Sovereign Investing and Corporate Governance

Paul Rose

Associate Professor of Law, Moritz College of Law, Ohio State University; Fellow, Law and Capital Markets @ Ohio State; Fellow, National Center for the Middle Market at the Fisher College of Business, Ohio State University; Sovereign Wealth Fund Initiative Affiliate, The Fletcher School, Tufts University

Email: rose.933@osu.edu.

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Abstract

Sovereign wealth funds (SWFs) are increasingly important players in equity markets in the United States and abroad. However, despite their economic power, their reach, and their desirability as investors, SWFs are almost entirely disengaged from corporate governance matters in U.S. firms. Indeed, with the exception of Norway's Government Pension Fund-Global, SWFs are notable primarily for their passivity as shareholders.

Given that a variety of domestic and external political and regulatory factors that discourage SWF engagement in corporate governance in the United States, how can SWFs provide appropriate stewardship over their equity investments? This article addresses this question by describing how SWFs and regulators can create the crucial "space" necessary for SWF engagement in corporate governance.

Introduction

Discussions of corporate governance often focus solely on the attractiveness of firms to investors, but it is also true that firms seek out preferred investors.[1] What, then, are the characteristics of an attractive investor? With over $5 trillion in assets, sovereign wealth funds (SWFs) are increasingly important players in equity markets in the United States and abroad, and possess characteristics that firms prize: deep pockets, long-term (and for some, theoretically infinite) investment horizons, and potential network benefits that many other shareholders cannot offer. Indeed, in a recent BNY Mellon survey of large corporations, SWFs were identified as particularly attractive investors.[2] The survey report notes that "[w]hile in 2010 47% of corporates reported engaging with SWFs, in 2012 that had grown to 62%." But the report also notes an important concern for US markets: of the companies reporting engagement with SWFs, companies based in Western Europe had the highest rate of engagement, with 79% of corporations reporting discussions with SWFs. On the other hand, North American companies had the lowest rate of engagement with sovereign investors, at 49%.

Despite their economic power, their reach, and their general desirability as investors, SWFs are almost entirely disengaged from corporate governance matters in U.S. firms. Indeed, with the exception of Norway's Government Pension Fund-Global,[3] SWFs are notable primarily just for their passivity as shareholders. It is well-documented that SWFs present unique challenges not only to the countries in which they invest, but also to their own domestic governments and citizen-beneficiaries, and it is these varied political challenges that provide the strongest explanation for SWF's relative passivity in corporate governance.[4] But complete passivity has a dark side, especially when combined with a long-term investment horizon. If, like consumers, shareholders' two primary means of affecting corporate behavior are voice and exit,[5] than passive SWFs are not simply a non-factor in corporate governance, but may have a negative effect by holding large, inert share blocks that could be held by more engaged shareholders that would be more vigilant in containing managerial agency costs.

Given the domestic and external political and regulatory factors that discourage SWF engagement in corporate governance in the United States, how can SWFs provide appropriate stewardship over their equity investments? The article answers this question by describing how SWFs and regulators can create the crucial "space" necessary for SWF engagement in corporate governance.

The analysis proceeds in two substantive sections. Part I discusses the key factors that limit SWF involvement in corporate governance activities in the United States. Part II describes how, given these limitations, SWFs may engage in governance without triggering regulatory reprisals, and how regulators can encourage SWF investment and engagement.

I. SWF Corporate Governance Strategies and Responses to Regulation

The most comprehensive evaluation of SWF behavior in corporate governance is found in Mehrpouya, Huang and Barnett's comprehensive 2009 study[6] reviewing the proxy voting and engagement policies and practices of SWFs. The study examined the behavior of the largest ten SWFs: Abu Dhabi Investment Authority (ADIA), Australian Government Future Fund (AGFF), China Investment Corporation (CIC), Government of Singapore Investment Corporation (GIC), Kuwait Investment Authority (KIA), Libyan Investment Authority (LIA), Government Pension Fund Global (GPFG), Qatar Investment Authority (QIA), Russian Reserve Fund (RRF) and National Wealth Fund (NWF), and Temasek Holdings (Singapore). All but the Russian funds—RRF and NWF—held equity positions at the time of the study.

Obtaining information on engagement and proxy voting is difficult because most countries do not require disclosure of shareholders' proxy votes. Most SWFs (like many other institutional investors) do not publish data on their proxy votes, though Norway's GPFG is a notable exception to this rule; the authors were therefore required to search numerous public and proprietary sources to find indications of SWF engagement and proxy voting behavior. The authors looked at several markers of engagement, such as whether the SWF seeks board seats, whether it actively votes its shares, whether it makes other engagement efforts (such as direct contact with management), whether the SWF has proxy voting guidelines and whether it discloses proxy votes.

A board seat would allow the SWF a more active role in management, but would create a heightened risk that the SWF would use its influence to extract private (and possibly political) benefits. Unsurprisingly, the authors found little evidence of SWFs seeking board seats.

They found that when SWFs do hold board seats, it is typically because the SWF holds a large percentage of the outstanding shares or has historically held controlling stake.[7] Much more rarely, a SWF holding a non-controlling stake may secure a board seat. Mehrpouya, Huang and Barnett note only two such instances, one of which involving an 8% shareholding in German company GEA Group by KIA, and the other a 10% holding in Beijing Capital International Airport by GIC.

As noted above, most SWFs do not disclose their proxy policies, and of the ten largest SWFs, only GPFG discloses its proxy voting policies. GPFG's proxy voting policies are based on guidelines from the OECD's Principles for Corporate Governance, the OECD"s Guidelines for Multinational Enterprises, and the UN Global Compact. The authors report that, while not disclosing detailed proxy voting policies, "[a] number of the funds, including KIA and Temasek indicate that they exercise their shareholder rights, including voting on resolutions, in order to protect their financial interests." In its most recent annual report (following the publication of the Mehrpuoya, Huang and Barnett study), CIC also provides some discussion of its proxy voting and corporate engagement approach:

> As a financial investor, we usually maintain a minority shareholder status and do not seek to control or influence investee companies. Nor do we always exercise our full ownership rights. When we do, we are consistent with our investment policy to protect the value of our investment. CIC continues to strengthen its postinvestment management process and strives to do what we can as a minority shareholder to help our investee companies achieve success. By helping these companies thrive, we also fulfills [sic] our own value creation objectives.[8]

As with proxy voting policies, only GPFG discloses actual proxy votes. This lack of transparency makes it difficult to ascertain whether SWFs behave similarly to other types of large investment funds, such as pension funds, endowment funds, or mutual funds. Although a few countries, including Italy, require disclosure of actual proxy votes, there are insufficient investments in most jurisdictions from which to draw definitive conclusions about SWF proxy voting behavior. However, from interviews with some prominent SWF portfolio companies, the authors were able to determine that most SWFs exercise their proxy voting rights. They also noted examples of engagement with management. As suggested by the language from CIC's annual report, SWFs may attempt to engage management in an effort to enhance the value of their investment. In some cases, portfolio company managers have close relationships with SWFs. Norges Bank Investment Management, which manages GPFG, has an extensive engagement program that engages companies on corporate governance, environmental, human rights and other issues. Mehrpuoya, Huang and Barnett report that "[i]n 2008, NBIM engaged with 16 companies on corporate governance and shareholder rights; with 19 companies on child labor, risk management in the supply chain, and board competence; and with ten companies about their stance on greenhouse gas emissions." Aside from GPFG and a handful of examples of engagement that are connected to large equity purchases, it is unclear to what extent SWFs attempt to take an active role in influencing management of their portfolio companies. The available evidence suggests that SWFs are passive investors. The following section seeks to explain why this is the case.

