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ENGAGEMENT: THE MISSING MIDDLE APPROACH IN THE BEBCHUK–STRINE DEBATE

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This article discusses a critical approach for influencing directors and management that is missing from the long-standing board versus shareholder debate. This debate has typically been polarized between those who believe in giving shareholders as much power as possible and those who believe that boards need to be insulated from shareholder activism. In contrast to these mutually exclusive views, this article evaluates the increasing relevance of a middle approach—engagement— particularly with respect to its use by asset managers and institutional investors acting on behalf of a disparate group of shareholders. This article advocates for the use of engagement as a meaningful way for shareholders to become informed about and influence decisions of the board and management. We demonstrate the appeal of engagement over other means of influence, such as voting on shareholder proposals, particularly in circumstances when a long-term relationship between shareholders and management exists.

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Introduction

The board versus shareholder debate has long been about whether more director or shareholder control would maximize firm value.[1] On one side are those who argue for giving shareholders as much power as possible to revamp firms and reorganize boards and the executive suite in ways to make firms more efficient.[2] Under this view, firm executives are agents that need to be monitored. Boards must not become entrenched because then they become close to executives and resistant to helpful change. Instead, executives need to be managed as effective agents through active principals.[3] This view is compatible with advocating for corporate structures that incentivize better oversight of boards by shareholders. Recommendations consistent with this view include opposition

1. Zohar Goshen & Richard Squire, *Principal Costs* (Fordham Law Legal Studies, Working Paper No. 2571739, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2571739 ("A central question in corporate law is whether lawmakers should side with directors or shareholders in battles for corporate control.").

2. *See* Lucian Arye Bebchuk, *The Myth That Insulating Boards Serves Long-Term Value*, 113 COLUM. L. REV. 1637 (2013) [hereinafter Bebchuk, *The Myth That Insulating Boards Serves Long-Term Value*]; Lucian Arye Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675 (2007) [hereinafter Bebchuk, *The Myth of the Shareholder Franchise*]; Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005) [hereinafter Bebchuk, *The Case for Increasing Shareholder Power*]; Lucian Arye Bebchuk, *The Case for Shareholder Access to the Ballot*, 59 BUS. LAW. 43 (2003) [hereinafter Bebchuk, *The Case for Shareholder Access to the Ballot*]; Lucian Arye Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973 (2002) [hereinafter Bebchuk, *The Case Against Board Veto in Corporate Takeovers*].

3. *See* Lucian Arye Bebchuk & Jesse M. Fried, *Executive Compensation as an Agency Problem*, 17 J. ECON. PERSP. 71 (2003) ("The director agency problem undermines the board's ability to effectively address the agency problems in the relationship between managers and shareholders.").

to staggered boards,[4] more frequent voting by shareholders,[5] and more power for shareholders,[6] including the ability to adopt provisions that would allow them to change the company's charter or state of incorporation.[7]

On the other side are those who believe that firm management and boards are already incentivized to fulfill their fiduciary duties towards shareholders and that boards need to be insulated from shareholder activism. Under this view, boards can be trusted to act consistently with shareholder interests without shareholder intervention. Activist shareholders influencing boards can harm longer-term firm value by trying to make speedy gains that simply increase risk.[8] Hence, boards should be more closely aligned with executive management. Under this view, protection of the board leads to long-term considerations, and incentives should be designed to keep activist shareholders from undermining the efforts of the expert fiduciaries.[9] Recommendations in this area include having

4. Bebchuk, *The Case for Increasing Shareholder Power*, *supra* note 2, at 853 ("Staggered boards make it difficult to replace the board in either a proxy fight or a hostile takeover. There is evidence that having a staggered board greatly increases the likelihood that targets of hostile bids remain independent, and that it considerably reduces the returns to the target's shareholders both in the short-run and in the long-run. There is also evidence that staggered boards are correlated with lower firm value.").

5. *Id.* at 836 ("Shareholder power to adopt governance arrangements should include the power to adopt provisions that would allow shareholders, down the road, to initiate and vote on proposals regarding specific corporate decisions. Increasing shareholder power to intervene, I argue, would improve corporate governance and enhance shareholder value by addressing important agency problems that have long afflicted publicly traded companies.").

6. *Id.* at 842–43 (arguing that increased shareholder power is likely to improve corporate performance and value).

7. *Id.* at 843.

8. *See* Leo E. Strine, Jr., *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449, 458–59 (2014) [hereinafter Strine, *Can We Do Better by Ordinary Investors?*] ("Many of [Bebchuk's adversaries] view it as likely that money managers—who do not intend to be around when the consequences of corporate policies proposed by activist hedge funds come to fruition—will give great weight to the short-term effect of policies, without adequately considering whether those policies create too little long-term investment or too much leverage and externality risk.").

9. *See id.* at 501. According to Strine, a better corporate governance system would be:

staggered boards,[10] less frequent voting by shareholders,[11] and maintaining a corporate republic that defers to the elected directors.[12]

Each side has sought to cast the debate in empirical terms, and yet the empirical evidence remains inconclusive.[13] Professor Bebchuk and Justice Strine advanced this debate by focusing in particular on the ways in which activists can be beneficial (as says Bebchuk) or harmful (as per Strine) to firm

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> one that made them strongly accountable to stockholders in a form of republican democracy supplemented by required stockholder votes on many important items, but in a more rational framework where end-user investors focused on sustainable, long-term growth were better represented, where there was fuller information for the electorate to consider, and where there was more time for them to give thoughtful consideration to how to vote without being overwhelmed by an unmanageable number of annual votes.

Id.

10. *See* K. J. Martijn Cremers, Lubomir P. Litov & Simone M. Sepe, *Staggered Boards and Firm Value Revisited* (2014), http://papers.ssrn.com/ sol3/ papers.cfm?abstract_id=2364165 (showing that firms adopting a staggered board increase in value, with stronger positive association with firm value for firms where long-term commitment is more relevant).

11. Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1750 (2006) (advocating against expansive shareholder voting rights as disruptive of the corporate scheme centralized upon the decision-making authority of the board of directors).

