value creation*.⁹

As a leading indicator of these failures, wages have failed to keep pace with productivity gains, a brutal process (for working people) underway since 1973.¹⁰ This divergence is illustrated in Figure 1 and its “Drunken Y” pattern: compensation gains tightly tracking productivity growth in the early post-war years, then falling progressively behind. One of the

primary reasons for anemic middle-class income growth in both post-2001 recoveries is a retreat in business investment, which, according to the Center for American Progress (CAP) has remained well below its historic trend. Profits have been rising while investment has been falling since 2000, which has slowed productivity.

FIGURE 1

Disconnect between productivity and a typical worker's compensation, 1948–2014

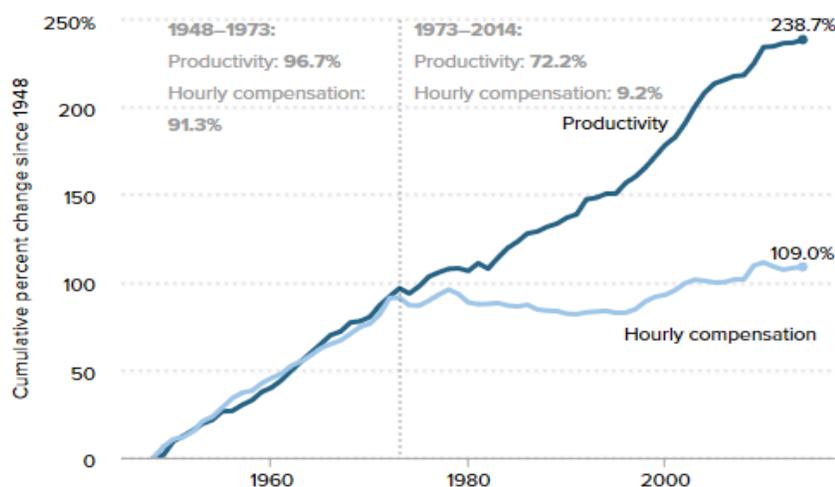


Chart Data

Note: Data are for average hourly compensation of production/nonsupervisory workers in the private sector and net productivity of the total economy. "Net productivity" is the growth of output of goods and services minus depreciation per hour worked.

Source: EPI analysis of data from the BEA and BLS (see technical appendix for more detailed information) ...

This needs to change. America needs to drastically reverse our alienated, monarchical corporate work culture and move instead toward a "commonwealth" company, one that respects its employees, provides increased human capital investment, and empowers and embraces a long-term engagement with workers.

Regaining Control of Workers' Capital and Voice

In their role as both shareholders and stakeholders, workers can help change the status quo. Labor, public pension funds, and socially-responsible investors have been winning major shareholder and corporate campaigns to question CEO pay, elect more diverse boards of directors, promote a more transparent and accountable corporate management, and push for human rights and environmentally-healthy corporate practices, etc. They have taken the lead in forcing corrupt corporations to alter behavior and become more accountable.

As shareholders, workers' pension funds can seek to positively influence the behavior of investee companies through shareholder activism. Such activism can range from private engagements (such as behind the scenes consultations, letters, meetings, one-on-one communication) with companies to formal shareholder proposals presented at a company's annual meeting that seek to tackle issues related to governance such as CEO compensation, board of director selection, mergers and acquisitions, as well as non-financial corporate sustainability issues such as human rights, diversity, and environmental pollution.

Through shareholder proposals, trustees and other fiduciaries can bring attention to and support those issues that are expected to contribute to the long-term economic best interest of workers and their beneficiaries or that will have no adverse effect on the same. The U.S. Department of Labor (DOL) encourages pension funds to take a proactive approach to corporate issues, rather than merely respond to proxy solicitations. The DOL's Interpretive Bulletin 2016-01 ("IB 16-01") also rescinded the Bush-era proxy voting guidance due to the perception that the ruling wrongly discouraged ERISA plan fiduciaries from exercising their engagement or voting duties in terms of representing their beneficiaries. It states:

The existence of financial benefits associated with shareholder engagement is suggested by the fact that a growing number of institutional investors are now engaging companies on ESG issues.... Other market developments further substantiate the financial benefits from shareholder engagement.¹¹

As the core stakeholders of America's businesses, workers, unions and pension funds (representing workers and their beneficiaries) should exercise their immense, collective influence to include stronger social commitments within their investment policy and beliefs statements, enabling funds to positively shape the work practices of investee companies. In addition, workers' pension funds should help support worker-friendly policies at investee companies. As the Global Trade Unions have repeatedly emphasized, trustees, in keeping with their fiduciary duty, "should promote -- and do not weaken -- workers' fundamental rights to freedom of association and collective bargaining."¹² By furthering a range of sustainability issues, including accounting for the intangible assets of a company such as its human capital, worker stakeholders can not only advance social and environmental rights, but also secure better performance outcomes for their pension investments.

In addition to the more publicized investments of active responsible funds around the "E" and "G" of the Environmental, Social and Governance framework for responsible investment, more investors are giving higher priority to the needs and roles of working people through their investments, thus raising the profile of the "S" in ESG. In so doing, capital stewards can reclaim fiduciary duty. The obligation to fiduciary duty requires that trustees not only enable workers to achieve their financial goals for retirement, but also champion a long-term, responsible and activist approach to the management of workers' assets and to promoting workers' interest.