Explaining SWF Passivity

As Balding has stated, sovereign wealth funds operate at the intersection of money and politics.[9] This puts the managers of SWFs—who in some cases are bureaucrats with experience in the sponsor country's central bank or ministry of finance, or in other cases professional managers recruited from private financial services

firms—in a position that requires balancing of both domestic pressures (financial, such as the responsibility to meet an internal benchmark, and internal political pressures to invest locally) and foreign (political pressures from host governments). This section sets out the ways in which SWF managers respond to these pressures and shows how the investment behavior of SWFs is directly shaped by both foreign and domestic pressure.

The numerous explanations for SWF passivity have been discussed amply elsewhere,[10] and only a brief review of these pressures is necessary here. The following is not a definitive list of the factors (and, particularly, regulations) that may affect ownership decisions, but does reflect the most important of these factors from the perspective of a sovereign wealth fund.

1. Taxation of Sovereign Wealth Funds

Under Section 892 of the Internal Revenue Code, income earned by foreign governments on investments in the United States in stocks, bonds, or other domestic securities, financial instruments held in the execution of governmental financial or monetary policy, or interest on deposits in banks in the United States, is exempt from taxation. The exemption provided under § 892 does not apply to commercial activity, however, with the justification that as an extension of the doctrine of sovereign immunity, § 892's exemption should be limited to activities that are related to sovereign activities of the government, as opposed to commercial activities.[11] The definition of commercial activity under § 892 turns on whether income was received from a controlled commercial entity, a term defined to mean

> any entity engaged in commercial activities (whether within or outside the United States) if the government (i) holds (directly or indirectly) any interest in such entity which (by value or voting interest) is 50 percent or more of the total of such interests in such entity, or (ii) holds (directly or indirectly) any other interest in such entity which provides the foreign government with effective control of such entity.[12]

Because "effective control" may come at shareholdings significantly below 50%, SWFs have a tax incentive to avoid making investments that might trigger tax liability under § 892.

2. Regulation by the Committee on Foreign Investment in the United States

CFIUS reviews every covered transaction in which a foreign government-controlled entity takes control of a US firm. The definition of control is the crucial trigger in determining not only whether the transaction will be deemed to be a covered transaction, but, assuming the threshold of control is passed, whether the transaction requires a mitigation arrangement that reduces the ability of the foreign government-controlled entity to control the target firm. The Treasury regulations promulgated after the FINSA amendments to the Exon-Florio framework clarify that not only what situations in which the investor might be deemed to have a taken a controlling stake in a target firm, but also encourages interests acquired and held passively. Section 800.302 of the regulations, which lists "Transactions that are not covered transactions," includes the following safe harbor:

> (b) A transaction that results in a foreign person holding ten percent or less of the outstanding voting interest in a U.S. business (regardless of the dollar value of the interest so acquired), but only if the transaction is solely for the purpose of passive investment. (See § 800.223.)

Although the ten percent safe harbor provides some comfort, the Treasury also makes clear that holdings of less than ten percent are not presumptively passive. The regulations further clarify that an

ownership interest is held for the purpose of passive investment if "the person holding or acquiring such interests does not plan or intend to exercise control, does not possess or develop any purpose other than passive investment, and does not take any action inconsistent with holding or acquiring such interests solely for the purpose of passive investment."

If an investment does not clearly fall within the safe harbor, CFIUS may require a mitigation agreement. Under the statute, "[CFIUS] or a lead agency may, on behalf of the Committee, negotiate, enter into or impose, and enforce any agreement or condition with any party to the covered transaction in order to mitigate any threat to the national security of the United States."[13] There are two primary hurdles that CFIUS must overcome before entering into a mitigation agreement with a party undertaking a covered transaction. First, CFIUS must provide "a written analysis that identifies the national security risk posed by the covered transaction and sets forth the risk mitigation measures that the CFIUS member(s) preparing the analysis believe(s) are reasonably necessary to address the risk."[14] CFIUS must then, as a committee, agree that "risk mitigation is appropriate and must approve the proposed mitigation measures."[15] Second, "CFIUS may pursue a risk mitigation measure intended to address a particular risk only if provisions of law other than section 721 do not adequately address the risk."[16] If, for example, another statute or set of regulations, such as the National Industrial Security Program Operating Manual ("NISPOM") adequately mitigate the risk posed by the investment, then CFIUS would not enter into a separate mitigation agreement.

When analyzing the investment and governance behavior of SWFs, generalizations often conceal important issues arising between specific SWFs and home countries. While CFIUS lets the overwhelming majority of transactions pass through review without either requiring a further investigation or imposing a mitigation agreement,[17] the earlier analysis of the bi-lateral behavior of acquisition activity originating from certain SWF sponsor countries (particularly China) suggests caution in viewing the CFIUS process as overwhelmingly successful for foreign investors. For which SWF is CFIUS review most likely to be successful? It seems obvious that it is likely to be more successful for SWFs from countries that are not political rivals with the United States. That CFIUS might view an acquisition by a Chinese SWF differently from an acquisition by a large Canadian pension fund is no surprise. China poses concerns for the US government that Canada or Norway do not. What is problematic, however, is the perception—and perhaps reality—that Chinese investment is actively discouraged. This concern is particularly worrisome when the U.S. political climate tends to reward such discouragement; this is perhaps most likely to be the case in an election year, when charges of being soft on China or other political or economic rivals become especially pronounced. Suspicions of this brand of politicization were recently expressed by Gao Xiqing, the vice chairman and president of China Investment Corporation; according to the report, "when CIC seeks to invest in the United States, despite the fact that US infrastructure is in pretty dire straits, [Gao] is politely asked to look elsewhere, even when the investment represents only a small stake."[18] No doubt referring to CFIUS, Gao stated that while the seemingly technical roadblocks to investment in the United States appear to be technical in nature, they are in reality political: "It's not serendipity, it's by design." The US regulatory structure thus presents an irony: while US regulations have actively promoted shareholder engagement (to take just two recent examples, through Dodd-Frank's say-on-pay regulations and the SEC's failed efforts to promote proxy access), the CFIUS rules work against engaged SWF investment.