12. *See id.* at 1749 (asserting that expansive shareholder voting rights would not make sense in light of the pervasiveness in corporate law of favoring a deference to the board's authority); Stephen M. Bainbridge, *Independent Directors and the ALI Corporate Governance Project*, 61 GEO. WASH. L. REV. 1034, 1074–81 (1993) (citing judicial deference to management boards); STEPHEN M. BAINBRIDGE, MERGERS AND ACQUISITIONS 130–48 (2003) (showing the courts' recognition of the importance of preserving the board's authority through the functioning of the business judgment rule and in the court's recognition of the board's role as gatekeeper). *See also*, Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1774 (2006) ("[T]he reality is that investors often entrust their capital to new public firms with charters that mandate staggered boards, limit the ability of stockholders to act by written consent, and empower the boards to issue preferred stock and to resist takeover bids if they believe that is the right thing to do. If such measures really destroy value over the long term, then one would expect investors to demand different charters.").

13. Goshen & Squire, *supra* note 1, at 2–3. For a thorough and careful review of the empirical evidence, see John C. Coffee, Jr. & Darius Palia, *The Impact of Hedge Fund Activism: Evidence and Implications* (Eur. Corp. Governance Inst., Working Paper No. 266/2014, 2014), http://papers. ssrn.com/ sol3/papers.cfm?abstract_id=2496518.

value. Bebchuk believes that activist shareholders help all investors;[14] Strine believes that they only help the myopic shareholder.[15]

This article argues that in this debate a critical approach for influencing firm management effectively that is missing but growing in importance is the use of engagement with boards and firm management by asset managers and institutional investors to influence the actions of directors and management. Engagement has been described by a number of market participants, and even regulators. Engagement has been defined as "direct communication between investors and companies,"[16] and "direct contact between a shareowner and an issuer (including a board member)."[17] Other commentators have provided more nuanced definitions of engagement.[18] Investors can view engagement in differing ways de-

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14. Bebchuk, *The Myth that Insulating Boards Serves Long-Term Value*, *supra* note 2.

15. Leo E. Strine, Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1, 8 (2010) [hereinafter Strine, *One Fundamental Corporate Governance Question*].

16. Michelle Edkins, *The Significance of ESG Engagement*, *in* 21ST CENTURY ENGAGEMENT: INVESTOR STRATEGIES FOR INCORPORATING ESG CONSIDERATIONS INTO CORPORATE INTERACTIONS 4, 4 (2015) [hereinafter 21ST CENTURY ENGAGEMENT], https://www.blackrock.com/corporate/en-us/literature/publication/blk-ceres-engagementguide2015.pdf .

17. MARC GOLDSTEIN, DEFINING ENGAGEMENT: AN UPDATE ON THE EVOLVING RELATIONSHIP BETWEEN SHAREHOLDERS, DIRECTORS AND EXECUTIVES 7 (2014), http://irrcinstitute.org/wp-content/uploads/2015/09/engagement-between-corporations-and-investors-at-all-time-high1.pdf.

18. *See, e.g.*, James Noland & Robert Phillips, *Stakeholder Engagement, Discourse Ethics and Strategic Management*, 12 INT'L J. MGMT. REV. 39, 40 (2010). Engagement can be understood as "a type of interaction that involves, at minimum, recognition and respect of common humanity and the ways in which the actions of each may affect the other." *Id. See also,* Bethel Uzoma Ihugba & Onyeka K. Osuji, *Corporate Citizenship and Stakeholder Engagement: Maintaining an Equitable Power Balance*, 16 ELECTRONIC J. BUS. ETHICS & ORG. STUD. 28, 30 (2011), http://ejbo.jyu.fi/pdf/ejbo_vol16_no2_pages_28-38.pdf ("The common themes running through these definitions are trust, understanding, respect and collaboration suggesting that any process devoid of these elements is not Stakeholder Engagement. Hence the objective of Stakeholder Engagement should be to resolve the interests of the engaging parties, give them opportunity to associate with the result of the engagement and not just to meet the hidden agenda of the power holders i.e. corporations."); Cate Gable & Bill Shireman, *Stakeholder Engagement: A Three Phase Methodology*, ENVTL. QUALITY MGMT., Spring 2005, at 9, 9. ("[Stakeholder en-

pending on factors influencing their investment. For example, investors may define engagement as any communication with a company that enhances mutual understanding, or as a process intended to bring about a change of approach or behavior at a company, or even as a continuum covering all this and more, including full-blown activism.[19] Regardless of the definition being utilized, engagement is a more collaborative approach than the view of activism as assumed by Professor Bebchuk[20] and Justice Strine.[21] Engagement also allows for a more dynamic relationship between management and those entities, often asset managers, representing the views of diverse shareholders than the views that have typically been described in the academic debate manifested by these commentators.

This article draws from work conducted on and by institutional investors and asset managers to describe the use and significance of engagement and advocate for its greater use. Asset managers act as agents on behalf of their clients, and their clients invest in a variety of funds and individual companies. Consequently, when asset managers engage on issues relating to the corporate governance of a company, they are operating through the lens of an agent on behalf of a diverse group of clients. Asset managers that serve as advisors to multi-

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gagement is] a process of relationship management that seeks to enhance understanding and alignment between company and their stakeholders.").

19. Edkins, *supra* note 16, at 4.

20. *See, e.g.,* Bebchuk, *The Myth that Insulating Boards Serves Long-Term Value*, *supra* note 2, at 1643 (arguing that activist stockholder interventions produce accountability and discipline that "provide incentives to avoid shirking, empire building, and other departures from shareholder interests that are costly both in the short and the long term.").

21. *See, e.g.,* Strine, *One Fundamental Corporate Governance Question*, *supra* note 15, at 8. ("[M]any activist investors hold their stock for a very short period of time and may have the potential to reap profits based on short-term trading strategies that arbitrage corporate policies. Indeed, it is possible for stockholders to engage in activism while holding a net short position, in which they stand to profit if the corporation's profits decline. The rights given to stockholders to make proposals and vote on corporate business are premised on the theory that stockholders have an interest in increasing the sustainable profitability of the firm. But in corporate polities, unlike nation-states, the citizenry can easily depart and not eat their own cooking. As a result, there is a danger that activist stockholders will make proposals motivated by interests other than maximizing the long-term, sustainable profitability of the corporation.") (citations omitted).

ple funds and portfolios have strong fiduciary obligations,[22] and the products they offer are heavily regulated.[23] Thus, asset managers have a unique perspective on corporate governance issues derived from client mandates to maintain long-term investments.