Of course, activist shareholders must take care in running afoul of Securities and Exchange Commission (SEC) rules. The Commission’s controversial “ordinary business rule” exception, which prevents initiatives that interfere with company operations, has stopped in their tracks many important shareholder initiatives. But as it becomes more clear that investors who don’t include ESG matters in their investment decisions may be violating fiduciary duty, shareholders should push for corporate governance measures that more aggressively recognize workers’ rights and the treatment of workers. As activist scholar Marlene O’Connor has pointed out in her prophetic discussion of the need for human capital management disclosures and shareholder-stakeholder balance, the hallmark of fiduciary law is disclosure.¹³ Responsible investment advocates should push to have the new DOL provisions on ESG, along with those in other global compacts, embedded into fiduciary duty.

Toward Commonwealth Companies

Below, we suggest new pathways toward commonwealth companies, loosely described here as those that practice responsible governance rules but also those that respect worker stakeholders, empower workers to participate in decision-making, and “share the wealth” with those core stakeholders. These pathways include:

- 1) Reclaiming the investment of workers’ capital for the long term and for the benefit of workers and their beneficiaries through responsible investment strategies
- 2) Using responsible activism in corporate governance and pushing for worker-friendly agenda on the basis of pension investments
- 3) Balancing shareholder wealth creation with stakeholder value creation
- 4) Demanding better human capital management practices and disclosure

- 5) Reinstating workers' voice and rights through unions and new work systems such as work councils

Reclaiming Workers' Capital through Responsible Investment Strategies

Pension plans are generally organized as trusts with a board of trustees that is responsible for the oversight and investment of pension fund assets.¹⁴ Trustees are the primary stewards of the plan's assets and are the "ultimate decision-makers" in relation to their investment.¹⁵ They have a fiduciary responsibility to invest plan assets prudently, impartially, cost-effectively, in accordance with governing laws and documents, and, most importantly, with loyalty toward, that is, solely in the best interest of, plan participants and their beneficiaries.¹⁶

Pension trustees have a duty to protect and grow the trust funds for the trust's participants and beneficiaries. Workers and their family members depend on these assets held in trust to meet their financial goals in retirement. However, trustees who oversee the management of pension funds encountered practical challenges such as weak governance structures, increased capital market complexities, oversized influence of investment managers and external consultants, and a multitude of changing regulations. They have sometimes succumbed to short-termism and institutional herd mentality,¹⁷ suffering "disrupted attention to the fiduciary duties of loyalty and impartiality."¹⁸

We encourage pension trustees to re-align their governance and investment strategies with the long-term interests of the beneficiaries of pension funds by incorporating responsible investment practices into the investment decision-making process for plan assets. What is responsible investing? It is "the integration of certain non-financial concerns in the investment process"¹⁹ to help generate competitive financial returns in the long-term alongside positive environmental and social impacts. These concerns are collectively referred to as ESG issues.

We believe that responsible investors, with their longer term focus, ESG-based holistic risk assessment, and shareholder activism, are better equipped to preserve and grow retirement capital while maintaining intergenerational equity. This concept of intergenerational equity represents the idea that “growth should occur whilst ensuring a certain level of economic, social and environmental security for future generations”²⁰ -- emphasizing important and inherent links between the goals of workers’ capital and those of responsible investing.

By re-aligning their governance and investment strategies with the long-term interests of beneficiaries, trustees can regain control of their fiduciary responsibilities and better influence the future of workers’ capital. In so doing, trustees can also ensure that “their decision-making processes balance allocation of capital between near-term needs and future wealth creation and consider the potential transfer of risks between participant generations.”²¹

Supporting and re-affirming trustees in this reassessment of their fiduciary duty are investors and unions, both globally and nationally. Leading the charge for investors is the PRI, a growing coalition of pension funds and other institutional investors, unions, consultants, and asset managers, who have pledged the incorporation of ESG considerations in their investment decisions. Together, the coalition represents an influential group of aspiring responsible investors representing nearly \$70 trillion in assets.²²

Similarly, the Global Trade Unions, with over 200 members from 25 countries, seeks to promote the long-term responsible investment of pension assets.²³ And closer to home, the AFL-CIO, the largest federation of unions in the U.S. with 56 national and international unions as members, has also urged wider adoption of responsible investment practices by pension plans.²⁴

Using Responsible Activism in Corporate Governance

“Nothing concentrates the mind of a corporate executive quite so sharply as a pointed inquiry from large investors or outside director.”

Robert Reich, Former Secretary, Department of Labor²⁵

The question of governance influences everything about how a company is run. It involves many different actors who have a stake in the ownership and control of companies, including shareholders, management, corporate boards, workers and their unions, and other key stakeholders.

Good corporate governance, as CalPERS has noted, is about making “the boss” accountable.²⁶ It allows for proper incentives for the board and management to pursue objectives that are in the interests of the company, its shareholders, and other stakeholders.

The DOL, in addition to minding traditional board governance concerns, updated and reformulated corporate governance objectives to include the following responsibilities:

...the nature of long-term business plans including plans on climate change preparedness and sustainability, governance and compliance policies and practices for avoiding criminal liability and ensuring employees comply with applicable laws and regulations, the corporation's workforce practices (e.g., investment in training to develop its work force, diversity, equal employment opportunity), policies and practices to address environmental or social factors that have an impact on shareholder value, and other financial and non-financial measures of corporate performance.²⁷

As the Organization for Economic Cooperation and Development's (OECD) 2004 report on Principles of Corporate Governance states, “The degree to which corporations observe basic principles of good corporate governance is an increasingly important factor for investment decisions.”²⁸ In the aftermath of the 2008 financial crisis, bad corporate governance practices were placed front and center in the minds of investors.