3. Securities Regulations

Several securities regulations may also impact the extent of a SWF's holdings in U.S. listed companies. For example, holdings of 5% or more of a company's outstanding stock may result in disclosures required by sections 13G or 13D of the Exchange Act of 1934. A more important limitation, not unique to SWFs but acting as a deterrent to large block holdings generally, is Section 16 of the Exchange Act. Section 16 has two relevant components. First, Section 16(a) imposes potentially burdensome disclosure obligations on any person who beneficially owns more than 10 percent of any class of equity security. Beneficial ownership of shares may be determined by reference to the definition under Exchange Act Rule 13d-3, which, among other things, links ownership investment and voting rights over the shares. Section 16 reporting includes the filing of Form 3 once the Section 16 ten percent threshold has been passed; statements of changes in the beneficial ownership of the shares under Form 4; and an annual statement filed under Form 5.

Second, Section 16(b) imposes what is known as the "short-swing profit rule", which forces disgorgement of any profits made by the section 16 filer on any sale and purchase, or purchase and sale, within a given six-month period. Unlike the Exchange Act's general antifraud provision, Section 10(b), the section 16 filer need not be in possession of material, non-public information, and need not have acted with scienter. Indeed, through the matching rules under Section 16(b), a series of trades need not produce a profit to result in liability; only a single matched pair, within a six-month time frame, need show a profit. As Bernard Black has noted, "[t]hese rules create a strong incentive not to cross the 10% threshold. The forfeiture rules greatly reduce a shareholder's liquidity, and the reporting burden is substantial, especially for a large institution which is frequently buying and selling."[19]

Black also cites additional federal securities regulations that discourage becoming investors generally from becoming a "control person", including the limitations on the sale of stock imposed by Rule 144 of the Securities Act and potential liability for the corporation's activities under Section 15 of the Securities Act of 1933 and section 20 of the Exchange Act of 1934. The SEC defines control very broadly, so that ownership amounting to as little as 10% might be considered a control stake for purposes of the statutes and regulations.[20]

4. Transaction Costs and Headline Risk

As I have argued elsewhere, transaction costs may have an effect on a SWFs' investment decisions.[21] If navigating the CFIUS process requires significant expenditures of effort by the SWF and its attorneys, or the SWF fears that the transaction may become politicized, it may choose to invest elsewhere or to limit the scope of the investment so as to avoid creating a risk that the transaction would be closely investigated by CFIUS and, possibly, ultimately blocked.[22] Some deal-making behavior by SWFs may be characterized as a kind of regulatory arbitrage,[23] as SWFs limit investments to ownership levels so as to avoid CFIUS filings and attention, securities regulations, or other regulations or internal governance provisions that might trigger increased costs for the SWF.

Transaction costs also play another very important role in encouraging SWF passivity: they encourage SWFs to avoid appearing political in their investment and governance decisions. This may be viewed as "headline risk" for SWFs. SWFs are already viewed with suspicion by many regulators, and publicity suggesting that a sovereign is using its SWF for political purposes can have a profound effect on the costs of SWF investment; alarmist portrayals of SWF investment activity routinely ignore these headline risks and how they impact large, diversified portfolios. Imagine, in an extreme scenario involving national

security, that a SWF decided to use an investment in a US firm as a tool of espionage. An SWF makes an investment in a company and begins to pressure the company for information on certain operations or products. Leaving aside potential violations of Regulation FD,[24] if a company were to share such information, what would be the effects? First, CFIUS may be triggered, and the investment could be frozen or unwound. Second, and more devastatingly, regulators would take an interest in every other investment made by the SWF. Other home countries' regulators, seeing that a SWF investment was used for political purposes, would apply enhanced scrutiny to existing investments[25] and proposed investments, and countries would likely consider protectionist regulations governing SWF investment. All of these effects would dramatically increase the cost of investment by the SWF: increased legal fees, increased managerial time and effort in explaining investment decisions, and potential losses as the SWF is forced to forego or unwind some investments and instead shift funds to less attractive opportunities.

In a more likely scenario, a SWF may invest for more benign strategic purposes—arguably, for political purposes in the sense that the investment extends beyond purely commercial gains for the SWF itself and serves to further some political end, such as food security or the support of a local industry. Some of the research reviewed above suggests that some SWFs have invested strategically. It is helpful to distinguish here between strategic investing that implicates the national security of host nations and strategic investing that does not, since the U.S. regulatory structure (and most other host country regulations of foreign investment activity) restricts activity that implicates the host country's national security, but does not restrict strategic activity that might be politically beneficial to the SWF sponsor country but does not impact the national security of the host country. Examples of such strategic investing may include establishing links to resource-producing or extracting firms as a means of buttressing resource supplies, or investing in a firm in order to acquire know-how (for example, a relationship with a private equity firm may enable a SWF to learn valuable investment techniques). Assuming such investments are not prohibited by CFIUS—e.g., there is no unmitigated national security risk—why, then, does the U.S. not see more such investments from China and other political rivals? One explanation is that even when investments do not create national security risk, the use of a SWF for any purpose that suggests a double-bottom line, whether in the United States or not, creates headline risk not just for the SWF but also for U.S. regulators, who may be wary of the perception that U.S. firms are part of a politically strategic investment program. Or, more simply, the strategic use of a SWF—CIC, for example, or even other nationally-sponsored funds from the same country, such as the China-Africa Development Fund—may provide political cover to U.S. politicians who would like to discourage investment for their own political purposes.

5. The Santiago Principles

By design, the IWG's "Generally Accepted Principles and Practices,"[26] more commonly known as the "Santiago Principles," are designed to affect SWF investment behavior. The Santiago Principles were intended, among other things, "to continue to demonstrate—to home and recipient countries, and the international financial markets—that the SWF arrangements are properly set up and investments are made on an economic and financial basis." The principles are non-binding, however, and many host countries remain suspicious of SWF motives.

The Santiago Principles contain two principles that are especially relevant to this article. The first, GAPP 19, relates to SWF investment decisions. The second, GAPP 21, relates to SWF participation in corporate governance.