This article is organized in five parts. Part I describes engagement and its purpose. Part II provides examples of the use of engagement and evidence of its potential effectiveness. Part III discusses the trends that are likely to result in the increasing relevance of engagement. Part IV discusses ways in which

22. Advisers to both hedge funds and mutual funds have fiduciary duties under the securities laws. *See* Investment Company Act of 1940 § 36, 15 U.S.C. § 80a-35 (2012) (stating that an advisor can be held liable for breach of fiduciary duty). In the mid-1980s, the Department of Labor issued an opinion that, under ERISA, parties responsible for managing assets in ERISA-governed pension plans have the fiduciary duty not only to vote all of their portfolio shares, but also to do so in accordance with a "prudent man" standard. *See* Latham & Watkins LLP, *The Parallel Universe of Institutional Investing and Institutional Voting*, CORP. GOVERNANCE COMMENT, March 2010, at 1, 2, https://www.lw.com/upload/pubContent/_pdf/pub3446_1.pdf (citing Letter from U.S. Dep't of Labor to Helmuth Fandl, Chairman of Retirement Bd., Avon Products, Inc.; Interpretive Bulletin Relating to Exercise of Shareholder Rights, 73 Fed. Reg. 61731 (Oct. 17, 2008) (to be codified at 29 C.F.R. pt. 2509)). Not long thereafter, the SEC Division of Investment Management issued a similar ruling that the fiduciary obligations of registered investment advisors include voting all shares held in managed portfolios in accordance with the fiduciary duties of loyalty and care. *See* Proxy Voting by Investment Advisors, 68 Fed. Reg. 6585, 6589 (Feb. 7, 2003) (to be codified at 17 C.F.R. pt. 275) ("The duty of care requires an adviser with proxy voting authority to monitor corporate events and to vote the proxies. To satisfy its duty of loyalty, the adviser must cast the proxy votes in a manner consistent with the best interest of its client and must not subrogate client interests to its own."). The SEC also requires registered management investment companies to disclose the specific proxy votes they cast at shareholder meetings of their portfolio companies. *See* Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, 68 Fed. Reg. 6564 (Feb. 7, 2003) (to be codified at 17 C.F.R. pts. 239, 249, 270, 274).

23. For instance, mutual funds are investment companies registered under the Investment Company Act of 1940. 15 U.S.C. § 80a (2012). Other provisions of the securities laws also apply in certain situations. *See, e.g.*, Securities Act of 1933 § 5, 15 U.S.C. § 77e (2012) (requiring all investments sold to the public to be registered with the SEC); Securities Exchange Act of 1934 § 13, 15 U.S.C. § 78m (2012) (requiring issuers of securities, including mutual funds, to provide periodic reporting to investors). Additionally, collective investment trusts, offered by some asset managers, are regulated under specific banking regulations established by the Office of the Comptroller of the Currency. *See* 12 C.F.R. § 9.18 (2015).

the use of engagement could be further encouraged and studied. Part V demonstrates the strengths of an engagement-based approach by applying it to a current issue in corporate governance—that of setting appropriate executive compensation.

I.
ENGAGEMENT: DESCRIPTION AND PURPOSE

The engagement approach is one in which shareholders, primarily long-term ones, engage with management to understand firm objectives and strategies and potentially influence firm outcomes.[24] Under this approach, voting is not the only means of being active and bringing about change. Engaging with boards and firm executives on a continuous, long-term basis can bring about change through incremental, non-confrontational means. While the corporate governance debate has focused on the significance of voting as a means of inducing corporate change, engagement is another legitimate mechanism for influencing management and potentially bringing about change. Indeed, Chair of the Securities and Exchange Commission Mary Jo White encouraged engagement by stating that engagement with shareholders should mean more than just the annual proxy statement and annual meeting, and calling on the board of directors to play a more central role in shareholder engagement.[25] She also spoke to the effectiveness of engagement and advocated for more frequent use of it:

> Direct engagement with a company is likely to be more meaningful than a precatory vote on a 500-word proposal. Some companies are better at engagement than others, but I would urge more companies to embrace it so that more shareholders will be incentivized to choose direct engagement as their preferred first approach.[26]

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24. *See* Edkins, *supra* note 16, at 4.

25. *See* Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Remarks at the 10th Annual Transatlantic Corporate Governance Dialogue (Dec. 3, 2013), http://www.sec.gov/News/Speech/Detail/Speech/1370540434901#.VLv9i_ldWvg.

26. Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Building Meaningful Communication and Engagement with Shareholders (June 25, 2015),

Engagement could take the form of consultation for the purpose of enhancing two way information flow between shareholders and management.[27] Many forms of engagement can be used to potentially increase the value of assets and mitigate risk, including: holding direct conversations with companies, regulators, and issue experts; conducting educational outreach with the market; collaborating with other investors, companies, and advocates; convening summits to identify tipping points; soliciting shareholder proposals; and sponsoring academic and other intellectual analysis on the issues to increase market participant awareness.[28] Board–shareholder engagement can even occur informally, "through brief phone calls, email exchanges, or even short meetings."[29]

The main purpose of engagement for investors is to express views and concerns to the company's board and management who can do something to address them.[30] Engagement should be of interest to shareholders because it has been effective in certain situations and has the potential to be even more effective on a going-forward basis. This is because engagement builds relationships over time that engender trust and facilitate effective dialogue.[31] It does so through "informed dialogue . . . rather than public confrontation, [which is more likely to build trust] and lead to a mutually productive outcome."[32]

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http://www.sec.gov/news/speech/building-meaningful-communication-and-engagement-with-shareholde.html.

27. Ihugba & Osuji, *supra* note 18, at 30.

28. Anne Sheehan & Brian Rice, *Laying the Foundation for Successful Engagement*, *in* 21ST CENTURY ENGAGEMENT, *supra* note 16, at 5.

29. Lisa M. Fairfax, *Mandating Board-Shareholder Engagement?*, 3 U. ILL. L. REV. 821, 848 (2013).

30. Edkins, *supra* note 16.

31. *See* Larry Fink, *The Value of Our Voice*, *in* 21ST CENTURY ENGAGEMENT, *supra* note 16, at 1, 1. *See also* Andrew C. Wicks, Shawn L. Berman & Thomas M. Jones, *The Structure of Optimal Trust: Moral and Strategic Implications*, 24 ACAD. MGMT. REV. 99, 99 (1999) ("[T]rust in relationships between the firm and its various stakeholders . . . is an integral part of the strategy formulation process.").