To prevent a repeat of that crisis, the Trade Union Advisory Committee (TUAC)²⁹ to the OECD asserts that corporate governance principles should not accept the status quo standards

that contributed to the 2008 crisis but should instead aim for aspirational governance standards to achieve the long-term interests of the company and its stakeholders. TUAC's proposals to strengthen corporate governance principles and practices include the fundamental principles of

- Giving workers a voice through right to information, consultation, representation and negotiations
- Ensuring greater transparency in the investment chain
- Promoting the responsible use of shareholder rights
- Board independence and diversity
- Checks on executive pay³⁰

Most importantly, the idea here is undertaking responsible activism that is in the interest of all key stakeholders, not just shareholders. Workers' pension funds should not be engaging in the type of negative, speculative "value-unlocking" activism engaged in by CalSTRS, Relational Investors, and other raiders. As Suzanne Berger, a professor of political science at M.I.T noted,

In the microcosm of Timken, you can see the larger forces playing out in manufacturing in America. It's not classic greed, like 'Barbarians at the Gate.' But we've set up financial markets in a way that's injurious to long-term investment and industrial companies...where California teachers have to protect their pension funds by hurting manufacturing in Ohio.³¹

There is much evidence to support the value of responsible corporate governance initiatives for shareholder value. For example, findings from two large meta-studies³² reveal that in aggregate, good corporate governance principles lower the cost of capital and are positively correlated with improved operational and stock market performance. Further, active responsible investment approaches such as proxy voting and shareholder engagement, along with the integration of material ESG factors in the valuation of securities, positively impact corporate behavior and performance when compared with passive approaches (such as negative screenings

which involve excluding investments in companies that manufacture certain products or engage in certain practices that may be objectionable to investors).³³

Balancing Shareholder Wealth Creation with Stakeholder Value Creation

Workers' pension funds in America have a greater responsibility to use their rights as shareholders to insist on policies at investee companies and the capital markets at large that respect working people and that empower workers to be more engaged by industry. In European countries with a dualistic model of corporate structure, such as in Germany, Austria, and the Netherlands, the workers' voice is empowered through codetermination and stronger unions.

Shareholders are generally more passive in their engagement with companies because, unlike in the U.S. where market forces dictate the employment model, EU worker protection is institutionalized through regulation.³⁴ In addition, in Europe, the concept of corporate social responsibility (CSR), a variant of responsible corporate governance, "differs a great deal from the American understanding because many social issues that are part of the original CSR social approach, such as employee participation, education and healthcare, are regulated by law in European countries."³⁵

Since American unions do not have European legally-embedded consultation rights (as part of co-determination) outside of collective bargaining, workers' capital stewards have promoted a stronger, earlier push toward exercising their shareholder rights. As a result, union and public pension funds have generally been aggressive in launching proxy campaigns and shareholder engagements with companies.

Agency theory supposes that only shareholders incur risk. It assumes that shareholders, as rational investors with residual claims on a company's profits, and thus incurring a high risk, have the right to assert total control over their agents and corporate boards, and can demand

maximum financial returns. Based on the “nexus of contract” theory, it is believed that “the interests of other stakeholders such as employees, and ‘social’ concerns such as environmental preservation, are by contrast thought to be more efficiently dealt with by contract and/or through extra-corporate regulation” and that employees are “fully capable of bargaining for contractual protections in addition to those made generally available through labor and employment law.”³⁶

Of course, the nexus theory, like the theory of efficient markets,³⁷ breaks down upon closer inspection. The rise of corporate dominance in the U.S. economy and public affairs, the increase in deregulation since the Reagan era, and the related decline of labor unions has meant that individual workers and communities have no comparable “power” to force negotiations. Companies are not required to (and so generally will not) enter into voluntary contract negotiations with individual workers or communities as partners.³⁸

Stakeholder theory, by way of contrast, holds that workers and other stakeholders of companies also make firm-specific investments and incur risk, and that core stakeholders should be considered in investment decisions. Labor economists observe that employees tend to develop long-term attachments to corporations under implicit contracts and make long term human capital investments in firms. In fact, shareholders can sell their stocks much more easily than employees can find another job.

While we firmly support ethical and progressive shareholder activism, we would be remiss to ignore the rising list of authors who pinpoint shareholder primacy as a driver in the rise of short termism and financialization, the demise of innovation, and the destruction of the many corporations. Shareholders like CalSTRS, as in the case of Timken. As John Kay, author of the Kay Report, asserts: “Markets and corporations serve citizens when, and only when, they are embedded in the societies of which they are part.”³⁹

Therefore, there is a need to balance shareholder primacy with an approach that creates value for all stakeholders. Indeed, American labor and its pension allies view value creation as long term value creation, and signed on to the Aspen Principles, which assert that companies and investors should “recognize that firms have multiple constituencies and many types of investors, and seek to balance these interests for long-term success.”⁴⁰

The Need to Demand Better Human Capital Management Practices and Disclosure

In an earlier section, we described a growing canon of performance studies that has demonstrated the financial benefits of responsible investment and good corporate governance. There has been less interest, historically, in researching and understanding the “S” in ESG, which includes critical issues such as union representation, worker participation, good wages, and workers’ health and safety. Respecting workers, providing good wages, training, and other benefits, and engaging with workers yields increases in productivity, according to the evidence.

