Incentivizing Private Scientific Companies to Go Public

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INCENTIVIZING PRIVATE SCIENTIFIC COMPANIES TO GO PUBLIC

The United States no longer leads the world in the field of science. After sitting atop the list of countries achieving scientific greatness throughout the 1960s, the United States began its decline in the 1970s when the Nixon Administration decided to restrict NASA to low Earth orbit. In subsequent decades, the United States continued to turn away from scientific discovery. Since the 1970s, cuts to NASA’s budget have left it hovering between 3-4% of discretionary non-defense spending; a massive decline from 19% of the discretionary non-defense spending NASA received during the height of the space program. These budget decreases led to an overall decline in the program’s ability to continue to pursue scientific accomplishments; although NASA remains active in scientific discovery, NASA’s reduced budget hinders its ability to achieve future accomplishments.

The first notable large scale exploratory voyage, Christopher Columbus’ search for a shorter path to the East Indies, was funded by the Spanish crown. Columbus’ voyage cost the crown around 1 million to 1.14 million maravedis. However, between Columbus’ title demands and the crown’s cost concerns, the voyage that made history almost did not happen. Funding originated from the crown, but was gathered through payments and penalties collected from all areas under Spanish control at the time. Thus, the first explorative voyage stands as an example of an explorative venture backed by an entity which can

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2 See id.


4 See id.

5 See id. (explaining 19% of discretionary non-defense spending equals 4.4% of total federal spending, and the noted decline started as a decrease from 19% to 8% by 1969, then to 6% by 1973, and finally resting between 3-4% through 2002.).

6 David Satava, *Columbus’s First Voyage: Profit or Loss From a Historical Accountant’s Perspective*, 23 J. APPLIED BUS. RES. 1, 5 (2007).

7 Id. at 5 (representing the most agreed upon expenses).

8 See id. at 5.

9 See id. at 6 (Columbus had underquoted the voyage; the Spanish, in lieu of imposing a monetary penalty on the city of Palos for wrongful acts of piracy, compelled the donation of two fully stocked ships so the Spanish could meet the terms of the agreement with Columbus.).
afford to foot the bill. In modern times, these entities are almost always governments.\(^\text{10}\) Astrophysicist Neil deGrasse Tyson best described the dissuasion of companies from partaking in high cost exploration in an interview about the possibility of a mission to Mars. In this interview, Tyson noted that investors do not take keenly to the high costs, potential dangers, and lack of short term return on the investment.\(^\text{11}\) From this, it can be inferred that whenever there is an idea which requires leaving a known area and traveling into uncharted territory, a company is unlikely to fund the venture.

Recently, Moon Express, a private company, was approved for a lunar landing.\(^\text{12}\) Moon Express thus became first company to get the go-ahead from the United States government for a mission beyond Earth’s orbital sphere to land an unmanned ship on the Moon.\(^\text{13}\) If a private company is able to successfully land on the Moon, it begs the question of whether Tyson’s contention of the private industry’s apprehension to lead in the space frontier is in fact true.\(^\text{14}\) Further, what would be blocking a private company from leading the charge?

Science companies are dissuaded from going public because most investors are generally looking to make money in the short term, and are thus adverse to maintaining long term investments.\(^\text{15}\) Science companies therefore remain private in order to avoid reporting to the Securities Exchange Commission (“SEC”) and shareholders.\(^\text{16}\) If these companies were incentivized to go public,

\(^{10}\) See id.

\(^{11}\) Chris Smith. *Neil deGrasse Tyson says it’s a ‘Delusion’ that SpaceX will ‘lead the space frontier,’* BGR TECH ENT. NEWS, REVIEWS, OPINIONS, AND INSIGHTS (Nov. 26, 2015, 1:30 PM), http://bgr.com/2015/11/26/neil-degrasse-tyson-spacex/ (comparing a potential trip to Mars with the voyage of Christopher Columbus to find a faster way to India, noting that companies will not set long term goals because it is not attractive to shareholders, referencing the merchant companies that stayed away from exploration.).


\(^{13}\) Chris Smith. *Neil deGrasse Tyson says it’s a ‘Delusion’ that SpaceX will ‘lead the space frontier,’* BGR TECH ENT. NEWS, REVIEWS, OPINIONS, AND INSIGHTS (Nov. 26, 2015, 1:30 PM), http://bgr.com/2015/11/26/neil-degrasse-tyson-spacex/ (arguing Tyson refutes claims that private company SpaceX will lead in space exploration citing to lack of potential funding due to high costs, high risk, and no short term return on investment.).


\(^{15}\) Id.
they would be able to amass wealth,\textsuperscript{17} making long term goals more attainable. For this to occur, the SEC should allow companies focused on long term scientific ventures to go public with decreased accountability to shareholders. Specifically, the SEC should exempt these companies from quarterly reporting, and allowing for the withholding of large capital gains for the purpose of reinvestment. Public corporations are required to file quarterly reports with the SEC\textsuperscript{18} but, for companies working on long term projects, not much changes over three months. Frequent reporting would simply waste the company time and resources, which should be focused on furthering accomplishments.