32. TEACHERS INS. & ANNUITY ASS'N–COLL. RETIREMENT EQUITIES FUND, POLICY STATEMENT ON CORPORATE GOVERNANCE 3 (6th ed. 2011). *See also* Fink, *supra* note 31, at 1 ("Constructive dialogue between investors and companies helps business leaders be the best they can be. Understanding investor views and concerns helps boards and management make better informed decisions."); Ihugba & Osuji, *supra* note 18, at 33–34 ("[E]vidence has shown that engagement is always better than confrontation, particularly in terms of

Effective board-shareholder engagement could enable directors to conserve valuable time and resources, or otherwise ensure that directors are not compelled to expend additional resources unnecessarily. Indeed, anecdotal evidence suggests that directors' failure to effectively communicate with shareholders could cause shareholders to reject corporate policies, prompting directors to devote added resources toward those policies to regain the support of shareholders. Since "proactive engagement can save valuable time and resources,"[33] the work of asset managers in this area serves valuable purposes on behalf of shareholders. Unlike activist shareholders and managers, who typically seek to initiate proxy contests to bring about changes in the way firms operate,[34] asset managers use engagement as a means of influencing a company without the urgency of immediate share prices being impacted or the explicit threat of removing particular board members.

II.
Examples of Engagement and Its Effectiveness

Engagement is becoming more relevant,[35] with more asset managers utilizing it. For instance, Vanguard engages with

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business community relationship.") (citing Jedrzej George Frynas, *The False Developmental Promise of Corporate Social Responsibility: Evidence from Multinational Oil Companies*, 81 Int'l Aff. 581 (2005); O. F. Tuodolo, Corporate Social Responsibility, Local Communities and TNCs in the Oil and Gas Sector of Nigeria, (2007) (unpublished Ph.D. thesis, University of Liverpool); O. F. Tuodolo, *Corporate Social Responsibility: Between Civil Society and the Oil Industry in the Developing World*, 8 ACME: An Int'l E-Journal for Critical Geographies 530 (2009), http://www.scribd.com/ doc/40870279/CSR-Civil-Society-Oil-Industry).

33. Fairfax, *supra* note 29, at 848.

34. *See* Goshen & Squire, *supra* note 1, at 2–5, 22–26, 39–45.

35. *See* David A. Katz & Laura A. McIntosh, *Engagement and Activism in the 2015 Proxy Season*, N.Y. L.J. (Jan. 29, 2015), http://www.newyorklawjournal.com/id=1202716340937?keywords=engagement+and+activism&publication=New+York+Law+Journal (remarking that as activism and shareholder rights have taken center stage in the corporate governance debate, and following statements by U.S. Securities and Exchange Commission Chair Mary Jo White advocating engagement and the establishment of organizations such as the Shareholder-Director Exchange offering guidance to shareholders and boards of directors on direct engagement, there has been a push towards increased communication between boards and institutional investors as an effective means of addressing problems before they become public controversies). *See also* Edkins, *supra* note 16, at 4 (observing that engagement as "direct communication between investors and companies," on envi-

companies owned in portfolios it manages hundreds of times annually.[36] T. Rowe Price (T. Rowe) holds hundreds of short, direct conversations with companies owned in portfolios it manages throughout the year on issues that fall beyond the normal due diligence meetings with the companies. For example, T. Rowe has initiated short-term engagements with companies upon discovering their poor rating in environmental or social risks by external research providers. This 'light' engagement led to the knowledge that such poor relative rankings resulted from spotty disclosure practices, which can easily be addressed through engagement. Simultaneously, T. Rowe engages heavily through in-depth exchanges with the management or board of a few companies, often extending over a year. Through such heavy engagement, T. Rowe is able to influence change when appropriate. As an example, T. Rowe affected the composition of the board of a pharmaceutical company, advocating for a renewed focus on certain skills and qualifications to suit the changing challenges facing the company.[37]

Aside from one-off examples of success, the effectiveness of engagement has been discussed at a broader level. Among the S&P 500 companies that disclosed engagement, almost half (forty-six percent) disclosed changes in practices or disclosure as a result of such engagement in 2015,[38] a significant increase over the mere six percent in 2010.[39] Similarly, the experience of the California Public Employees' Retirement System (CalPERS) may suggest positive effects of engagement.[40] CalPERS screens its investments to identify companies that have underperformed in terms of total stock returns and

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ronmental, social, and governance matters is on the rise in the United States).

36. *Our Governance and Executive Compensation Principles*, VANGUARD, https://about.vanguard.com/vanguard-proxy-voting/corporate-governance/.

37. Donna Anderson, *A Spectrum of Engagement Intensity*, *in* 21ST CENTURY ENGAGEMENT, *supra* note 16, at 11, 12.

38. *Four Takeaways from Proxy Season 2015*, ERNST & YOUNG 2 (June 2015), http://www.ey.com/Publication/vwLUAssets/EY-four-takeaways-from-proxy-season-2015/$File/EY-four-takeaways-from-proxy-season-2015.pdf.

39. *Let's Talk Governance: 2014 Proxy Season Review*, ERNST & YOUNG 4 (July 2014), http://www.ey.com/Publication/vwLUAssets/ey-proxy-season-review/$FILE/ey-proxy-season-review.pdf.

40. Dominic Barton & Mark Wiseman, *Focusing Capital on the Long-Term*, HARV. BUS. REV., Jan.–Feb. 2014, at 44, 48.

fallen short in some aspect of corporate governance, and puts these companies on its Focus List to try to work with management and the board to institute changes in strategy or governance. A recent study showed that from 1999 to mid-2013, the companies targeted through the Focus List collectively produced a cumulative excess return of twelve percent above their respective industry benchmarks after five years.[41] While these results do not conclusively demonstrate a causal connection between engagement and the value of firms with which asset managers engage—companies that engage with managers may differ in significant ways from those that do not and these differences could be what drives their value—such correlations should, at a minimum, inspire further research into whether a causal connection exists.

Engagement often occurs privately—away from the scrutiny of the public and the media—and it is less measurable than a shareholder vote. Consequently, empirical research on the effectiveness of engagement is lacking. Despite these limitations, what we know so far about the experiences of asset managers and institutional investors, such as CalPERS, as discussed above, indicates that it should be studied further.