As the TUAC notes, in addition to the active participation of pension plans in corporate governance, there are also many complementary workplace practices that protect workers’ rights, engage empowered workers, and facilitate productivity and higher bottom line results. These include:

- Undertaking responsible employment relations
- Supporting greater workforce participation and ownership
- Engaging in workforce training and knowledge sharing
- Employing empowerment and diversity strategies⁴¹

Investors are slowly becoming interested in a broader framework that places more importance on workers as major stakeholders of industry, and they describe this broader field as human capital management (HCM). As defined by one investor group, HCM includes, but is not

limited to, “hiring and retention, employee engagement, training, compensation, fair labor practices, health and safety, responsible contracting, ethics, desired company culture, and diversity, both with respect to a company’s direct employees and to the employees of vendors throughout the company’s supply chain.”⁴² Some analysts also include employee engagement, workforce participation and broader work systems. Others recognize the collateral importance of sharing ownership, profits and productivity with employees of firms. Human capital management has become widely accepted as a key component of corporate strategy.

An Harvard Law School IRRC Institute study conducted in 2015 surveyed the literature on human capital, reviewing empirical studies that examined the relationship between Human Resource (HR) policies and financial outcomes such as return on equity, return on investment, and profit margins. The majority of the reviewed 92 studies found positive correlations between training and HR policies with investment outcomes. The authors concluded that there is “sufficient evidence of human capital materiality to financial performance to warrant inclusion in standard investment analysis.”⁴³ Beyond employee training, this report confirmed the theory that firms are more competitive if their work systems are designed well and function effectively to make the most of employee talent and skills by stimulating worker engagement and commitment on the job.

In order to protect and enhance their investments, shareholders are increasingly incorporating HCM analyses into their overall evaluation of a company’s ability to deliver long-term sustainable value. These investors believe that firms with strong HCM policies and practices may be at a competitive advantage, and conversely, firms that have illegal or poor HCM practices are exposed to risks of failure.

However, despite the importance of HCM, corporate reporting requirements on HCM are virtually nonexistent. And where reporting does exist, the data cannot be compared across similar companies/industries due to lack of standardization in reporting. The Human Capital Management Coalition, representing an influential group of institutional investors holding \$2.8 trillion in assets, is seeking to change this. Among its many initiatives to further elevate HCM as a critical component in company performance, the Coalition has submitted a petition to the SEC asking it to demand HCM disclosure of public companies.

In addition, sustainability rating agencies, which have grown dramatically, play an important role in shaping the demands placed on companies regarding sustainability disclosures and practice. The Global Trade Unions, through its Committee on Workers' Capital and its Taskforce on Sustainability Ratings, has begun having a multi-year dialogue with a group of sustainability rating agencies to promote its "Guidelines for the Evaluation of Workers' Human Rights and Labour Standards." The Guidelines are meant to improve the methodology used by agencies in order to provide accurate snapshots of company strategy on the provision of decent working conditions and workforce empowerment, factors that are tied to long term performance.

These efforts towards disclosure will drive best practices, which may yield a more motivated, productive, and innovative workforce, and thus, should reduce personnel costs. Firms that ignore HCM are likely to have higher personnel costs, more disruption and embarrassing operational, reputational and legal risks. The Coalition notes, worse, that HCM failures have resulted in disastrous losses of life and share value reduction at firms such as Massey Coal and BP.

Reinstating Workers' Voice and Rights through Unions and New Work Systems such as Works Councils

As TUAC notes, “various mechanisms exist across OECD and G20 economies to ensure workers’ voices in the governance of the firm. These rights are recognized and upheld by several ILO conventions and by the OECD Guidelines for Multinational Enterprises (MNE). The most fundamental form of contractual governance consists of collective bargaining between senior management and worker representatives... But other important mechanisms to participate in company decision-making also exist, such as works councils and board-level employee representation.”⁴⁴

Though UAW lost the union vote at VW’s Chattanooga plant, mentioned earlier, an unexpected outcome from the loss was the commitment in 2015 on the part of IG Metall (the German union that represents workers in VW Germany) to partner with the UAW to explore the introduction of a Works Council in the U.S. to represent blue-collar and white-collar workers.⁴⁵ There does not appear to have been much progress on this front as of yet. Still it is a positive step towards giving workers a voice in corporate decisions affecting their wellbeing.

Most studies that have examined the productivity of firms with Works Councils have found a positive correlation between the two. In one report, the author found that, on average, establishments with a Works Council were 6.4% more productive. Other reports confirmed this conclusion if there was also a collective bargaining relationship.⁴⁶ There are also initiatives being led by the AFL-CIO and the European Trade Union Congress to demand, as part of the negotiations for the Trans-Atlantic Trade and Investment Partnership, that the treaty mandate that trans-national firms operating in the U.S. would have to replicate the dual union/works council structures that they operate under in Europe.⁴⁷

Toward a Balanced Shareholder and Stakeholder Approach

In *The Divine Right of Capital*, Marjorie Kelly predicted the implosion of a corrupt global corporate leadership and correctly pinned the gigantic meltdown on systemic organizational hubris and speculation on a mass scale. Kelly, in 2001, was not talking about the banks that drove the sub-prime financial markets collapse of 2008, but the 2000-2001 dot-com recession and an earlier group of corporate corruption scandals (which, by the end of 2001, included the Enron bankruptcy and self-demolition). Kelly argued for a new “stakeholder” politics of the corporation and of society, which drew on the philosophical tradition represented by Jefferson, Paine, Lincoln, and even Adam Smith to make her case. One of the biggest fans of this outlook was business journalist Bill Greider, who observed in the book’s foreword: “The opening question that hovers over American politics and smothers public life is this: Do corporations have too much power in our society?”⁴⁸