GAPP 19 states that "[t]he SWF's investment decisions should aim to maximize risk-adjusted financial returns in a manner consistent with its investment policy, and based on economic and financial grounds." The baseline policy position of the Santiago Principles is commercial, non-strategic investing. However, Subprinciple 19.1 provides SWFs with some liberty to deviate from purely return-based investing: "If investment decisions are subject to other than economic and financial considerations, these should be clearly set out in the investment policy and be publicly disclosed." Notwithstanding this liberty, the commentary on this subprinciple does not discuss strategically-oriented deviations from return-based investing. It instead references deviations due to "legally binding international sanctions and social, ethical, or religious reasons," and specifically mentions Kuwait, New Zealand and Norway, which all have internally restrictive investment policies.[27] The commentary goes on to state that "[m]ore broadly, some SWFs may address social, environmental, or other factors in their investment policy. If so, these reasons and factors should be publicly disclosed," a vague principle that would arguably encompass some kinds of strategic behavior provided the strategic policy is disclosed.

GAPP 21, which addresses governance, states that:

> SWFs view shareholder ownership rights as a fundamental element of their equity investments' value. If an SWF chooses to exercise its ownership rights, it should do so in a manner that is consistent with its investment policy and protects the financial value of its investments. The SWF should publicly disclose its general approach to voting securities of listed entities, including the key factors guiding its exercise of ownership rights.

The commentary explains that:

> SWFs' demonstrated ability to contribute to the stability of global financial markets results in part from their ability to invest on a long-term, patient basis. The exercise of voting rights is seen to be important by some SWFs for their capacity to hold assets and preserve value rather than becoming a forced seller and, by definition, a shorter-term investor. The exercise of ownership rights is also seen by some SWFs as a mechanism for keeping the management of a company accountable to the shareholders, and thus contributing to good corporate governance and a sound allocation of resources.

6. Internal Political Constraints

Some SWFs, and perhaps particularly those founded in democratic regimes, may come under pressure to conform their investment and corporate governance practices with the governance preferences of the public. As Norway's GPF-G explains,

> [I]nvestors should also share responsibility for how the companies in which they invest are conducting themselves, for what they are producing and for how they are treating the environment. The Government deems it important to integrate this type of responsibility into the management of the Government Pension Fund, because it promotes values that are important to the Norwegian people, and because it represents an important contribution to raising awareness amongst investors and companies domestically and abroad.[28]

As a more general matter, the ability to engage in corporate governance correlates with long-term investment. Internal political pressures may make long-term investment objectives more difficult to obtain. As Dixon and Monk argue,[29] sovereign investors may have difficulty in

explaining performance results and investment strategies to their constituencies. But even when funds attempt to provide higher-quality disclosure, explanation and education about results and investment policies, "such a strategy still may prove ineffective and be trumped by the salience of and desire for short-term performance metrics."[30] Additionally, "domestic opponents of a country's SWF could utilize the poor performance to reinforce their argument against the existence of the fund or the fund's strategy."[31] These concerns may lead SWFs to either adopt a short-term investment approach, and/or decrease transparency to avoid signaling investment strategies.

7. Institutional Constraints

Finally, most SWFs have two significant internal constraints which limit their effectiveness in corporate governance. The first is structural, and it is simply the reality that, unlike private equity firms and some hedge funds, SWFs are typically designed to act as broad-based investors that tend to follow the tenets of modern portfolio theory, which prescribes diversification of investments across various asset classes. The very structure of SWFs—often, as decreed by the governing documents of the SWF—is designed to limit the SWF's investments in equity to relatively small positions as part of a larger portfolio that includes numerous asset classes. This does not prevent SWFs from engaging in activism, of course; pension funds generally invest similarly, for example, and many are active shareholders in governance matters. However, because they hold relatively small amounts of any given company in the portfolio, SWF managers may believe that they have relatively little economic incentive to engage in shareholder activism.[32]

The second structural concern with SWFs' ability to engage in corporate governance matters is that SWFs tend to be relatively thinly staffed, and more importantly, it appears that none (with the exception of Norway's GPFG) invest in governance matters by creating specialized internal governance-focused groups. To be sure, the absolute ratio of staff to assets is not dispositive on the issue of whether the SWF will be able to engage in governance. In 2010, GPFG had a staff of only 217 employees and $322 billion in assets and engaged extensively in governance activities,[33] while the Qatar Investment Authority had a staff of 110 and assets of $60 billion and did not engage in governance. However, the many reasons suggested above for why SWFs are passive and reluctant to engage in governance also help to explain Norway's interest in governance. Most particularly, Norway is both a democracy in which the population holds relatively strong views on social issues, and Norway is not viewed as a political rival or potential threat to host countries, while most other SWFs come from non-democratic (or less democratic) regimes, and some are viewed as political rivals to host countries. Both domestic and international politics are inseparably linked to the ability and will of SWFs to engage in corporate governance.

II. Toward Bi-Lateral Transparency In Sovereign Investing

As SWFs continue to acquire equity interests in the United States and around the world, questions concerning their proper role in corporate governance will continue to arise. SWFs have many reasons to remain overly passive. Some may even hesitate to exercise their basic voting rights. This is unfortunate, however, because SWFs are designed to be long-term investors and should be well-incentivized to provide an important voice in corporate governance matters. How then, can SWFs manage to avoid the political and regulatory ramifications that would likely arise from efforts to engage in corporate governance? In this section, I outline two key roles for transparency and how it links to the role of SWFs in corporate governance. First, SWFs must

become more transparent in their investment decision-making and corporate governance activities. Second, and equally important, regulators must be more transparent in how they deal with SWFs.

SWF Transparency

Because of concerns with the potential politicization of SWFs, regulators and observers have called on SWFs to become more transparent in how they invest and in how they engage with their portfolio companies—for example, how SWFs vote proxies and disclose proxy voting policies. Others have attempted to provide benchmarks to encourage transparency. The Sovereign Wealth Fund Institute, for example, publishes the Linaburg-Maduell Transparency Index, which rates SWFs on ten measures of transparency.[34]

Transparency can be evaluated across a number of dimensions. Dixon and Monk identify five: political transparency, (the fund's objectives and relationship with the sponsoring government), procedural transparency (governance and decision-making procedures); policy transparency (internal fund operations and policies); operational transparency (implementation of investment strategies); and performance transparency (fund outcomes, benchmarking, and risk profile).[35] All of these aspects relate to and build upon one another, and all have an impact on the ability of a SWF to engage in activism, as well as signaling what kind of activism the SWF might engage in. For example, political transparency equates to disclosure of fund motives, as well as disclosure of the relationship of the sponsor government to the SWF; these disclosures help establish confidence that the SWF will be used for commercial purposes. If there is no political transparency, host country regulators will be inclined to examine transactions more carefully because of the risk that the SWF will act non-commercially, and may put in place mitigation agreements (as is not uncommon in the U.S.) that limit the ability of a SWF to engage in governance. Lack of transparency thus creates external pressures on SWFs that manifest themselves through increased regulatory scrutiny and attendant transaction costs. On the other hand, transparency may also invite scrutiny of a fund's holdings and investment practices, which in turn can create internal popular or political pressures on the fund to alter its practices. Transparency thus reduces investment frictions, but may also enhance domestic pressures on the SWF.