III.
THE SIGNIFICANCE OF ENGAGEMENT IS LIKELY TO INCREASE

Engagement builds relationships over time. It is, therefore, conducive to the needs of long-term investors who may not wish to have a confrontational relationship with the management of the companies in which they invest. Certain investment trends make this interest in long-term investing, and the resulting interest in engagement, likely to remain and potentially become more relevant in the future.

As an initial matter, while asset managers service a variety of clients, the clients they represent often have a long-term view. This perspective is rooted in the goals of their clients, e.g., ninety-one percent of mutual fund investors indicate that they are saving for retirement[42] and the average equity mutual

41. *Id.* at 49.

42. INV. CO. INST., 2015 INVESTMENT COMPANY FACT BOOK 115 (55th ed. 2015) [hereinafter INV. CO. INST., 2015 FACT BOOK], https://www.ici.org/pdf/2015_factbook.pdf.

fund investor holds a fund for more than three years.[43] Furthermore, asset managers also face the significant drive towards index fund assets, which are inherently long-term, and the reality that another fund or client may enter a position exited by a particular fund or client, typically making the interests represented by the asset manager acting as agent, long-term. Long-term investors, by the very nature of being long-term, cannot bring about change simply through the threat of divesting their holdings. This interest in long-term growth and value creation was well articulated in a recent letter to the CEOs of all of the companies in the S&P 500 from BlackRock CEO Laurence Fink.[44] Thus, such long-term interests make engagement a useful tool for shareholders to influence boards and management.

The relevance of engagement is likely to increase for several reasons. Many investors are long-term, buy-and-hold investors. They could be long-term investors because they hold investments for long-term purposes, or because they invest in funds which execute investment strategies that involve holding stocks for the long-term. We explore each of these aspects of long-term investing below.

First, many household investments are inherently long-term due to the long-term nature of household goals. For instance, $24.8 trillion, or 36% of all household financial assets in the U.S. is held for retirement savings.[45] Defined Contribution plans and Individual Retirement Accounts comprised 46% of total mutual fund assets at year-end 2014,[46] and retirement assets accounted for approximately two-thirds of assets at some large asset managers.[47] Saving for other long-term

43. *See* Adam Shell, *Holding Stocks for 20 Years Can Turn Bad Returns to Good*, USA TODAY (June 8, 2011, 9:39 PM), http://usatoday30.usatoday.com/money/perfi/stocks/2011-06-08-stocks-long-term-investing_n.htm.

44. *See* Letter from Laurence D. Fink to CEOs on 2016 Corporate Governance (Feb. 1, 2016).

45. Inv. Co. Inst., *Retirement Assets Total $24.8 Trillion in Second Quarter 2015*, INNOVEST (June 30, 2015), http://www.innovestinc.com/blog/2015/10/15/retirement-assets-total-248-trillion-in-second-quarter-2015.

46. INV. CO. INST., 2015 FACT BOOK, *supra* note 42, at 124.

47. BLACKROCK, 2013 ANNUAL REPORT 14 (Apr. 14, 2014), http://media.corporate-ir.net/media_files/IROL/11/119943/2013AR/blackrock_0415a/assets/pdfs/BlackRock_AR13_AllPages.pdf; *Fidelity by the Numbers*, FIDELITY MGMT. & RESEARCH CO. (Sept. 2014), https://www.fidelity.com/about-fidelity/fidelity-by-numbers/corporate-statistics.

goals, e.g., college, has also increased, with the assets in 529 plans having risen from $15.1 billion in 2001 to $258.5 billion in 2015.[48] It is unlikely that such trends in saving for long-term goals would reverse in the foreseeable future.

Second, 35% of all investments—up from 2% twenty years ago—are passive investments.[49] Holders of index funds (although these are not the only funds that hold securities long-term) comprised $2.1 trillion as of year-end 2014,[50] up from $1.7 trillion as of year-end 2013.[51] Of particular relevance for the corporate governance debate, the share of assets invested in index equity mutual funds out of all equity mutual funds has continued to rise, hitting 20% in 2014,[52] up from 18.4% in 2013.[53] A significant majority of these funds, $1.7 trillion or 82%, are invested in equity funds that track the S&P 500 or other equity indices.[54] This trend is particularly pertinent because index funds tend to be passive holders of securities in an index, and do not remove or add companies unless they are moved in or out of the index. The S&P 500 index, in particular, has significant stability historically. Specifically, only 10% of the companies in today's index have changed since 2011, and 17% are different since 2009.[55] On average, twenty-two companies, or 4.4%, are substituted in or out of the index each year.[56] For investors in index funds, selling shares to demonstrate displeasure with company policies is not an op-

48. Inv. Co. Inst., *529 Plan Program Statistics June 2015*, ICI GLOBAL (Nov. 17, 2015), https://www.iciglobal.org/research/stats/529s/529s_15_q2.

49. Chris Flood, *Vanguard's Record Inflows Prove Passive is Massive*, FIN. TIMES (Jan. 11, 2015, 7:24 AM), http://www.ft.com/intl/cms/s/0/43812508-9745-11e4-9636-00144feabdc0.html#axzz3Op6WM0Mf.

50. INV. CO. INST., 2015 FACT BOOK, *supra* note 42, at 45.

51. INV. CO. INST., 2014 INVESTMENT COMPANY FACT BOOK 42 (54th ed. 2014) [hereinafter INV. CO. INST., 2014 FACT BOOK], https://www.ici.org/pdf/2014_ factbook.pdf.

52. INV. CO. INST., 2015 FACT BOOK, *supra* note 42, at 46.

53. INV. CO. INST., 2014 FACT BOOK, *supra* note 51, at 44; Lauren Silva Laughlin, *America's Most Popular Investment May be Toxic*, FORTUNE (Dec. 30, 2015, 8:00 AM), http://fortune.com/2015/12/30/index-funds-toxic/ (showing that nearly $145 billion flowed into index funds in the first eleven months of the year 2015, while $161 billion flowed out of actively managed mutual funds).

54. INV. CO. INST., 2015 FACT BOOK, *supra* note 42, at 46.

55. Sam Ro, *The Makeup of the S&P 500 is Constantly Changing*, BUS. INSIDER (June 15, 2015, 3:07 PM), http://www.businessinsider.com/sp-500-index-constituent-turnover-2015-6.