Despite the progress that has been made in responsible investment, CSR, and ethical business management, we agree with Kelly that corporations have become “feudal estates.” Corporate managers and shareholders, as economist Lazonick points out, have, unfortunately, increased executive bonuses, stock buybacks, and other measures that reduce workers’ pay and benefits, workforce training and R&D, and thus bleeding corporate innovation.⁴⁹

Except where there are strong unions, conscientious owners, or employee-owned firms, workers are generally treated like serfs, with little or no rights. And, labor-generated shareholder actions, while often calling on firms to comply with ILO core labor standards, have generally been less successful in putting forth motions that focus on the workplace or that call for more democratic, high-performance work practices (and, shareholder motions in the U.S., in contrast to Europe, are non-binding).⁵⁰

In conclusion, to ensure that worker shareholders can protect their rights and that we can move toward broader balance for shareholder and stakeholder value, we offer the following recommendations:

(1) Broadly adopt shareholder rights to push firms to be more accountable, and responsible to all stakeholders.

Capital stewards should invest in responsible firms and demand the integration of ESG considerations in investment decisions. They should utilize responsible corporate governance strategies through shareholder engagement, proxy votes, screening, (selecting or excluding companies to invest in based on their ESG practices) and other tools. This can improve corporate governance practices, and by extension, the long-term value of the funds' assets. Diligent activists should also engage firms to disclose and improve HCM practices and support the HCM Coalition Petition to the SEC to require HCM disclosure from U.S. firms. These endeavors would boost fair wages, benefits, and working conditions, increase workforce training, and facilitate more broadly shared profits. Investors should, finally, demand that Sustainability Ratings Firms adopt and utilize the Committee on Workers Capital "Guidelines for the Evaluation of Workers' Human Rights and Labour Standards."

Further, shareholders and public investors should engage with the boards and management of firms around stakeholder issues, and prioritize investment in firms that adopt good human capital management practices. Labor shareholders should also explore new work systems, which include a broad array of existing U.S. workforce participation and industrial democracy practices (some considered part of HCM), including Euro-centered dual union/works council systems. Finally, shareholders and unions alike might consider engaging with the boards and management of firms to demand communication, consultation and codetermination, the three key elements of works councils.

(2) Fight for Worker Stakeholder Board Representation.

Workers should have a statutory right to representation on corporate boards. The UAW and USW have both experimented with Board representation, having collectively bargained this provision with several of the largest industrial corporations in the U.S. While this process has been inconsistent, it has allowed for more information sharing with corporate management and discussion with other board members. But legislation requiring board representation or codetermination would be more effective than relying on case by case collective bargaining agreements.

(3) Amend trade deals to stakeholder company adoption.

In the coming years, there will be a number of efforts to reform trade deals. While supporting the push from labor and civil society for more democratic and transparent terms for all country partners, we acknowledge the important precedent, as in the case of the Trans-Atlantic Trade and Investment Partnership, to require that overseas firms operating in the U.S. adopt dual union/works council structures, especially given the productivity results that are apparent in firms utilizing the German model.

(4) Revisit State Constituency Statutes.

Since the corporate takeover and merger wave of the 1980s, a majority of states has adopted so-called “constituency statutes,” giving boards of directors broad latitude to take account of stakeholder interests in corporate decision-making. “The statutes, which allow companies to prioritize the interests of ‘stakeholders’ -- often employees -- rather than just shareholders, tend to allow businesses more time to bring innovations to market, rather than forcing those companies to prioritize quarterly financial results at the exclusion of new products and new activities.”⁵¹

Since there is a legitimate fear among labor-oriented corporate governance advocates that some directors and managers will use constituency statutes as a shield to self-deal and avoid responsible corporate governance measures, we might want to revisit the constituency statute framework. Progressive stakeholder statutes should guarantee that boards are accountable, monitored, and allow responsible governance initiatives to prevail; that companies integrate ESG; and that they embrace information, consultation and codetermination rights for workers, their core stakeholders. Working people and communities need all the tools they can find to prevent destructive hostile takeovers, illogical and often unprofitable mergers and acquisitions, offshoring, and irrational break-ups (think Timken).

An idea with deep roots in our society, with origins in the writings of C. Wright Mills, is this: why does American democracy end when you step outside the ballot box? Seizing on Mill's writings, the New Left of the 1960s lit the fires under the notion of economic democracy, pushing it into schools, neighborhoods, and even factories. They proclaimed that students, residents and workers should have more of a say in these social spaces. According to Noam Chomsky, economic democracy is simply this: participants in economic institutions (e.g. factories, stores and universities) decide on the policy of the institution.⁵²

These initial steps toward a more social and inclusive, participatory, bottoms-up democracy were taken up later by union and community activists. For example, in 1949 the Association of Independent Telephone Unions used their share ownership in AT&T to bring fellow shareholders' attention to the unilateral decision by management to cut pension benefits.⁵³ In the 1970s, the Amalgamated Clothing and Textile Workers Union (ACTWU) brought the unsavory employment practices of the southern textile firm J.P. Stevens to light at the company's

shareholder meetings. As a result of its efforts, the union won representation for more than 3,000 of Stevens' workers. The campaign was also portrayed in a 1979 hit movie called *Norma Rae*. Such legacies created a lasting impact.