The Securities Exchange Act of 1934 charges with protecting investors and acting in furtherance of the public good.\textsuperscript{19} The SEC should view science companies as acting in furtherance of the public good because science advances society, and where there is movement away from fossil fuels and toward renewable energy sources, there is a drastic increase in the demand for other resources to facilitate green energy.\textsuperscript{20} The problem faced today is that the supply of these resources is scarce due to difficulties in mining them on earth, as many are simply the byproducts of mining other well-known metals.\textsuperscript{21} This scarcity has led some companies to forgo developing green technology in fear that shortages will lead to failure.\textsuperscript{22} Although there is scarcity on Earth, one science company, Planetary Resources, has looked to mining asteroids for resources, where the belief is that the rare metals will be more abundant.\textsuperscript{23} By incentivizing these science companies to go public via relaxed requirements, the SEC would not only create long term investment opportunities but bring about an influx of funds for companies focused on solving problems we today face. Because solving scarcity problems is in furtherance of a public good, the SEC should slacken requirements for companies producing significant long term return on investments; giving them a stamp of approval to give warry

\textsuperscript{17} Compare id., with David Satava, \textit{Columbus's First Voyage: Profit or Loss From a Historical Accountant’s Perspective}, 23 J. APPLIED BUS. RES. 1, 6 (2007) (arguing that exploratory trips require the pulling together of mass funds from outside sources.).


\textsuperscript{20} David S. Abraham, \textit{The Next Resource Shortage?}, NEW YORK TIMES (Nov. 20, 2015) http://www.nytimes.com/2015/11/20/opinion/the-next-resource-shortage.html?_r=0 (most of these metals are found in China, which has a history of cutting off exports to maintain its own supply of the resources.).

\textsuperscript{21} See id. (rare metals are found blended with well-known metals, i.e. copper, and produced in quantities in the thousands of tons; a comparatively minuscule figure to its geological counterparts.).

\textsuperscript{22} Id.

investors a trustworthy option to protect them from scams that prey on investors looking for short term returns.

Companies with long term goals frequently face the inability to maintain investments and increase capital for the business in furtherance of the goal. When companies do not distribute capital gains, courts presume shareholders are being harmed.24 This is a rebuttable presumption, however, and each case will come down to an analysis of the use for the capital and the company’s charter and how it uses the capital.25 Because investors will have access to, and knowledge of, the charter, directors may reinvest capital for business development. As long as the company uses the profits in a reasonable manner and for further development it “cannot be objected to or enjoined by the shareholders.”26

It is also noteworthy that companies acting in furtherance of a public good are normally not liable to shareholders claiming some decision has harmed the company. Directors are granted deference under the business judgment rule for decisions made in furtherance of some public good as long as there is no illegal purpose of the decision.28 The deference creates further separation between the shareholders and the directors of the corporation when it comes to basing decisions on the long term benefit to humanity rather than the short term monetary benefits to the shareholder. If the SEC were to relax reporting requirements, it would logically follow that the investing class would not be those looking to make a quick buck, but rather those who are less risk averse and are willing to invest long term, even with the risk, because of the potential for large monetary gain. Although “shareholders forming an ordinary business corporation expect to obtain the profits of their investment in the form of

25 Id. at 501.
26 Id. at 500 (stating that it will not be an abuse of directors’ discretion to invest profits in a way that furthers business development via “providing additional facilities” for the business.); and, cf. VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS 420 (2d ed. 1886) (Profits earned by a corporation may be divided among its shareholders; but it is not a violation of the charter if they are allowed to accumulate and remain invested in the company’s business; “agents . . . cannot arbitrarily withhold profits . . . or apply them to any use which is not authorized by the company’s charter.”).
27 Lori McMillan, The Business Judgment Rule as an Immunity Doctrine, 4 WILLIAM & MARY L. REV. 521, 526 (2013) (“The business judgment rule ensures that decisions made by the directors in good faith are protected even though, in retrospect, the decisions prove to be unsound or erroneous.”).
28 See Shlensky v. Wrigley, 95 Ill.App.2d 173, 183, 237 N.E.2d 776, 781 (1968) (holding that a decision to forgo playing night games in an area that that would suffer from light pollution was covered under the business judgment rule and not an injury to investors because of the directors’ decision that using the lights would cause more damage the community than would it benefit the corporation.)
regular dividends," shareholders of science companies should not have the same expectation because they would not be ordinary investors looking to make quick returns.

Long term goals require a consistent flow of capital. Where companies earn profits, the best thing for these companies would be to reinvest as much of these profits as possible to more quickly reach goals. Adding a provision into a company’s charter that give the company ability to initially withhold profits would preempt law suits brought by investors unwilling to wait for the company to achieve milestones before distributing capital gains. The option to insert such a provision would thus incentivize many science companies to go public. On the other hand, if a company retains full discretion as to when it will make distributions, it may not interest many investors. Accordingly, science companies should be sure to draft charters that require the company to make distributions to shareholders on a regular schedule once the milestones have been reached.

In a time where the US no longer leads the world community in the field of science, incentivizing science companies to go public would help bring the US back to its leading role. As an added side effect, the media attention normally associated with companies going public would likely put science back into the minds of American citizens. If scientists became “rock stars” once again, that would be a good start towards America reclaiming its position as the scientific leader of the world.

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30 Id. at 421 (once a business has reached a “prosperous condition, and necessary provision has been made for future prosperity, a reasonable share of the profits should be applied in the payment of regular dividends, though a part may be reserved to increase the surplus and enlarge the business itself”).
32 Michael Schmidt, supra note 15.
33 See Katherine Beard, Behind America’s Decline in Math, Science, and Technology, U.S. News (Nov. 13, 2013), http://www.usnews.com/news/articles/2013/11/13/behind-americas-decline-in-math-science-and-technology (quoting Grant Imahara, “In the 60s astronauts were rock stars;” discussing ways to make children interested in academia to bring about change in the scientific community.).

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