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MAKE AMERICA A LIMITED PARTNER AGAIN

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This article begins with the question posed by the symposium's call for papers: "How can we foster resilience among those engaging in social entrepreneurship, impact investing, and sustainable development in these times of change and great uncertainty?" But what if the uncertainty is good? What if today's turbulence—policy shifts, public–private experiments, and legal disruptions—is laying the groundwork for a more robust and equitable application of social entrepreneurship's most innovative tools? Using the Trump administration's heterodox policies as a case study, this article explores how cuts to traditional grants, expansion of public–private incentives, and direct federal equity stakes in firms like Intel, U.S. Steel, and MP Materials may open new pathways for mission-driven entrepreneurs and more inclusive economic growth. Against this backdrop, this paper introduces the "Community Carried Interest" (CCI), a legal and financial framework designed to reallocate a portion of the financial returns normally owned to residual owners of firms to people and relevant community stakeholders who rarely share in the financial upside of high-growth firms or broader economic development activities. Drawing on corporate law, economic development policy, entrepreneurship, and the innovative legal engineering, the CCI offers a model for embedding public value in private transactions and transforming strategic alignment into enforceable economic alignment. In this way, the article argues that current upheaval can catalyze—not cripple—a broader, more responsive, and yet still technically sound bargain between the macroeconomy and local stakeholders.

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I.
Social Entrepreneurship and Impact Investing?

A. *Simply Definitional*

This paper will not settle the theoretical debate over corporate purpose and whether social purpose can be prioritized over shareholder value. That conflict is long and enduring.[1] Before publishing *The Wealth of Nations*, Adam Smith produced the Theory of Moral Sentiment in which he outlined why "sympathy" (or the process by which we judge or praise others by imaginatively placing ourselves in the other person's circumstances) should serve as the moral restraint on commercial society.[2] Smith advocated no commercial activity should be conducted without a moral and ethical grounding.[3] In fact, Adam Smith was a law professor who was as concerned with justice as he was economics. At the very least, he understood the two as connected.[4] The "father" of modern free-market economics understood there were valid noneconomic constraints on commercial activity and that those engaged in commercial activity have a responsibility to consider the implication of their activities on others.[5] In short, entrepreneurship has always been social.

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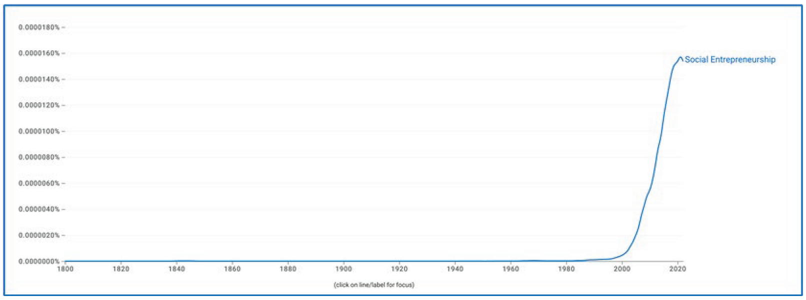
1. *See generally*, David Chan Smith, *The Beginning of History for Corporate Law: Corporate Government, Social Purpose and* The Case of Sutton's Hospital (1612), 45 Seattle U. L. Rev. 367 (2021), https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2778&context=sulr [https://perma.cc/JRE6-NAL4?type=image] (discussing how one of the few pre-modern corporate law cases should reframe our understanding of the history of corporate law.).

2. Adam Smith, The Theory of Moral Sentiments (1759).

3. Nava Ashraf, Colin F. Camerer & George Loewenstein, *Adam Smith, Behavioral Economist,* 19 J. of Econ. Persp. 131 (2005).

4. *See* Maria Pia Paganelli & Fabrizio Simon, *Crime and Punishment: Adam Smith's Theory of Sentimental Law and Economics,* 44 J. of Hist. of Econ. Thought 268 (June 2022).

5. "No society can surely be flourishing and happy, of which the far greater part of the members are poor and miserable. It is but equity, besides, that they who feed, clothe, and lodge the whole body of the people, should have such a share of the produce of their own labour as to be themselves tolerably well fed, clothed, and lodged." Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, bk. I, ch. 8, at 38 (1776).



The concept that social entrepreneurship is separate and apart from the run of the mill entrepreneurship has gained traction in the zeitgeist.

A quick, and wholly unscientific, use of Google Books' Ngram Viewer reveals a massive uptick (though still relatively niche compared to most every other term) in the use of social entrepreneurship in English language books.[6] This tracks the general salience of social entrepreneurship, particularly in the legal field.