There are thousands of interesting companies utilizing alternative ownership models in the US and abroad, such as co-ops and employee-stock owned (ESOPs) firms that share profits with workers and in some cases provide meaningful participation. U.S. ESOPs with significant worker ownership shares include about 6,000 companies that collectively employ some 3 million employees, according to Chris Mackin, Rutgers University (see "Property not Pay: Restoring the Middle through Ownership," one of the papers presented at the "Futures of Work" conference). As we pointed out in the *Handbook*, many unions such as the Steelworkers, Machinists and UFCW employed defensive worker buyouts starting in the 1980s to salvage larger at-risk firms.

There are also newer ethical business models, such as benefit, social purpose or B-Lab companies, that have been chartered in many states and several countries, and that aim to integrate ESG and elevate the roles of worker stakeholders. There are, globally, 2,482 B Corporations in over 50 countries, representing 130 industries. B-Corps, which include popular brands such as Patagonia, Seventh Generation and number of breweries, proclaim their commitment to "a living wage for all workers, a boardroom with the same mix of people as the factory floor and business that works for everyone."⁵⁴

While a systemic stakeholder company policy approach doesn't preclude such brave and hard-fought models (and others we don't have space to recognize, such as impact investors who give priority to enabling workers to share in ownership), we need to acknowledge the inherent limits in a brutal financialized, capitalist, global economy. In the case of the USW ESOPs, for example, most of these firms eventually lost the battle, as workers did not have the capital to

overcome major downturns, global competition and unfair trade practices. And most alternative business models are voluntary—even with favorable state regulations--so they have limited application to the people who toil daily in our factories, stores and marketplace.

A bridge to economic democracy is the promotion of the broader interests of workers and all stakeholders: investors, customers, suppliers and the broader community, rather than to solely maximize shareholder value. Businesses are publicly chartered, though the public rarely has a voice in whether or not a company has violated that charter. We need to, as a society, rein in bad actors and lift up the concept of *commonwealth companies* that make profits for shareholders, of course, but that also share the wealth with their core stakeholders -- employees. To do that, we need a consistent, integrated web of national and state laws and business rules that look more like those of our friends in Europe.

As Marlene O'Connor noted in 2001, there are convergences not only in global corporate ownership (with more European firms operating in the U.S. and U.S. firms merging with European firms) but also in fiduciary and shareholder law that call for a reconsideration of how business is conducted in the U.S. Across the last two decades, these trends have only become more prevalent. Political pendulums swing, and it's time to swing back to economic democracy.

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Notes

¹ “Collateral damage investing” is the opposite of “collateral benefits,” an allowable outcome of economically targeted investments (ETIs) by the Department of Labor (DOL). DOL 1994-1, updated by DOL 2016-1, allows pension investors to achieve “collateral benefits” as long as that investment is risk-adjusted competitive with comparable investments). Those benefits might include, for example, union construction jobs or affordable housing units. The authors of the “Collateral Damage” chapter in *Working Capital* coined that title to indicate that bad short-term investment practices could yield societal or environmental damages (e.g., Love Canal).

² Thereby, better protecting the beneficiaries of pension investment.

³ Nelson D. Schwartz, “How Wall Street Bent Steel,” *The New York Times*, December 6, 2014; accessed September 1, 2017 at <https://www.nytimes.com/2014/12/07/business/timken-bows-to-investors-and-splits-in-two.html?mcubz=3&r=0>

⁴ The Motley Fool, “Timken Steel,” September 2017; accessed September 1, 2017 at <https://www.fool.com/>.

⁵ Steven Greenhouse, “Volkswagen Vote is Defeat for Labor in South,” *The New York Times*, February 14, 2014; accessed September 1, 2017 at <https://www.nytimes.com/2014/02/15/business/volkswagen-workers-reject-forming-a-union.html?mcubz=3>

⁶ AFL-CIO, “At what cost? Workers report concerns about Volkswagen’s new manufacturing jobs in Tennessee,” May 2017; accessed September 1, 2017 at http://www.industrial-union.org/sites/default/files/uploads/documents/2017/SWITZERLAND/at_what_cost.pdf

⁷ Willis Towers Watson, “Global Pension Assets Study 2017,” January 30, 2017; accessed September 1, 2017 at <https://www.willistowerswatson.com/en/insights/2017/01/global-pensions-asset-study-2017>

⁸ A. Fung, Tessa Hebb, and J. Rogers, J. eds., *Working Capital: The Power of Labor’s Pensions*, (Ithaca, NY: Cornell University Press, 2001), p. 1.

⁹ William Lazonick, *Sustainable Prosperity in the New Economy*, (Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 2009).

¹⁰ Marc Jarsulic, Brendan Duke, and Michael Madowitz, “Long-Termism or Lemons: The Role of Public Policy in Promoting Long-Term Investments,” October 21, 2015; accessed September 21, 2017 at <https://www.americanprogress.org/issues/economy/reports/2015/10/21/123717/long-termism-or-lemons/>.

¹¹ U.S. Department of Labor, “Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments,” October 26, 2015; accessed September 1, 2017 at <https://www.federalregister.gov/documents/2015/10/26/2015-27146/interpretive-bulletin-relating-to-the-fiduciary-standard-under-erisa-in-considering-economically>.

¹² Committee on Workers’ Capital, “Aligning Workers’ Capital with Societal Objectives Conference Report,” 2016; accessed September 1, 2017 at <http://www.workerscapital.org>.

¹³ Marlene O’Connor, “Labor’s Role in the Shareholder Revolution,” in Tessa Hebb, et al, eds, *Working Capital: The Power of Labor’s Pensions*, (Ithaca: Cornell University Press, 2001), pp. 67-68.