While transparency is connected to corporate governance engagement, obscurity is linked to passivity and disengagement. This may be a conscious trade-off for many funds: they are willing to forego corporate governance activities in order to avoid unwanted attention by either foreign regulators or by politicians, bureaucrats or citizens of their own country. It is also certainly the case that even if all SWFs were highly transparent, some SWFs would still not engage in governance. First, they may not believe that the benefits of engaging in corporate governance efforts outweigh the costs. Alternatively, they may choose to free-ride off the efforts of other investors and avoid the costs of engagement. For some SWFs, however, engagement has costs that extend beyond those expended by other investors because SWFs present risks that most other investors do not. Some kinds of engagement may be risky for SWF investors in US firms because of the reach of CFIUS. The US Treasury regulations implementing FINSA broadly define "control" to encompass activities in which an investor has the ability to "determine, direct or decide important matters affecting an entity", including major transactions, closing or relocating operations, dividend payments, equity and debt issuance, selection of new business lines, entry or termination of significant contracts, appointment and dismissal of senior officers, or amending the articles of incorporation. These matters typically fall far outside the range of actions that even the most active shareholders would engage in (excepting transactionally-oriented activist hedge funds), but what about aggressively criticizing pay

practices at a firm? Or asking a company to cease dealing with companies in certain countries? These activities would seem to invite scrutiny, even if the engagement falls comfortably within "mere influence" and does not suggest control. In other words, if SWFs engage as "activist" investors, they may worry that they will not be treated as other investors. Further, the reality faced by SWFs is that risks presented by sovereign investment differ from one SWF to another; US regulators likely do not consider the risks presented by Chile or Norway's SWFs to be equivalent to the risks presented by China's. Thus, the range of governance activities that may be undertaken by Norway's GPF-G with respect to US firms would be far greater than what could be undertaken by China's CIC.

If SWFs are concerned about signaling investments and practices to the market, it is possible in the U.S. to selectively disclose some information to regulators without disclosing it to other parties. The SEC provides a limited exemption for institutional investors who would be otherwise required to disclose all their holdings under Form 13F. The exemption is intended to protect investment strategies, and so is limited as to duration (one year) and is generally not used for a large number of stocks because the SEC requires that "[i]f confidential treatment is requested as to more than one holding of securities, discuss each holding separately unless the Manager can identify a class or classes of holdings as to which the nature of the factual circumstances and the legal analysis are substantially the same." The SEC also requires filers to describe, among other things, the investment strategy being followed, why public disclosure of the securities would be likely to reveal the investment strategy, and to explain how failure to grant the request for confidential treatment would be likely to cause substantial harm to the filer. The exemption does not contemplate political motivations for requesting confidential treatment, such as the desire to avoid domestic political pressures.

Unfortunately, most SWFs are not filing 13Fs at all, let alone filing confidential treatment requests for portions of their holdings. Only two foreign-based SWFs, Norway's Government Pension Fund-Global and Singapore's Temasek Holdings, have filed recent 13Fs. As will be discussed in the next section, SWFS are treated differently from other investors by regulators. However, in this instance, most SWFs are not acting like other investors, and because of their status as entities controlled by a sovereign government, the SEC is limited (by politics, if not by legal authority) in its ability to enforce its rules against them.

Enhancing Regulatory Transparency

Just as regulators and some observers call for more transparency from SWFs, SWFs and other observers have raised the need for enhanced transparency from regulators. The risk of SWF politicization has been amply discussed, but equally important is the risk that politicians and regulators from countries in which an SWF seeks to invest will use the cover of "national security" review to prohibit SWF investment. In each case, SWF investment has become politicized. This is not to ignore the reality that SWFs are, indeed, unlike other investors in important ways, and that regulatory structures must be adapted to take these differences into account. However, reciprocal transparency helps to facilitate both the investment decision by the SWF and the analysis of national security risk (if any) by the regulator.

Lawyers who regularly advise foreign investors (not only SWFs, but any foreign investor that would be subject to a CFIUS investigation) are familiar the transactional frictions that mark the current CFIUS process. An opinion piece written by two attorneys, Stephen Paul Mahinka and Sean P. Duffy, outlines these challenges.[36] They note that CFIUS could reduce the uncertainty surrounding

its reviews and investigations by "providing brief general summaries of the bases for its determinations with respect to proposed transactions." CFIUS provides little clarity to its proceedings except through the annual report provided to Congress, a portion of which is made public. As described above, this report provides general statistics about notices submitted, investigations and reviews initiated, industries involved, and the nationalities of the bidders. The public report does not provide any information regarding specific transactions or the mitigation agreements that may have been entered into as a consequence of an investigation. Mahinka and Duffy compare this opacity with other agencies:

> In contrast, numerous US regulatory and enforcement agencies, including the Department of Justice Antitrust Division and the Food and Drug Administration, commonly provide public statements describing their decisions, while accommodating confidentiality concerns. Any similar brief summaries of Cfius' parameters of decision would necessarily be circumspect, in view of security concerns and the need to protect the Agency's deliberative process. Nonetheless, it is difficult to conclude that US government, foreign government, foreign investors and acquirers, and indeed Cfius itself, would not be better served by a short statement of the parties to the transaction, the industry involved, and the Agency's general rationale for its determination. Such transparency, which would require an amendment of the Agency's statute, would enhance the predictability and likely the legitimacy of Cfius' decisions, enabling both US sellers and foreign investors and acquirers to better gauge Cfius' probable concerns and more efficiently undertake investments in US businesses.

The recent *Ralls* suit shows the difficulty in obtaining clarity on CFIUS decisions. On July 25, 2012, CFIUS issued an order identifying national security risks associated with the acquisition of wind farms, located near a US navy facility, by Ralls.[37] Ralls, a subsidiary of Sany, China's largest machinery manufacturer, filed a complaint against CFIUS on September 12.[38] The complaint sought, among other things, an order and judgment declaring that CFIUS violated the APA, that CFIUS lacks the authority to issue an order prohibiting the Ralls transaction or regulating future transactions not resulting in foreign control of a person, and enjoining CFIUS from attempting to do so, an order and judgment declaring "arbitrary and capricious" CFIUS's determinations that the Ralls transaction falls within CFIUS jurisdiction and that it presents national security risks. Ralls then filed a motion on September 13 seeking a temporary restraining order and preliminary injunction.[39] Ralls argued that to avoid irreparable harm it needed to resume construction by September 20, which would allow the company to finish construction by the end of the year and be eligible to claim $25 million in federal tax credits. The suit was thought to have little chance of success, but did have some interesting implications:

> The plaintiffs challenge CFIUS's procedures for reviewing transactions. Ralls objects to CFIUS's failure to provide any "evidence or explanation for its determination[s]" that the transaction was a "covered transaction" (and thus under CFIUS jurisdiction), that the transaction poses national security risks, and that those risks cannot be mitigated by less-restrictive means than the overbroad (in Ralls' view) measures in the amended order. The challenges

should be understood in the context that CFIUS review is generally confidential (CFIUS does not disclose even the fact that a review was requested). When CFIUS has a national security concern, the Committee will often explain to parties that there is evidence of a national security concern but, in the interest of national security, the Committee often will not share the reasoning or evidence with the parties. Here, Ralls is complaining about the inability to hear or understand the issues. If successful, the suit could increase the transparency of the review—such as a requirement that the Committee articulate for the parties its justification for orders beyond a bare finding of "national security risk." It could also open the door for CFIUS to explain the reasons for recommending to the President that a transaction poses national security threats. If this were to come to pass, such disclosure could open the door to fruitful mitigation discussions.[40]

Unfortunately for Ralls, on the recommendation of CFIUS President Obama issued an order blocking the transaction, and by statute the order is not reviewable.[41] As noted above, however, there are important justifications for enhanced transparency of CFIUS actions, particularly when the transparency takes the form of a short public statement setting out the reasons for the action. As argued by Mahinka and Duffy, more disclosure of the bases for its recommendations would make CFIUS reviews and investigations more predictable and provide foreign investors with a better sense of the types of investments that are likely to create national security concerns. More generally, an explanation of its actions would help inoculate CFIUS against claims that its decisions are susceptible to political manipulation, and that increased frictions for certain deals, particularly from political and economic rivals, are not "by design."

More disclosure is not a panacea for politicization of SWF investment, and it is crucial to recognize the limits of transparency. Transparency does not eliminate political influence in business transactions, just as more transparency through campaign finance laws does not eliminate business influence in political elections. But transparency can raise the costs of improper behavior. In the case of CFIUS rulemaking, a statement accompanying an action would require CFIUS to provide principled reasons for its determinations, which could then be evaluated by the public and other nations. The U.S. has much to gain from eliminating politicized treatment of foreign investments, and could take a lead in providing a stable foreign investment environment that would strengthen the US case when it demands similar treatment for US-based firms investing in foreign markets.

Creating space for SWFs in corporate governance

As noted at the outset, complete passivity may be detrimental for SWFs and the firms in which they invest. On the other hand, regular, active engagement may not be necessary or even desirable for all SWFs. But if SWFs are indeed investing for the long term, how can they play a meaningful role in corporate governance? In this part, I will outline ways in which even the most constrained SWF can find space to play an important role in corporate governance matters: a role that is not problematically passive, but does not create regulatory risks for the SWF.

As noted above, Treasury rules restrict what may be called "positive" governance. Positive governance efforts are typified by engagement with management on social issues, governance changes, and even business matters. Examples of positive

governance outcomes include board nominations, shareholder proposals, and advice on business strategies. Most of the shareholders classified as "activist", including activist hedge funds, some labor union funds, and some public pension funds, are engaged in positive governance efforts. Positive governance efforts, especially those resulting in strategy changes and changes on board composition, are more likely to create regulatory concern because they increase the risk that the SWF is using or could use its influence for non-commercial purposes.

For SWFs that are viewed by U.S. regulators as presenting more significant political risks, positive governance is not a realistic option, even if the SWF intends to only engage in what it believes are shareholder value-producing governance efforts. However, the same SWFs may be able to focus on "negative" or "restrictive" shareholder rights.[42] Examples of negative governance include merger approvals, exercise of voting rights, approval or ratification of transactions in which there is self-dealing, and the creation of bounded governance structures, such as supermajority approval requirements for certain transactions or for certain governance changes. Negative governance is typified by rules creation and approval of major events, but passivity with respect to most corporate governance matters.

Qatar's SWF provides a useful recent example of negative governance. Qatar Holdings, an investment vehicle of the Qatari SWF, owned approximately 13% of Xstrata, a large mining company with operations around the world. Glencore, a large commodities trading and mining company, sought to merge with Xstrata. Glencore held shares in Xstrata, but because the deal required approval by a majority of disinterested shareholders, Qatar Holdings' ownership block was sufficient to successfully block the merger. Qatar Holdings engaged in lengthy discussions with Glencore and Xstrata, and consistently held out for a better deal over months of negotiations (which it succeeded in getting, even though it was not as much as Qatar Holdings had hoped to gain). Some viewed Qatar Holdings' efforts as "activist" investing.[43] However, the SWF was not engaged in positive governance, which is typified by efforts to catalyze change. Indeed, they were acting as a roadblock, as a check on a management decision that was exceedingly material to their investment.

Significantly for SWFs, negative governance efforts are implicitly granted a safe harbor by the Treasury rules. The Treasury rules[44] state that various activities which fall under the definition of negative governance outlined above will not trigger the "control" definition under FINSA, including (1) the power to prevent the sale or pledge of all or substantially all of the assets of an entity, (2) The power to prevent an entity from entering into contracts with majority investors or their affiliates, (3) The power to prevent an entity from guaranteeing the obligations of majority investors or their affiliates; (4) The power to purchase an additional interest in an entity to prevent the dilution of an investor's pro rata interest; and (5) The power to prevent the change of existing legal rights or preferences of the particular class of stock held by the SWF. As I have argued elsewhere, this regulatory posture makes good sense from a policy perspective, because negative rights do not tend to divert management authority away from the directors and officers, but instead place limits on the ability of directors and officers to impair the rights or interests of the negative right-holder. On the other hand, positive rights necessarily involve the exercise of management influence or power, which is precisely the kind of activity that one might worry about with SWFs, i.e., that management is influenced to do something that inures to the political benefit of the SWF. Exercising positive rights makes you an activist, but exercising negative rights makes you a responsible shareholder.

While positive governance activities may raise suspicion with regulators, depending on the political relations between the host country and the SWF sponsor country, negative governance efforts merely set limits to or check managerial behavior, and are less likely to concern regulators. These are generalities, of course, that will not hold for every SWF investing in the United States. Particular decisions by SWFs with respect to corporate governance are intensely context-specific. A given SWF must consider the effects of its activism on numerous parties, including corporate managers and other shareholders, host country regulators, home country citizens, and regulators in other countries in which the SWF has or invested or may invest in the future. The political relationship between the SWF sponsor country and the host country plays a large role in shaping governance behavior, as does economic necessity (a desperate host country may welcome investments that it would otherwise prefer to discourage; see, for example, the investments by numerous SWFs in U.S. financial institutions in 2008-2009). Finally, layered on to these factors, internal pressures may encourage certain types of engaged governance behavior, as with Norway's environmental and social shareholder activism.