Still, there is no real consensus on the definition of social entrepreneurship.[7] For the purposes of this paper, I will cheat.[8] To engage in social entrepreneurship is to *prioritize* anything that is not exclusively and immediately a value to current shareholders. This definition includes the prioritization of future (and therefore non-ratable to current shareholders) value over immediate returns.[9] This definition could also include prioritization of

6. Google Books Ngram Viewer, *"Social Entrepreneurship" 1800–2022*, https://books.google.com/ngrams/graph?content=Social+Entrepreneurship&year_start=1800&year_end=2022&corpus=en&smoothing=3 (last visited Sept. 22, 2025).

7. *See* Deborah Burand & Anne Tucker, *Legal Literature Review of Social Entrepreneurship and Impact Investing (2007–2017): Doing Good by Doing Business*, 11 Wm. & Mary Bus. L. Rev. 1 (2019) (The closest the field comes to a consensus) (Burand and Tucker, rightfully, simplify the definition to, "doing good by doing business." This is perhaps the only other workable definition. Obviously, this leaves to be defined what is "good" and what is "business" and if one wanted to be pedantic, "doing" as well).

8. There is no bottom to my moral turpitude.

9. The definition specifically uses prioritization because it does not exclude profit or pecuniary motivations nor does it require those motivations be insignificant. Prioritization requires that when in conflict the social purpose controls. For more on prioritizations *see* Tyler et al., *Producing Better Mileage: Advancing the Design and Usefulness of Hybrid Vehicles for Social Business Ventures*, 33 Quinnipiac L. Rev. 235, 289–90 (2014); *see generally*, Bradford Cornell & Aswath Damodaran, *Valuing ESG: Doing Good or Sounding Good*, NYU

employees, the environment, or neighbors near the commercial activity.[10] In short, social entrepreneurship is anything that makes a University of Chicago economics professor involuntarily gag.[11]

With the definition of social entrepreneurship addressed, we must understand the implications this has on corporate governance in pursuit of the prioritized social purpose. Much legal scholarship ink has been spilled on social entrepreneurship as a corporate governance issue, e.g., the fiduciary duties of officers and board members to prioritize social issues over shareholders. This focus is merited, but pure legal analysis will only tell us what decisions managers are permitted to make, not what decisions managers *will* make.

B. *Investment, Not Regulation, as the Instrument of Control*

To truly understand what decisions will accomplish social impact, we must turn to the financial incentives of managers making resource allocation decisions.[12] Recently, legal scholars have increasingly looked to investment terms attached to financing for more tractable accountability mechanisms for impact investors.[13]

Stern School of Business 6 (Mar. 2020) (discussing how even the most generous case for ESG delivering financial value still has an increased short-term cost, e.g. increased wages, increase cost of raw materials, etc) [hereinafter "*Valuing ESG*"].

10. *See* Burand & Tucker, *supra* note 7.

11. Which until recently I took as a badge of honor. Now, it is an open question.

12. *See generally*, John R. Graham and Campbell R. Harvey, *The Theory and Practice of Corporate Finance: Evidence from the Field*, 60 J. FIN. ECON. 187 (2001) (finding most CFOs relied on present value models and Capital Asset Pricing Model (CAPM)).

13. *See, e.g.*, Anne M. Tucker, *A Case Study in Green Dividends and the Conditions for ESG Accountability*, 48 SEATTLE L. REV. 519 (2025) (arguing firms can hard-wire ESG performance into a payout mechanism—"green dividends"—so shareholders actually feel the effects of ESG success or failure); John Armour, *Green Pills: Making Corporate Climate Commitments Credible*, 65 ARIZ. L. REV. 285 (2023) (proposing a takeover-style "green pill" to make reneging on climate commitments costly, thereby using private ordering to enforce ESG); Tomer S. Stein, *Debt as Corporate Governance*, 74 HASTINGS L.J. 1207 (2023) (showing that covenants and pricing in debt instruments can serve governance and thus can be adapted to ESG performance goals); Ryan Chan, *Ensuring Impactful Performance in Green Bonds and Sustainability-Linked Loans*, 42 ADEL. L. REV. 222 (2021) (explaining how KPIs, verification, and step-up/step-down pricing can make ESG promises in bonds and SLLs actually binding); Cristina M. Banahan, *The Bond Villains of Green Investment*, 43 VT. L. REV. 689