¹⁴ In some cases, the plan may be managed by a single fiduciary rather than a board.

¹⁵ OECD (Organisation for Economic Co-operation and Development), *G20/OECD High-Level Principles of Long-Term Investment Financing by Institutional Investors*, 2013; accessed September 1, 2017 at <http://www.oecd.org/finance/private-pensions/G20-OECD-Principles-LTI-Financing.pdf>.

¹⁶ James Hawley, Keith Johnson, and Ed Waitzer, “Reclaiming Fiduciary Duty Balance,” *Rotman International Journal of Pension Management*, Fall 2011, vol. 4, no. 2., p. 7.

¹⁷ “Herd instinct” -- a form of investor behavior also known as “herding”, can “often cause large, unsubstantiated rallies or sell-offs, based on seemingly little fundamental evidence to justify either. Herd instinct is the primary cause of bubbles in finance. For example, many look at the dot.com bubble of the late 1990s and early 2000s as a prime example of the ramifications of herd instinct in the development and subsequent burst of that industry’s bubble” (<http://www.investopedia.com/terms/h/herdinstinct.asp>, retrieved June 21, 2016)

¹⁸ James Hawley, Keith Johnson, and Ed Waitzer, “Reclaiming Fiduciary Duty Balance,” *Rotman International Journal of Pension Management*, Fall 2011, vol. 4, no. 2, p. 4.

¹⁹ J. Sandberg, C. Juravle, T.M. Hedesstrom and I. Hamilton, “The heterogeneity of socially responsible investment,” *Journal of Business Ethics*, July 2009, (87[4]), p. 519.

²⁰ C. Woods and R. Urwin, “Putting sustainable investing into practice: a governance framework for pension funds,” *Journal of Business Ethics*, August 2010, (92[1]), p. 1.

²¹ James Hawley, Keith Johnson, and Ed Waitzer, “Reclaiming Fiduciary Duty Balance,” *Rotman International Journal of Pension Management*, Fall 2011, vol. 4, no. 2, p. 8.

²² UN-PRI, “About” Page, 2017; accessed September 18, 2017 at <https://www.unpri.org/about>

²³ Committee Workers’ on Capital, “Who We Are” Page, 2017; accessed September 18, 2017 at <http://www.workerscapital.org/who/>

²⁴ AFL-CIO, “About Us” Page, 2017; accessed September 18, 2017 at <https://aflcio.org/about>.

²⁵ P. McGurn, “DOL Issues New Guidelines on Proxy Voting, Active Investing,” *IRRC Corporate Governance Bulletin*, July/Aug. 1994, p. 1

²⁶ On the front page of the CalPERS Governance Principles document: “Everywhere shareholders are re-examining their relationships with company bosses – what is known as their system of ‘corporate governance.’ Every country has its own, distinct brand of corporate governance, reflecting it’s legal, regulatory and tax regimes... The problem of how to make bosses accountable has been around ever since the public limited company was invented in the 19th century, for the first time separating the owners of firms from the managers who run them....” “Corporate Governance: Watching the Boss,” *The Economist*, January 29, 1994.

²⁷ U.S. Department of Labor, “Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments,” October 26, 2015; accessed September 1, 2017 at <https://www.federalregister.gov/documents/2015/10/26/2015-27146/interpretive-bulletin-relating-to-the-fiduciary-standard-under-erisa-in-considering-economically>.

²⁸ OECD (Organisation for Economic Co-operation and Development), *Principles of Corporate Governance*, 2015; accessed September 1, 2017 at www.oecd.org/daf/ca/corporategovernanceprinciples/31557724.pdf.

²⁹ The Trade Union Advisory Committee to the OECD (TUAC) is a key partner of the OECD, as the official voice of the labor movement at the Organization, representing more than 60 million workers in 30 countries in the work of the OECD. The OECD represents the governments of its 30 member countries, but it does not work for them in a vacuum. The major stakeholders of

democratic societies – business, trade unions and other members of civil society – also have an important role in OECD work (http://www.tuac.org/en/public/tuac/0812_TuacRole.pdf.)

³⁰ In its efforts to strengthen the 2014 revisions of the 2004 OECD Principles of Corporate Governance, TUAC presented its corporate governance priorities as part of the OECD’s review process. TUAC’s submission can be found at http://www.tuac.org/en/public/e-docs/00/00/0E/49/document_doc.phtml.

³¹ Nelson D. Schwartz, “How Wall Street Bent Steel,” *The New York Times*, December 6, 2014; accessed September 1, 2017 at <https://www.nytimes.com/2014/12/07/business/timken-bows-to-investors-and-splits-in-two.html?mcubz=3&r=0>.

³² 1. “Sustainable Investing: Establishing Long-term Value and Performance,” a 2012 meta-study of 100 academic studies by DB Climate Change Advisors; 2. “From the Stockholder to the Stakeholder: How Sustainability can Drive Financial Outperformance,” a 2014 meta-study of over 190 academic studies (including the meta-study above) by Arabesque Asset Management Ltd and the University of Oxford.

³³ A few studies included in the meta-studies demonstrated neutral or negative impact of responsible investment practices on financial performance. This was the case primarily when only negative screening strategies were used when engaging in responsible investments. See, Commonfund Institute, “From SRI to ESG: the Changing world of Responsible Investing,” September 2013. Also see, Elroy Dimson, “Active Ownership,” August 13, 2014. Negative screening refers to screening out investments based on one’s ethics or values and is the oldest and the most basic way to engage in responsible investing. Depending on investor preference and/or available investment products, investments may be screened out, fully or based on a materiality threshold to exclude companies engaged in certain products or practices, such as investments in weapons, alcohol, or tobacco stock.