CONCLUSION

SWFs as a group are still finding their way as investors. While some SWFs are very sophisticated investors, others are still developing their investment capabilities. So it is with SWF engagement in corporate governance. While a few SWFs have sophisticated governance engagement programs in place, most do not invest in corporate governance. I have argued that this consequence is not solely the result of SWF choices, however; regulatory frameworks in the U.S. and elsewhere discourage corporate governance engagement by SWFs. This is not to say that all SWFs should engage in *positive* corporate governance. However, they should have the ability at least to effectively engage in *negative* governance efforts, and markets and regulators should expect SWFs to engage in such efforts.

Available empirical evidence indicates that markets tend to welcome minority SWF investment, but some studies suggest suspicions that SWFs will engage in tunneling or political activities. SWFs can alleviate these suspicions by enhancing transparency of when and how they engage in corporate governance efforts. Regulators can promote engagement and responsible sovereign investing by providing greater transparency to their regulatory efforts.

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[1] *See* Edward B. Rock, *Shareholder Eugenics in the Public Corporation,* 97 CORNELL L. REV. 849 (2012).

[2] BNY Mellon, *Global Trends in Investor Relations* (2012) at 9, available at http://www.adrbnymellon.com/files/PB30916.pdf.

[3] Larry Cata-Backer has written extensively on Norway's investment behavior. See, e.g., *Sovereign Investing and Markets-Based Transnational Legislative Power: The Norwegian Sovereign Wealth Fund in Global Markets*, Consortium for Peace & Ethics, Working Paper No. 2012-11/11, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2177778.

[4] Bassan notes that SWFs are beginning to emerge as more important players in corporate governance generally. Fabio Bassan, THE LAW OF SOVEREIGN WEALTH FUNDS (Edward Elgar: 2011) at 6. This is not the case in the U.S., however, as this article explains.

[5] *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES (1970).

[6] AFSHIN MEHRPOUYA, CHAONI HUANG & TIMOTHY BARNETT, IRRC INSTITUTE, AN ANALYSIS OF PROXY VOTING AND ENGAGEMENT POLICIES OF THE SOVEREIGN WEALTH FUNDS 30–41 (Oct. 2009), *available at* http://www.irrcinstitute.org/pdf/Sovereign_Wealth_Funds_Report-October_2009.pdf.

[7] Temasek is an example of this type, "most likely due to the nature of Temasek as a vehicle to take over management of government assets." MEHRPOUYA, HUANG & BARNETT, *supra* note 6, at 22.

[8] China Investment Corporation, Annual Report 2011, at 26, available at http://www.china-inv.cn/cicen/include/resources/CIC_2011_annualreport_en.pdf.

[9] CHRISTOPHER BALDING, SOVEREIGN WEALTH FUNDS: THE NEW INTERSECTION OF MONEY AND POLITICS (2012).

[10] *See, e.g.,* Paul Rose, *Sovereign Wealth Funds: Active or Passive Investors?,* YALE L.J. POCKET PART, Vol. 118, p. 104 (2008)

[11] This explicit distinction was codified by the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 (2006); for a discussion of the development of the Foreign Sovereign Immunities Act and § 892, see N.Y. STATE BAR ASS'N TAX SECTION, REPORT ON THE TAX EXEMPTION FOR FOREIGN SOVEREIGNS UNDER SECTION 892 OF THE INTERNAL REVENUE CODE 14–16 (June 2008), http://www.nysba.org/Content/ContentFolders20/TaxLawSection/TaxReports/1157report.pdf [hereinafter NYSBA REPORT].

[12] I.R.C. § 892(a)(2)(B).

[13] 50 U.S.C. App. § 2170(*l*)(1)(A) (2011). The statute also states that "[a]ny agreement entered into or condition imposed under subparagraph (A) shall be based on a risk-based analysis, conducted by the Committee, of the threat to national security of the covered transaction." § 2170(*l*)(1)(B).

[14] Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States, 73 Fed. Reg. 74,568 (Dec. 8, 2008) [hereinafter CFIUS Guidance]. With respect to the identification of risk, Executive Order 11858 (as amended by Executive Order 13456) clarifies that the assessment of risk must be "based on factors including the threat (taking into account the Director of National Intelligence's threat analysis), vulnerabilities, and potential consequences." Exec. Order No. 13,456, 73 Fed. Reg. 4679 (Jan. 23, 2008). Mitigation agreements are (and are intended to be) rare. As discussed in the Treasury's guidance, "CFIUS may not, except in extraordinary circumstances, require that a party to a transaction recognize, state its intent to comply with, or consent to the exercise of any authorities under existing provisions of law." CFIUS Guidance, *supra* at 74,568. Between 2008 and 2010, CFIUS received 313 notices of covered transactions. Of these, 93 resulted in investigations, and only 16 resulted in mitigation agreements. COMM. ON FOREIGN INV. IN THE U.S., 2010 ANNUAL REPORT TO CONGRESS 3 (Dec.2011) [hereinafter CFIUS 2010 ANNUAL REPORT].

[15] CFIUS Guidance at 74,568

[16] *Id.*

[17] *See* David Zaring, *CFIUS as a Congressional Notification Service*, 83 S. CAL. L. REV. 81, 87 (2009) (quoting Alan Holmer of the U.S. Treasury as explaining to a Chinese audience that "less than 10 percent of all foreign direct investments were reviewed by [CFIUS], and the vast majority of those were resolved without controversy, including those by state-owned enterprises." (Alan F. Holmer, Special Envoy for China, Sustaining Economic Growth, Remarks at Wuhan University on the U.S.-China Strategic Economic Dialogue (May 21, 2008), available at http://beijing.usembassy-china.org.cn/052108p.html.)).

[18] Len Costa, *China Investment Corp.'s Gao Xiqing: Economy "Still on Right Track"*, CFA INST. (Oct. 9, 2012), http://blogs.cfainstitute.org/investor/2012/10/09/china-investment-corp-s-gao-xi-qing-economy-still-on-right-track/.

[19] Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 545 (1990).

[20] Black notes:

> The standard practitioner's advice is that a 10% holding "should create caution" and might even "creat[e] a rebuttable presumption of control, especially if such holdings are combined with executive office, membership on the board, or wide dispersion of the remainder of the stock." Thus, control person liability adds an additional strong impediment to a shareholder or group owning more than 10% of a company's stock.

Black, *Shareholder Passivity Reexamined*, *supra* note 19, at 549 (quoting A.A. Sommer Jr., *Who's "in Control"?—S.E.C.,* 21 BUS. LAW. 559, 568 (1966).

[21] Paul Rose, *Sovereign Wealth Fund Investment in the Shadow of Regulation and Politics*, 40 GEO. J. INT'L L. 1207 (2009).