In her last book, *Citizen Capitalism*, Lynn Stout and her co-authors outline a justification and plan for a universal fund that would hold public equities, like that of a sovereign mutual fund, on behalf of U.S. citizens—the "Universal Fund."[14] The initial capital to purchase the equities would be donated from an array of private sources.[15] The governance and financial rights would flow to the citizens, and because the right to the dividend would be a privilege, citizens would not be able to sell, hypothecate, or gift their shares.[16] The Universal Fund would be able to leverage its investments in public companies

(2019) (urging a regulatory body should oversee green bonds to help deliver on the promise of debt for sustainability); Nuncio D'Angelo & James Morris, *Sustainability-Linked Loans: A Framework for Review,* NORTON ROSE FULBRIGHT (Nov. 2021), https://www.nortonrosefulbright.com/en/knowledge/publications/b1e31827/sustainability-linked-loans-a-framework-for-review (describing market practice for SLLs where loan pricing is explicitly tied to ESG metrics); Yasser Eliwa et al., *Aligning Pay with Purpose: ESG-Linked Compensation and ESG Decoupling*, BUS. STRATEGY & ENV'T, Oct. 2025 (finding empirically that tying money to ESG can decrease "decoupling," i.e., talk without performance); Quinn Curtis, W. Mark C. Weidemaier & Mitu Gulati, *Green Bonds, Empty Promises*, 102 N.C. L. REV. 131 (2023) (finding that many "green" bonds lack enforceable use-of-proceeds or remediation terms, so the instrument often fails as an ESG disciplining tool); John P. Hunt, *Green Bond Reporting*, 2024 COLUM. BUS. L. REV. 201 (2024) (noting that current reporting regimes are thin enough that, without reform, green bonds can still permit substantial ESG slippage); John Basquill, *Sustainable Lending in the Regulatory Crosshairs*, GLOBAL TRADE REV. (April 22, 2024), https://www.gtreview.com/magazine/the-esg-trade-issue-2024/sustainable-lending-in-regulatory-crosshairs/ (documenting regulators' concern that SLLs are often structured with toothless KPIs and de minimis penalties); Bryant Rivera, *Green Bonds: Reforming ESG Regulation in the United States to Meet the Requisite Funding Demand for a Decarbonized Economy*, 28 HASTINGS ENV'T L.J. 191 (2022) (contending U.S. green-bond practice needs stronger regulatory scaffolding to make ESG terms credible); Aneil Kovvali and Yair Listokin, *Valuing ESG*, 49 BYU L. Rev. 705 (2024) (reasoning that ESG mechanisms only matter if they change cash flows or risk, so many ESG-linked instruments overpromise).

14. Lynn A. Stout, Sergio Gramitto & Tamara Belinfanti, *Citizen Capitalism: How Universal Fund Can Provide Influence and Income to All*, 5–6 (2019), https://digitalcommons.nyls.edu/fac_books/105/ [https://perma.cc/5DUZ-DN9E] [hereinafter *Citizen Capitalism*] (discussing the role of fiduciary duties and other corporate legal doctrine to cause management to consider long-term and broad implications of their decisions.); *see also*, Gramitto Ricci, *The Vitruvian Shareholder* (2018), https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=2729&context=faculty_scholarship [https://perma.cc/M8AU-YY2R?type=image] (arguing that retail investors make decisions based on pecuniary and financial returns, but also as humans living in a broader society and natural world).

15. *Citizen Capitalism*, *supra* note 14, at 61–66.

16. *Id.* at 54.

to influence corporate governance.[17] Stout argues that direct involvement in both company governance and financial benefits is necessary to maintain buy-in to the American value system of free-markets and property rights.[18]

Stout is not the only scholar to suggest using private ordering and corporate governance to advance public interest and social impact. Saule Omarova proposed a National Investment Authority (NIA), a government-sponsored enterprise (GSE) like that of Fannie Mae or Freddie Mac.[19] Like other GSEs, the NIA would straddle the line between private and public; on the one hand, using the government's full faith and credit to guarantee issued bonds, while on the other hand, being managed like a private equity fund.[20] The fund would be created through congressional appropriation.[21] Omarova suggests the NIA could use a golden share within portfolio companies as its tool for influencing corporate governance.[22] The strategic focus would predominantly be to bail out corporations in times of crisis and to invest in infrastructure, energy, and other large, capital-intensive projects necessary to address climate change and improve climate resilience.[23] Finally, the NIA would be held accountable to the public through transparent reporting, well-designed procedures, and direct Congressional oversight.[24]

Scholars are currently developing theories to guide government investment into private business for the purpose of achieving social impact.[25] In their paper, *Private Profits and*