³⁴ R. Block, P. Berg, and K. Roberts, “Comparing and quantifying labor standards in the United States and the European Union. Presented at the 13th World Congress of the International Industrial Relations Association,” Berlin, September 8–12, 2003; Retrieved September 1, 2017 from http://www.ilo.org/public/english/iira/documents/congresses/world_13/track_3_block.pdf.

³⁵ S. Schreckenbach and R. Thannisch, “Corporate social responsibility: the situation in Germany from the trade unions’ point of view,” *CWC Blog*, April 2, 2012; accessed September 1, 2017 at <http://www.workerscapital.org/blog/post/corporate-social-responsibility-the-situation-in-germany-from-the-trade-unions-point-of-view>.

³⁶ Christopher Bruner, “Center-Left Politics and Corporate Governance: What Is the ‘Progressive’ Agenda?” University of Georgia School of Law, 2017, pps. 7-9.

³⁷ Remember that Allan Greenspan, the former Federal Reserve Chairman who was at the helm when the US suffered the worst market crash since the Great Depression, conceded (in testimony before the US Senate) that the global market crisis exposed a “mistake” in his free market ideology, shorthand for the efficient market theory.

³⁸ Edward Dennehy, “Corporate governance - A stakeholder model.” *International Journal of Business Governance and Ethics*, June 2012; accessed September 1, 2017 at https://www.researchgate.net/publication/260259161_Corporate_governance_-_A_stakeholder_model

³⁹ John Kay, “The Kay Review of UK Equity Markets and Long-Term Decision Making Final Report” Department for Business, Energy & Industrial Strategy, 2012. http://www.ecgi.org/conferences/eu_actionplan2013/documents/kay_review_final_report.pdf.

⁴⁰ Aspen Institute, “Long-term Value Creation: Guiding Principles for Corporations and Investors” The Aspen Institute, 2010, p. 3.

⁴¹ TUAC (Trade Union Advisory Committee), “Statement by the Global Unions on responsible approaches to the stewardship of workers’ capital,” 2007; accessed September 1, 2017 at http://www.tuac.org/en/public/e-docs/00/00/05/E0/document_doc.phtml.http://www.tuac.org/en/public/e-docs/00/00/0E/49/document_doc.phtml.

⁴² HCM Coalition, *Human Capital Management Coalition: Questions*, 2014; accessed June 20, 2016 at <http://hausercenter.org/iri/wp-content/uploads/2012/05/HCM-Coalition-Questions.pdf>.

⁴³ Aaron Bernstein and Larry Beeferman, “The Materiality of Human Capital to Corporate Financial Performance,” Boston: Harvard Law School/Investor Responsibility Research Center Institute, 2015, p. 2.

⁴⁴ TUAC (Trade Union Advisory Committee), “Statement by the Global Unions on responsible approaches to the stewardship of workers’ capital,” 2007; accessed September 1, 2017 at http://www.tuac.org/en/public/e-docs/00/00/0E/49/document_doc.phtml.

⁴⁵ Ryan Beene, “UAW, IG Metall push for U.S. Works Councils,” Detroit: Automotive News, November 23, 2015; accessed September 1, 2017 at <http://www.autonews.com/article/20140224/OEM01/302249971/?template=print>.

⁴⁶ Steffan Mueller, “Works Councils and Establishment Productivity,” Cornell, NY: ILR Review, October 1, 2012; accessed September 1, 2017 at <http://journals.sagepub.com/doi/abs/10.1177/001979391206500405?journalCode=ilra>

⁴⁷ The authors are not, herein, advocating for new free trade agreements, but are highlighting efforts to include better labor and societal protections in such agreements.

⁴⁸ Marjorie Kelly, *The Divine Right of Capital: Dethroning the Corporate Aristocracy* (San Francisco: Berrett-Koehler Publishers, Inc., 2003).

⁴⁹ William Lazonick, “Innovative enterprise: a prosperous economy needs it, but ‘maximising shareholder value’ undermines it,” in Janet Williamson, Ciaran Driver, Peter Kenway, eds., *Beyond Shareholder Value: The reasons and choices for corporate governance reform* (Trade Union Congress, 2014).

⁵⁰ G. Klec and D. Mum, “Trade union influence on companies via pension fund investment,” in S. Vitols, ed., *Long-Term Investment and the Sustainable Company: A Stakeholder Perspective. Vol. III*, (Brussels: European Trade Union Institute, 2015), pp. 133-134. The authors note that in 1996-2005, out of 926 motions put by trade union pension funds in the U.S., only eight motions called for representation of the employees on the board of directors.

⁵¹ Peter Dzikes, “Laws allowing companies to prioritize stakeholders boost innovative activity,” February 17, 2016; accessed March 2018 at <https://phys.org/news/2016-02-laws-companies-prioritize-stakeholders-boost.html#jCp>.

⁵² Patrik Witkowsky, Jesper Lundgren, Andre Nystrom and Nils Safstrom, “Can We Do It Ourselves?” May 19, 2015; accessed April 27, 2018 at <https://www.youtube.com/watch?v=ZfaFriFAz1k>.

⁵³ J.W. Eisenhofer and M.J. Barry, *Shareholder Activism Handbook*. (New York, NY: Aspen Publishers, 2013).

⁵⁴ Certified B Corporation, “Home Page,” 2018; accessed April 30, 2018 at <https://www.bcorporation.net>.