[22] CFIUS rarely recommends that a transaction be blocked, and the president even more rarely issues an executive order blocking foreign acquisitions. In fact, 2012 saw the first blocked transaction since 1990. *See* Rachelle Younglai, *Obama Blocks Chinese Wind Farms in Oregon Over Security*, REUTERS (Sept. 28, 2012, 7:15 PM), http://www.reuters.com/article/2012/09/28/us-usa-china-turbines-idUSBRE88R19220120928 (""This . . . is the first time since 1990 that the president of the United States has either

blocked a transaction from occurring or divested a transaction that has occurred,' said Clay Lowery, a former assistant secretary at Treasury who oversaw the CFIUS process and now is with Rock Creek Global Advisors.").

[23] *See* Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 247 (2010).

[24] Regulation FD prohibits selective disclosure to certain shareholders of material, non-public information. Regulation FD, 17 C.F.R. §§ 243.100–03 (2001). In the hypothetical, one may imagine that the company's executives might attempt to keep their disclosure secret. Similar issues arise with Regulation FD. While that is possible, a company has less incentive to pass along this information than they might in the typical Regulation FD context, in which companies would pass along information in order to garner favor with certain analysts. Arguably, however, a company would be less inclined to serve as the political instrument of a foreign government, especially in cases involving the transfer of the company's technology.

[25] As an example of the potential magnitude of the effect on other investments, consider that as of year-end 2009, China Investment Corporation owned shares in over 60 companies listed in U.S. markets, and surely owned stock in dozens, perhaps hundreds, of companies worldwide. CHINA INV. CORP, REPORT FOR THE CALENDAR YEAR ENDED DEC. 31, 2009 (Form 13F) (Feb. 5, 2010), *available at* http://www.sec.gov/Archives/edgar/data/1468702/000095012310009135/c95690e13fvhr.txt.

[26] INT'L WORKING GRP. OF SOVEREIGN WEALTH FUNDS, SOVEREIGN WEALTH FUNDS: GENERALLY ACCEPTED PRINCIPLES AND PRACTICES-"SANTIAGO PRINCIPLES" app. 1, at 27 (2008), available at http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf

[27] *See infra* Part III.B.6 for a discussion of Norway's internal investment restrictions.

[28] Ministry of Finance, Report No. 24 (2006-2007), *On the Management of the Government Pension Fund in 2006*, at ¶ 4.1.1, *available at* http://www.regjeringen.no/en/dep/fin/Documents-andpublications/Propositions-and-reports/Reports-to-the-Storting/20062007/Report-No-24-2006-2007-to-the-Storting/4.html?id=464528.

[29] Adam D. Dixon & Ashby H.B. Monk, *Reconciling Transparency and Long-Term Investing Within Sovereign Funds*, J. of Sustainable F. & Investment (2012), 2:3-4, 275-286.

[30] *Id.* at 280.

[31] *Id.*

[32] Some, most notable Hawley and Williams, have argued that "small but highly diversified cross section of publicly traded stock (and debt) in the economy, and therefore, have the characteristic of representing the entire economy." JAMES HAWLEY & ANDREW WILLIAMS, THE RISE OF FIDUCIARY CAPITALISM: HOW INSTITUTIONAL INVESTORS CAN MAKE CORPORATE AMERICA MORE DEMOCRATIC 17 (2000).
These investors are thus, in Hawley and Williams' theory, "universal owners", and cannot escape poor corporate governance by divesting from particular companies. They thus have an incentive to push for "good governance" across markets.

[33] MEHRPOUYA, HUANG & BARNETT at 42.

[34] The criteria are: (1) the fund provides history including reason for creation, origins of wealth, and government ownership structure; (2) the fund provides up-to-date independently audited annual reports; (3) the fund provides ownership percentage of company holdings, and geographic locations of holdings; (4) the fund provides total portfolio market value, returns, and management compensation; (5) the fund provides guidelines in reference to ethical standards, investment policies, and enforcer of guidelines; (6) the fund provides clear strategies and objectives; (7) if applicable, the fund clearly identifies subsidiaries and contact information; (8) if applicable, the fund identifies external managers; (9) the fund manages its own website; (10) the fund provides main office location address and contact information such as telephone and fax. *See* SWF Institute, Linaburg-Maduell Transparency Index, available at http://www.swfinstitute.org/statistics-research/linaburg-maduell-transparency-index/

[35] Dixon & Monk, *supra* note 29, at 281-82.

[36] Stephen Paul Mahinka and Sean P. Duffy, *Cfius Review Needs Greater Transparency*, INT'L FIN. L. REV. (Oct. 11, 2012), available at http://www.morganlewis.com/pubs/CfiusReviewNeedsGreaterTransparency_IFLR_11oct12.pdf.

[37] Committee on Foreign Investment in the United States, Order Establishing Interim Mitigation Measures (July 25, 2012)[, available at http://www.volokh.com/wp-content/uploads/2012/09/July-CFIUS-Order.pdf].

[38] Complaint, Ralls Corporation v. Committee on Foreign Investment in the United States (D.D.C. filed Sep. 12, 2012) (No. 1:12-cv-01513-ABJ).

[39] Ralls Corp. Motion for Temporary Restraining Order and Preliminary Injunction

(D.D.C. filed Sep. 12, 2012) (No. 1:12-cv-01513-ABJ).

[40] Vinson & Elkins, *Chinese Energy Developer Sues Committee on Foreign Investment in the United States (CFIUS) for Blocking Oregon Wind-Farm Investment on National Security Grounds*, V&E CFIUS and National Security Review E-communication (Sep. 17, 2012), available at http://www.velaw.com/resources/ChineseEnergyDeveloperSuesCFIUSBlockingOregonWindFarmInvestment.aspx.

[41] Order Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, 77 Fed. Reg. 60,281 (2012).

[42] *See* Paul Rose, *Qatar Holdings an "Activist Investor"?*, THE STATE CAPITALIST BLOG, (Sept. 17, 2012), http://www.statecapitalist.org/2012/09/17/qatar-holdings-an-activist-investor/, and Paul Rose, *Qatar Holdings and SWF Passivity*, THE STATE CAPITALIST BLOG, (July 2, 2012), http://www.statecapitalist.org/2012/07/02/qatar-holdings-and-swf-passivity/.

[43] *See, e.g.,* Richard Levick, *Game-Changer: Qatar Plays Historic Role in Glencore's Bid for Xstrata*, FORBES (Sept. 12, 2012), http://www.forbes.com/sites/richardlevick/2012/09/12/game-changer-qatar-plays-historic-role-in-glencores-bid-for-xstrata/; Max Nisen, *Watch Out For This Dangerous New Type Of Activist Investor*, BUS. INSIDER (Sept. 6, 2012, 2:49 PM), http://www.businessinsider.com/watch-out-for-this-dangerous-new-type-of-activist-investor-2012-9.

[44] 31 CFR § 800.204(c) (2011).