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17. *See generally Citizen Capitalism*, *supra* note 14.
18. *Id.* at 86–87.
19. Saule T. Omarova, *Why We Need a National Investment Authority* 2 (2020) (unpublished Research Paper No. 20-34) (on file with Cornell L. Sch.), http://ssrn.com/abstract=3566462 [hereinafter *NIA*].
20. *Id.*
21. *Id.*
22. *Id.* at 4. The corporate governance details of the golden share are discussed below, but in short golden shares holders may veto an enumerated list of corporate decisions or matters to maintain fidelity to a social purpose or public concern.
23. *Id.* at 2, 6.
24. *Id.* at 3–4; *see also* Hockett & Omarova, *Private Wealth and Public Goods: A Case for A National Investment Authority* 148 (unpublished Research Paper No. 17-22) (on file with Cornell L. Sch), http://ssrn.com/abstract=2939309 [hereinafter *Private Wealth*].
25. *See generally* Aneil Kovvali & Joshua C. Macey, *Private Profits and Public Business*, 103 TEX. L. REV. 711 (2025), https://texaslawreview.org/wp-content/uploads/2025/03/Kovvali.Printer.pdf [hereinafter *Public Business*] (developing the theoretical framework for when and how government may invest within

Public Business, Aniel Kovvali and Joshua Macey propose that within heavily regulated industries, shareholder primacy theory fails to predict corporate behavior because the extreme government relationship distorts shareholder primacy's basic assumptions.[26] An example of this contortion is public utilities, wherein customers become de facto residual owners of public utilities when governments shield the utilities from competition and, at the same time, cap profits, which means productivity gains flow to the customer, not equity investors, who are transformed into quasi-fixed claimants.[27] Kovvali and Macey recommend internal corporate governance controls should be considered when external controls fail to deliver on desired corporate behavior.[28] This approach could be extended outside of traditionally heavily-regulated industries and into industries that are of utmost public concern, e.g., housing.

C. *Two Questions and a Solution*

There are two main issues with the above approaches. First, they are reliant on centralized powers of either government or corporate control. In the case of the Universal Fund, Professor Stout acknowledges that most U.S. citizens will not vote their shares directly.[29] She suggests a proxy service by which citizen shareholders may select their preferred voting approach and the proxy service will vote accordingly.[30] In the case of the NIA, Professor Omarova recommends the use of existing congressional and agency oversight of the NIA.[31] She suggests that procedural design, transparency, and testimony to Congress are adequate to prevent the worst abuses of a state-owned private equity fund.[32] Kovvali and Macey suggest that government officials will generally be responsive to political pressure, but even they foresee holdup issues where structurally

private industry to augment the current contractual and regulatory approach to controlling industry wherein there are limited suppliers).

26. *Id.*
27. *Id.* at 727–28.
28. *Id.* at 770–79.
29. *Citizen Capitalism*, *supra* note 14, at 58.
30. *Id.*
31. *NIA*, *supra* note 19, at 4.
32. *See generally* Private Wealth, *supra* note 24 (discussing how hierarchical organization charts, compensation incentives, reporting the General Accounting Office, and Congressional testimony will help mitigate from improperly motivated investments).

important industries will hold up government agencies in times of crisis.[33] All of the above theories assume some level of shareholder democracy, but that avenue of accountability may prove illusory.[34]

Such a narrow focus at the national or federal level forgets one fact: investments can *only* occur at a local level and will have an immediate local impact.[35] Even in Kovvali and Macey's theory, there are circumstances where mere stakeholders in a firm can become the actual residual claimants. In that example, it is the local customers of public utilities, not the far-flung holders of equity. Understanding that each investment has a definable subsection of residual claimants opens the field for democratic accountability. Traditional investors should exercise their rights as shareholders, but so too should the local community directly impacted by corporate decisions. Not only because it would facilitate policy outcomes, but also because those local stakeholders possess information into the corporate entity that other investors may not. This issue will be discussed in greater detail below.

The second theoretical gap is an explanation as to which structures, incentives, rules, and expectations will result in the desired public good. In other words, how does the impact investor determine where and how to invest? This is not a legal question so much as an economic and financial question gussied up in legal terms, or at least policy terms. So often, scholarship focuses on the legal guardrails around how to prevent harm or derive recompense. Much less emphasis is placed on what actually drives managers and investors and on how we can design instruments that meet them where they are.

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33. *Public Business*, *supra* note 25, at 718 n.14.