56. *Id.*

tion, making engagement an important way to obtain information and influence change.

Both the long-term purpose of household saving and the move towards index funds create long-term relationships between investors and the companies in which they invest. Such long-term relationships benefit from trust and collaboration between the managers of these portfolios and the management of the firms in which end-investors invest,[57] making engagement a particularly desirable means of bringing about change, likely more so than voting against a management proposal or a slate of directors.

In addition to the trends relating to investors described above, companies themselves are recognizing the need for engagement and are voluntarily choosing to commit to it as an approach. A total of 1494 companies[58] have signed on to the Principles for Responsible Investment (PRI) since their establishment in 2006 by a group that included some of the world's largest institutional investors organized by then United Nations Secretary-General, Kofi Annan.[59] These principles include the commitment to collaborative engagement initiatives, involving engaging clients on environmental, social, and governance (ESG) issues and providing appropriate disclosure on ESG issues to investors.[60] The companies who have committed

57. Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553, 561 (2001) ("The disposition to trust is particularly important in long-term, open-ended relationships, like business firms, given the costs of constructing fully effective constraints."); Carlton J. Snow, *Building Trust in the Workplace*, 14 HOFSTRA LAB. L.J. 465, 485–86 (1997) ("Without relationships of trust in the workplace, the long-term prosperity of a business entity maybe imperiled by a resistance to change, a lack of employee ideas about the most efficient changes and sensibilities that reject a strong commitment to workplace solidarity. The concrete economic value of trust reveals itself in a variety of ways.").

58. *Signatories to the Principles for Responsible Investment*, PRI ASS'N, http://www.unpri.org/signatories/signatories/.

59. The founding signatories to the PRI include BNP Paribas Asset Management and CalPERS. *History*, PRI ASS'N, (2006), http://www.unpri.org/about-pri/about-pri/history/.

60. *Id.* Recent guidelines from the Department of Labor (DOL) make clear that fiduciaries can take ESG factors into account. Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, 80 Fed. Reg. 65135 (Oct. 26, 2015) (to be codified at 29 C.F.R. pt. 2509), https://www.gpo.gov/fdsys/pkg/FR-2015-10-26/pdf/2015-27146.pdf (acknowledging that when ESG factors have a "direct relationship to the economic and financial value of the plan's investment," it

to these principles include asset managers (or their parent companies) of varying sizes,[61] such as Trillium Asset Management (with assets under management (AUM) of $2 billion as of Sept. 30, 2015),[62] Resource Capital Funds (with AUM of $2.4 billion as of Sept. 30, 2015),[63] J.P. Morgan Asset Management (with AUM of $1.78 trillion as of June 30, 2015),[64] State Street Global Advisors (with AUM of $2.4 trillion as of March 31, 2015),[65] and BlackRock (with AUM of $4.6 trillion as of December 31, 2015).[66] As these principles continue to be implemented, engagement will become more apparent and frequent in the corporate board room.

IV.
HOW CAN WE INCREASE THE UTILIZATION AND EFFECTIVENESS OF ENGAGEMENT?

Increasingly, large shareholders are reaching the conclusion that their ability to influence the direction of the corporation could be greater if they engaged in dialogue rather than more aggressive means.[67] Given this growing significance of

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is proper for fiduciaries to consider these factors in making investment choices). The DOL also clarified that it does not prohibit a fiduciary from "incorporating ESG factors in investment policy statements or integrating ESG-related tools, metrics and analyses to evaluate an investment's risk or return or choose among otherwise equivalent investments." Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, 80 Fed. Reg. at 65136.

61. *Signatories to the Principles for Responsible Investment*, *supra* note 58.

62. *About Us,* TRILLIUM ASSET MGMT. (2015), http://www.trilliuminvest.com/socially-responsible-investment-company/.

63. *Specialists in Mining*, RES. CAPITAL FUNDS (2015), http://www.resourcecapitalfunds.com/specialists-in-mining.

64. *About Us,* J.P. MORGAN ASSET MGMT. (2015), https://www.jpmorganam.com.sg/wps/portal/!ut/p/b0/04_Sj9CPykssy0xPLMnMz0vMAfGjzOItzDwtwlxdDA0MzHyNDDyNfBxNPSxDjSxCDfQLsh0VAcnan7U!/?WCM_GLOBAL_CONTEXT.

65. *Overview,* STATE ST. GLOB. ADVISORS (2015), https://www.ssga.com/global/en/about-us/who-we-are/overview.html.

66. BLACKROCK 2013 ANNUAL REPORT, *supra* note 47, BlackRock reports full year 2015 diluted EPS of $19.79, or $19.60 as adjusted Fourth Quarter 2015 Diluted EPS of $5.11, or $4.75 as adjusted. *Id.* at 14.

67. *See* John Haberstroh, *Activist Institutional Investors, Shareholder Primacy, and the HP–Compaq Merger*, 24 HAMLINE J. PUB. L. & POL'Y 65, 95 (2002) (recognizing that efforts at corporate monitoring and activism by institutional shareholders and others during the 1990s has supplanted the attempted use in the 1980s of hostile takeovers to pressure corporate managers).

engagement,[68] the academic literature, which limits itself to the study of voting behavior, is becoming more disconnected with the reality of shareholder behavior.

Despite these practical realities, throughout the debate between Professor Bebchuk and Justice Strine and the numerous academic articles written in the corporate governance area, the focus has almost always been on voting.[69] The primary test of efficacy has been shareholder votes and whether these votes are for or against management. Yet, so many other ways to influence management, as discussed above, exist. Academic literature should find ways to measure the effects of these less quantifiable means of influence. The fact that they are more difficult to measure does not make them less significant or effective. Case studies and interviews are needed to learn about private engagements, and this research needs to be longitudinal in nature in order to determine how discussions lead to concrete, be it incremental, changes in firm policies and decisions. The adoption of the PRI should make it easier to track such engagements.[70] Academics can see which firms have publicly committed to an engagement-based approach and can work with these firms to study their behaviors and compare the value and managerial practices of firms committed to engagement versus those that are not.

Along with expanding the dialogue about engagement, another way to increase the utilization of engagement is to promote resources that may assist fund managers with engagement practices. One resource facilitating engagement is the Shareholder–Director Exchange, which has prepared the Shareholder–Director Exchange Protocol (SDX Protocol)—a

68. *See supra* Part II.

