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Harvard's Shareholder Rights Project is Still Wrong

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A small but influential alliance of activist investor groups, academics and trade unions continues — successfully it must be said — to seek to overhaul corporate governance in America to suit their particular agendas and predilections. We believe that this exercise in corporate deconstruction is detrimental to the economy and society at large. We continue to oppose it.

The Shareholder Rights Project, Harvard Law School's misguided "clinical program" which we have previously criticized, today issued joint press releases with eight institutional investors, principally state and municipal pension funds, trumpeting their recent successes in eliminating staggered boards and advertising their "hit list" of 74 more companies to be targeted in the upcoming proxy season. Coupled with the new ISS standard for punishing directors who do not immediately accede to shareholder proposals garnering a majority of votes cast (even if they do not attract enough support to be passed) — which we also recently criticized — this is designed to accelerate the extinction of the staggered board.

While the activist bloc likes to tout annual elections as a "best practice" on their one-size-fits-all corporate governance scorecards, there is no persuasive evidence that declassifying boards enhances shareholder value over the long term. The argument that annual review is necessary for "accountability" is as specious in the corporate setting as it is in the political arena. In seeking to undermine board stewardship, the Shareholder Rights Project and its activist supporters are making an unsubstantiated value judgment: they prefer a governance system which allows for a greater incidence of intervention and control by fund managers, on the belief that alleged principal-agent conflicts between directors and investors are of greater concern than those between fund managers and investors. Whether these assumptions and biases are correct and whether they will help or hurt companies focus on long-term value creation for the benefit of their ultimate investors are, at best, unknown. The essential purpose of corporate governance is to create a system in which long-term output and societal benefit are maximized, creating prosperity for the ultimate beneficiaries of equity investment in publicly-traded corporations. Short-term measurement and compensation of investment managers is not necessarily consistent with these desired results. Indeed the ultimate principals of investment managers — real people saving for all of life's purposes — depend not on opportunism, shareholder "activism" or hostile takeovers, but rather on the long-term compound growth of publicly-traded firms.

As we have said, it is surprising and disappointing that a leading law school would, rather than dispassionately studying such matters without prejudice or predisposition, choose to take up the cudgels of advocacy, advancing a narrow and controversial agenda that would exacerbate the short-term pressures under which U.S. companies are forced to operate. In response to our critiques, the activists resort to ad hominem attacks, suggesting that, "as counsel for incumbent directors and managers seeking to insulate themselves from removal" we "advocate for rules and practices that facilitate entrenchment." The fact is that the board-centric model of corporate governance has served this country very well over a sustained period. A compelling argument should be required before those corporate stewards who actually have fiduciary duties, and in many cases large personal and reputational investments in the enterprises they serve, are marginalized in favor of short-term-oriented holders of widely diversified and ever-changing portfolios under the influence of self-appointed governance "experts." Indeed a just published comprehensive study by a distinguished group of professors at the London School of Economics demonstrates that the statistical analyses relied on by these experts are seriously flawed and that the shareholder-centric governance they are trying to impose was a significant factor in the poor performance by a large number of banks in the financial crisis.