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Dear Senator Warren,

We are a group of long-term scholars and practitioners of the law, finance, and economics of corporations and other business entities. We write you now in support of your Accountable Capitalism Act. We believe legislation along these lines to be long overdue, and are confident that your bill will begin the process of both (a) correcting long-standing problems in American corporate governance, and (b) putting in place a system of incorporation that produces better outcomes for all corporate stakeholders, not just for elite executives and ultra-large shareholders. In so doing, it will also begin to restore to our business landscape a critical element that lay at the core of our nation's economic "growth miracle" and "social contract" alike during its most prosperous era.

Original Purpose of the Corporate Privilege

"Perpetual" legal entities authorized to act and hold assets in their own names while shielding their owners from legal accountability are now so ubiquitous, and have been part of our legal landscape for so long, that many Americans have forgotten the circumstances surrounding and the reasons behind their invention. Many have likewise forgotten what an extraordinary departure these entities represented from commonsense understandings of responsibility and legal accountability when first they were invented. And thus many have also forgotten the *strictly conditional* nature of "the corporate privilege" when first it came to be granted by the states of our federal republic.

In the early days of our republic, productive capital was in short supply, and state revenues were often quite limited and unpredictable. In consequence our law developed an ingeniously pragmatic method of "outsourcing" the construction of vital public infrastructures and the supply of widely needed public goods. That method was to permit – solely for specific and well-defined public purposes – the chartering of legal entities whose owners could not be held liable for losses inflicted or caused by those entities, and which could not be sued by creditors of their owners, so long as the losses occasioning suit were inflicted by the entity only in its authorized course of operation. This is all that "the corporation" was – and remains all that the corporation should be.

Hence, for example, a US state in need of canals, turnpikes, or other transportation networks in the early days of the corporate form would confer a corporate charter on syndicates of individuals who credibly promised to construct such infrastructures. It would thereby shield those individuals' personal assets from suits that might be brought against their corporation for harms caused by defects in the relevant roads or bridges, for example. At the same time it would shield the corporation itself from suit that might be brought by some creditor of one or more (in

the limit, even all) of its owners should the latter default in their individual capacities on obligations owed to third parties. This two-way "asset-segregation" facilitated long-term private investment in infrastructure and other public goods, and that facilitation was the sole purpose of this extraordinary insulation from ordinary accountability.

These privileges were, again, extraordinary, and thus were conferred only for limited, well-defined public purposes. Ordinarily, one who provides funding to terrorists or other harm-causing enterprises, for example, is legally accountable for facilitating such harms, even if she or he does not "directly" *inflict* the harm. Likewise, one who is found liable for harms will see his or her assets attached by his or her "judgment creditor" if unable to pay damages determined by judgment in a court of law. Corporate privilege represented a profound departure from these longstanding background principles of legal responsibility – a departure that only sovereigns like US states could authorize, and only for reasons of extraordinary necessity. Hence the familiar ring, until recently, of phrases like "the [state-conferred] corporate franchise," and adages like that pursuant to which corporations are observed to be "creatures of the state."

The corporate privileges were also, again, meant solely to encourage the owners of scarce capital to organize and finance projects for the public good, during a time when capital was indeed scarce and reliable public revenue was correspondingly hard to come by. For this very reason, the privileges were operative *only* insofar as the incorporated entity was actually *pursuing* such projects. They were, in other words, strictly *conditional*. And both the state's Secretary of State and committees of interested citizens had to agree that the conditions were likely to be met before any firm's corporate charter would be conferred or periodically renewed.

Incorporated entities that *strayed* from their publicly defined purposes were said to have acted "*ultra vires*" – that is, outside of their limited powers – and thereby forfeited their privileges. An entity that acted outside of its authorized powers could then be dissolved and its assets made available to creditors of its owners. Those owners, for their part, then could be sued for harms caused by their incorporated entity – just as one might be sued, for example, were his or her negligently parked car to roll down a hill and cause injury. All of this was because the owners of the firm had strayed from the purposes that had warranted the departure from ordinary rules of legal responsibility and accountability in the first place. Fail the *purpose* of the privilege, the thinking went, and you *forfeit* the privilege.

Contemporary Superfluity and Abuse of the Corporate Privilege

The corporate form as originally designed and just described proved a highly successful, characteristically American means of pragmatically partnering the public and private sectors to provide transportation infrastructure, energy grids, sewage and water systems, schools and libraries, public assistance and other social services in a world of scarce capital and unpredictable public revenue. In the modern era, however, things began gradually to change. For one thing, capital grew much less scarce, as (a) stock and real estate bubbles throughout the 20th and early 21st centuries, (b) the current wave of "stock buybacks," and (c) the related wave of "taking firms private" all have made plain. For another thing, public revenue became much more reliable, as it remains to this day when tax codes are not radically changed over-frequently. And finally, in part precisely because of the first two developments, corporate chartering *itself* began to change.

As incorporated firms became less necessary for the supply of specific forms of public infrastructure, states began competing with one another for the "franchise tax" revenue that can be had by charging a fee for the granting of corporate charters. This competition took the form of increasingly lenient conditions' being placed on the *granting* of corporate charters, along with more and more "manager-friendly," "small shareholder-unfriendly" bodies of corporate law that insulated elite corporate executives from accountability to their firms' smaller shareholders where executive compensation, corporate political activity, and corporate policy more generally were concerned.