69. *See, e.g.*, Bebchuk, *The Myth That Insulating Boards Serves Long-Term Value*, *supra* note 2; Bebchuk, *The Myth of the Shareholder Franchise*, *supra* note 2; Bebchuk, *The Case for Increasing Shareholder Power*, *supra* note 2; Bebchuk, *The Case for Shareholder Access to the Ballot*, *supra* note 2; Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, *supra* note 2. For the opposing view, see Strine, *Can We Do Better by Ordinary Investors?*, *supra* note 8, at 499; Justin Fox & Jay W. Lorsch, *What Good Are Shareholders?*, HARV. BUS. REV., July–Aug. 2012, at 48, 56 ("Giving shareholders more things to vote on won't change [the ability of investors to effectively discipline or oversee management]. It may even make things worse, by spurring a culture of conflict between shareholders and managers and incentivizing the latter to become ever more mercenary and self-interested.").

70. *The Six Principles for Responsible Investment*, PRI ASS'N (2006), http://www.unpri.org/about-pri/the-six-principles/.

framework for direct engagement to promote effective communication.[71] The SDX Protocol provides a ten-point set of guidelines for when engagement may be appropriate, valuable, and effective. The SDX Protocol focuses on two-way interactions between directors and long-term investors.[72] It advocates for the board to adopt a clear policy for engagement, making each decision on a case-by-case basis.[73] Other guidelines include identifying engagement topics, requesting engagements, selecting participants, determining how to engage, preparing for the engagement, participating in the engagement, and reviewing and revising approaches to engagement. The SDX Protocol leaves flexibility for the engaging parties' judgment to modify its engagement practices to create customized policies as needed to fit their particular circumstances.[74]

In addition to signing on to the PRI and utilizing the SDX Protocol, many companies have chosen to institute proxy access, which can also serve as a tool for engagement, be it a more aggressive one than dialogue. Proxy access brings attention to the interests of long-term shareholders because a minimum holding period is generally required, and it is of little value to short-term activists as it does not generally provide enough control to change the majority of the board of a firm. Academics and policy makers will have a better sense of the potential benefits of proxy access in promoting the interests of long-term shareholders once a variety of such choices by companies provide data on how different percentage ownership and tenure requirements impact the relationship between shareholders and the board. Recently, a number of companies have been experimenting with different proxy arrangements, making such data more likely to exist in the future. The recent surge in proxy access is likely the result of a change in regulation. Along with adoption of Rule 14a-11 under the Securities Exchange Act of 1934,[75] which was vacated by the United

71. Letter from The Shareholder–Director Exchange Working Group to Chairman, Lead, or Presiding Director (July 2, 2014), www.sdxprotocol.com/wp-content/uploads/2014/07/SDX_Investor-Letter.pdf.

72. THE SHAREHOLDER–DIRECTOR EXCHANGE, INTRODUCTION AND SDX PROTOCOL 11 (February 2014), http://www.sdxprotocol.com/download-pdf/.

73. *Id.* at 12.

74. *Id.* at 15.

75. Final Rule: Facilitating Shareholder Director Nominations, Release No. 33-9136, 17 C.F.R. § 240.14a-11 (Sept. 16, 2010) [hereinafter Proxy Ac-

States Court of Appeals for the District of Columbia Circuit (D.C. Circuit Court),[76] the SEC amended Rule 14a–8.[77] Rule 14a-8 was not challenged,[78] thereby allowing shareholders to submit shareholder proposals seeking to amend the company's governing documents on nomination procedures.[79] The amending of Rule 14a-8 encouraged a large market movement towards shareholder proposals. The first major market-wide push of proxy access proposals was initiated by New York City Comptroller Scott Stringer when he launched the Boardroom Accountability Project, filing seventy-five proxy access proposals—the largest campaign in history for shareholder nominated directors.[80] Shareholders of several companies have recently been presented with competing proxy access proposals. For instance, the shareholder proposal for Whole Foods included a minimum ownership of three percent for at least three years, in order to nominate twenty percent of the board. The Whole Foods' board proposal differed in material ways, including a minimum ownership threshold of nine percent for a minimum ownership period of five years, in order to nominate ten percent of the board.[81] Since these precedential efforts, companies such as Citigroup Inc. and Chipotle Mexican Grill, Inc. have filed proxy access resolutions with alternative thresholds. For example, Citigroup required three percent ownership for at least three consecutive years,[82] and Chipotle set a threshold of eight percent to give shareholders the right to nominate board directors.[83]

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cess Release]. Rule 14a-11 as adopted required publicly-traded companies to include shareholders' director nominees in their proxy materials if the shareholder met certain criteria. *Id.*

76. Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

77. Proxy Access Release, *supra* note 75.

78. *Bus. Roundtable*, 647 F.3d at 1153.

79. Proxy Access Release, *supra* note 75.

80. Paul Hodgson, *At Whole Foods, Chipotle, and Others, Shareholders Prepare for Battle*, FORTUNE (Feb. 3, 2015), www.fortune.com/2015/02/03/whole-foods-chipotle-proxy-access/.

81. Avrohom J. Kess, *Proxy Access Proposals*, HARV. L. SCH. ON CORP. GOVERNANCE & FIN. REGULATION (Aug. 10, 2015), http://www.corpgov.law.harvard.edu/2015/08/10/proxy-access-proposals/.

82. Lauren Pollock, *J.P. Morgan to Consider Adopting Proxy Access*, WALL ST. J. (Oct. 26, 2015), http://www.wsj.com/articles/j-p-morgan-to-consider-adopting-proxy-access-1445892324.

83. Hodgson, *supra* note 80.

No consensus among major institutional managers on the issues of proxy access exists today. For example, acting in their role to vote proxies on behalf of their clients, BlackRock and State Street Global Advisors consider such proposals on a case-by-case basis.[84] Vanguard considers such proposals on a case-by-case basis as well,[85] with the caveat that it generally supports provisions that provide shareholders holding five percent of a company's outstanding shares for at least three years with the right to nominate up to twenty percent of the board's directors.[86] Fidelity Management & Research Company, on the other hand, is currently opposed to proxy access.[87] While we do not know what the appropriate level of proxy access is to achieve optimal corporate governance, we believe that this market experimentation is healthy and that competition will help the market place determine what level of proxy access creates accountability of the board and facilitates engagement with shareholders, thereby protecting value for shareholders. Empirical research into the effects of such proxy proposals on engagement would help to inform the engagement policies of asset managers acting on behalf of their clients.

V.
APPLICATION OF ENGAGEMENT TO EXECUTIVE COMPENSATION

The benefits of engagement may be best demonstrated through its application to a concrete corporate challenge faced by companies today. Taking executive compensation as

84. BlackRock, *Proxy Voting Guidelines for U.S. Securities* (Feb. 2015), http://www.blackrock.com/corporate/en-us/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf; State Street Global Advisors, *Proxy Voting and Engagement Guidelines* 2 (March 2015), https://www.ssga.com/investment-topics/environmental-social-governance/2015/Proxy-Voting-and-Engagement-Guidelines-United-States.pdf ("SSGA votes for the election/re-election of directors on a case-by-case basis after considering various factors including general market practice and availability of information on director skills and expertise. In principle, SSGA believes independent directors are crucial to good corporate governance and help management establish sound corporate governance policies and practices.").

85. *Vanguard's Approach to Corporate Governance*, VANGUARD, https://about.vanguard.com/vanguard-proxy-voting/.

86. *Vanguard's Proxy Voting Guidelines*, VANGUARD, https://about.vanguard.com/vanguard-proxy-voting/voting-guidelines/.

87. *Corporate Governance and Proxy Guidelines*, FIDELITY MGMT. & RESEARCH CO. (2015), https://www.fidelity.com/about-fidelity/fidelity-by-numbers/fmr/proxy-guidelines.

an example, setting executive compensation is an area where engagement by institutional investors is likely to be more effective for shareholders than prescriptive regulations.[88] This is because each company is unique, and both company and industry characteristics need to be taken into account in setting executive compensation. Relevant factors in setting executive pay include: the pay of executives at peer firms, industry trends, the performance of the individual, strategic plans for the company, the appropriate performance measures for the company, the company's appropriate risk appetite in light of returns to shareholders, and other issues internal or unique to the company.[89] Given the varied nature of these factors, a case

88. *See* BlackRock, *Our Approach to Executive Compensation* 2 (March 2015), http://www.blackrock.com/corporate/en-us/literature/fact-sheet/blk-responsible-investment-approach-exec-comp.pdf ("[A]rbitrary limits on potential compensation are [not] necessarily in shareholders' best interests if those limits have the potential to cap performance."). *See also,* Marc Hodak, *ISS v. Nucor's Ghost: Lost in Metric Madness*, DIRECTORS & BOARDS, Summer 2014, at 21, http://hodakvalue.com/wp-content/uploads/2014/08/D&B_Summer_2014_Hodak.pdf.

89. For a more detailed discussion of these factors and the appropriate use of peer groups in setting executive compensation, see BlackRock, *Our Approach to Executive Compensation*, *supra* note 88, at 1. Several comment letters in response to the SEC's Pay Versus Performance proposal describe a variety of factors impacting executive pay. *See also*, BlackRock, *Comment Letter, Pay Versus Performance* 2 (July 2, 2015), https://www.sec.gov/comments/s7-07-15/s70715-31.pdf (explicating why and how executive compensation needs to be tailored to each company's specific circumstances); Corporate Governance Coalition for Investor Value, *Comment Letter, Proposed Rules on Pay Versus Performance* 2 (July 23, 2015), https://www.sec.gov/comments/s7-07-15/s70715-74.pdf (advocating for the use of peer firm data); Mercer, *Comment Letter, Pay Versus Performance Disclosure* 8 (July 6, 2015), https://www.sec.gov/comments/s7-07-15/s70715-43.pdf (recommending the measurement of company and peer company performance for comparison). *See also* Charles M. Elson & Craig K. Ferrere, *Executive Superstars, Peer Groups and Over Compensation: Cause, Effect, and Solution*, 38 J. CORP. L. 487 (2003) (finding that boards invariably use the pay of executives at peer firms in similar industries and of similar size and complexity as a factor in determining executive pay, and recommending that more internal standards be created based on the current and historic performance of executives, the individual nature of the organization, its particular competitive environment, and its internal dynamics); Carol Bowie, Steve Silberglied & Liz Williams, *Institutional Shareholder Services, Evaluating Pay for Performance Alignment* (November 2014), https://www.issgovernance.com/file/publications/evaluatingpayforperformance.pdf (finding that the pay of peers or at peer firms is highly relevant for executive pay).

by case approach is compatible with an approach where asset managers engage with the compensation committee.

Engagement is likely effective if the company is prepared to discuss a compensation proposal and accompanying rationale as to why the proposal is in shareholders' best long-term economic interests. A sophisticated market participant, such as an asset manager, possesses the financial acumen to assess the validity of the rationale and how well the incentives are aligned for long-term shareholders.

While regulatory focus has been directed at setting prescriptive benchmarks for executive compensation,[90] we believe that a better approach would be to allow executive pay to be worked out on a case-by-case basis through engagement. We encourage regulators, therefore, to think about ways of facilitating such engagement rather than simply prescribing what executive compensation should or should not be and how it should be benchmarked.[91]

Conclusion

Discussion of engagement has long been missing in the corporate governance debate. Shareholders need not face a choice between activism that involves aggressive tactics and power through frequent voting versus passive acquiescence to whatever management proposes. Clearly, a third, middle-of-the-road approach exists. This approach involves ongoing communication and discussions on a long-term basis; its efficacy is more difficult to quantify and measure. These limitations, however, do not make it less worthy of study. Rather, academics and policy makers should look for more ways of understanding and promoting engagement in order to understand and fully reap its benefits.

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90. *See* Pay Versus Performance, 80 Fed. Reg. 26330 (May 7, 2015) (to be codifed at 17 C.F.R. pts. 229, 240), https://www.gpo.gov/fdsys/pkg/FR-2015-05-07/pdf/2015-10429.pdf.

91. *See* Letter from Steven Hall & Partners, to Brent J. Fields, Sec'y, U.S. Sec. & Exch. Comm'n (July 6, 2015), https://www.sec.gov/comments/s7-07-15/s70715-63.pdf (arguing that a principles-based approach to pay versus performance disclosure would provide companies with the flexibility necessary to communicate their pay for performance story more fulsomely).