This chartering competition, which remains underway to this day, bore all the attributes of an arms race – a classic collective action problem – that no state could or can exit save by "unilateral disarmament." This is why the race came to be called, and is still called, a "race to the bottom." "The bottom" here is a legal landscape in which nearly all states have unconditional, so-called "general incorporation" statutes, and few states encourage shareholder or stakeholder "activism" of any kind that might appreciably limit the prerogatives – or pay – of increasingly unaccountable elite corporate executives who use the corporate form principally to enrich themselves and large shareholders rather than to benefit smaller shareholders, rank and file employees, or the local and national economies.

The results of this historically anomalous "free incorporation" environment are as familiar as they are legion. High-powered executives increasingly run firms more for their own benefit than for the benefit of small shareholders, let alone other stakeholders and surrounding communities – the very people who used to have to approve grants of corporate charters in the first place. Unaccountable firms, meanwhile, impose massive inefficiencies upon the public thanks to the "moral hazard" and negative externalities permitted – indeed, actively encouraged – by the limited liability regime that we first came to permit solely in order to encourage private investment in public infrastructures. All the while, precisely because capital is *now* so *abundant* as *not to require* the conferral of special privileges on corporate investors, incorporated firms amass more and more capital from fewer and fewer ultra-wealthy interests, and in so doing grow much too large for states to monitor and control even were those states not already locked in the aforementioned "race to the bottom."

Clearly what we are confronted with now is an alien form of legally constructed "Frankenstein's monster" or "army of robots," originally created by states and now well beyond state control. Private firms enjoying publicly conferred corporate privilege in our states' coerced "race to the bottom" now monopolize or oligopolize entire industries – including such *de facto* public utility industries as the news media, telecommunications media, social media and payment platforms, banking and finance, healthcare and health insurance, and even transport and retail in some cases. The same firms' executives set their own pay and choose their own regulators – indeed, even their, and *our*, legislators – by determining through unaccountable and even shareholder-unapproved campaign donations and expenditures who wins many of our elections.

Ironically, these firms even make elections themselves, and hence our democracy's very capacity for self-government, exorbitantly expensive – by charging candidates huge fees for access to the public's own airwaves and communications infrastructure, which corporate executives control *only through public license*. This of course necessitates many of our lawmakers' spending hours each day seeking corporate money for reelection rather than listening to, learning from, and doing the bidding of their constituents.

States are, as mentioned before, both too small and too "divided and conquered" to solve this massive cluster of collective action problems with which the regime of "free incorporation" now confronts them. Only the states' and the public's authorized collective agent – our *federal* government – is both large enough and central enough to aid our states in addressing these collective action challenges and thereby restoring the great American tradition of conditioning publicly conferred corporate privilege expressly upon the fulfillment of legitimate public purposes.

How the Accountable Capitalism Act Begins to Restore Common Sense to Incorporation

This is, of course, where your Accountable Capitalism Act comes in. While some of us would like to go even further than the Act does, we all agree that your legislation takes the *critical first steps* in realigning our regime of incorporation with its original purposes. Specifically, it does so by doing the following:

First, by recognizing a new category of very large American corporations called "United States corporations," which must obtain a federal charter that obligates company directors to consider the interests of *all* corporate stakeholders, not just mega-shareholders, in their decision-making: American corporations with more than $1 billion in annual revenue must obtain a federal charter from a newly formed Office of United States Corporations at the Department of Commerce. The new federal charter obligates company directors to consider the interests of all corporate stakeholders – including employees, customers, shareholders of all sizes, and the communities in which their companies operate – not just large shareholders. This approach is derived from the (optional) benefit corporation model adopted by 33 states and the District of Columbia.

Second, by requiring robust worker representation on the boards of United States corporations: Every United States corporation must ensure that no fewer than 40% of its directors are selected by the corporation's employees. Germany has a similar requirement for large corporations and has seen robust economic growth and wage improvements for decades.

Third, by imposing restrictions on the sale of company shares by the directors and corporate officers of United States corporations: To ensure that corporate decision-makers are focused on the long-term interests of all corporate stakeholders, rather than on enriching themselves on the basis of short-term gains in their companies' manipulable share prices, the bill prohibits United States corporations' directors and officers from selling any company shares within five years of obtaining the shares or within three years of an open-market stock buyback.

Fourth, by requiring United States corporations to obtain shareholder and board approval for, and publicly to disclose, all political spending: In keeping with a proposal from John Bogle, the founder of Vanguard Group, United States corporations would have to receive the approval of at least 75% of their shareholders and 75% of their directors before engaging in political expenditures. They also would have to disclose all political and lobbying expenditures.

And fifth, by establishing a process for revoking United States corporations' charters when they engage in repeated misconduct: State Attorneys General are authorized to submit petitions to the Office of United States Corporations to revoke a United States corporation's charter. If the

Director of the Office and the Secretary of Commerce find that the corporation has a history of egregious and repeated misconduct and has failed to take meaningful steps to address its problems, they may grant the petition. The company's charter would then be revoked a year later – giving the company time before its charter is revoked to make the case to Congress that it should retain its conditional charter in the same or in modified form.

All five of these features, we believe, will facilitate state and federal collaboration in taming the nation's largest incorporated firms, bringing their operations more into line with the original purpose of the corporate form and its extraordinary privileges. In so doing, they will also begin the process of restoring that uniquely pragmatic, quintessentially American mode of partnering the public and private sectors in delivering broadly inclusive, sustainable prosperity to our citizenry. That is how we did things during our "miracle" years, when we created the greatest middle class that the world has ever known. That is how we must do things again.

We hope that you find the above considerations helpful and compelling. And we very much hope you will not hesitate to call upon us to assist if you think we might be of any help as you consider additional ways to restore what was once a healthy and refreshingly pragmatic regime of corporate formation and operation to an America now needlessly and unduly in thrall to the corporate creatures of its own states' creation.

Sincerely,

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