34. Gramitto A.G. Ricci, Daniel J.H. Greenwood & Christina M. Sautter, *The Shareholder Democracy Lie* (ECGI Working Paper No. 854/2025, July 2025) http://ssrn.com/abstract_id=5143857 (arguing that the idea of Shareholder Democracy is ploy by Wall Street and management to avoid more regulation and induce goodwill among shareholder that obscures the reality of the an undemocratic organization); *see also* Caroline A. Crenshaw, Comm'r U.S. Sec. & Exch. Comm'n, Statement on Division of Corporation Finance's Announcement on the 14a-8 Process (Nov. 17, 2025), https://www.sec.gov/newsroom/speeches-statements/crenshaw-statement-division-corp-fins-announcement-14a-8-process-111725 [https://perma.cc/B8WF-NN78].

35. The classic example would be corporate headquarters location or new manufacturing plants. A community may lose a source of employment while another community gains new jobs.

I propose a simple heuristic that can help with incentive design and investment structures. At a basic level, managers will invest where the expected risk-adjusted return of an investment is higher than an outside benchmark (e.g., stock market or Treasury rates), coupled with the cost of capital.[36] For the purpose of this paper, I will stipulate that prioritizing anything over the immediate financial return to shareholders will produce lower returns. The evidence suggests that, over time, a company governed by such a prioritization will offer lower average excess returns.[37] In the occasional instance where a well-run or well-positioned social enterprise can outperform the market, it is simply not true that, over time or at scale, this will hold.[38] In their paper, *Valuing ESG: Doing Good or Sounding Good*, Cornell and Damodaran provide the following:

> To begin with, the notion that adding an ESG constraint to investing increases expected returns is counterintuitive. After all, a constrained optimum can, at best, match an unconstrained one, and most of the time, the constraint will create a cost. To illustrate, the TIAA-CREF Social Choice Equity Fund explicitly acknowledges this cost and uses it to explain its underperformance, stating that "The CREF Social Choice Account returned 13.88 percent for the year [2017] compared with the 14.34 percent return of its composite benchmark . . . Because of its ESG criteria, the Account did not invest in a number of stocks and bonds . . . the net effect was that the Account underperformed its benchmark."[39]

Yes, socially focused firms will not be as lucrative, but not so much that the difference cannot be covered by impact investors. In the above example, the difference of 46 basis points, while material, is not insurmountable. It is this gap that impact investing must fill with a subsidy in the form of a lower cost of

36. *See* Graham & Harvey, *supra* note 12 (Graham and Harvey did find most managers do not measure risk at the project level, but at the firm level. This means they impute the risk of one project into the entire "portfolio" of investments the firm has made).
37. Bradford Cornell & Aswath Damodaran, *Valuing ESG: Doing Good or Sounding Good*, 14 (N.Y.U. Stern Sch. Of Bus. Working Paper, Mar. 20 2020), https://ssrn.com/abstract=3557432 [hereinafter *Valuing ESG*].
38. *Id.*
39. *Id.* at 19.

capital. In exchange for this lower cost of capital, the impact investor insists on the prioritization of the social purpose over immediate financial returns. This is the crux of impact investing and operational social entrepreneurship.

It is at the intersection of finance and corporate governance that we meet the Trump administration's recent spate of deals with private enterprises. It is almost taken as a given that the current administration's policy decisions will denude the enthusiasm for social entrepreneurship. However, I find that, for better or worse, the current administration is stridently applying the mechanisms (if not the spirit) of social entrepreneurship. Rather than being a winter for social entrepreneurship, the administration is actively wielding legal and financial tools to direct private commercial activity to benefit the public interest, at least nominally.[40]

Depending on a person's priors, this shift could be seen as a betrayal of American, market-based capitalism or a quasi-fascist attempt to use government power to enrich friends and allies. Either may be true in the instance of this administration's use of social entrepreneurship. It might also be true of any administration's use of social entrepreneurship. I argue this administration's use of social entrepreneurship tools should not determine the validity of the approach. A clear theory and stronger design would accentuate the positive aspects and lower some of the more pronounced risks. Using the recent Trump administration deals as early prototypes, I examine where they succeed and fail in implementing social impact mechanisms. I then apply those lessons to the existing corporate literature to develop a coherent theory of how impact investing could be implemented. Finally, I use an example of a successful housing investment program in Colorado to demonstrate the validity of my theory.

To that end, this Article introduces the concept of a Community Carried Interest (CCI)—a novel legal and financial framework to align private impact capital with the mission-driven organizations so that people, ". . . should have such a share of the produce of their own labour as to be themselves tolerably well fed, clothed, and lodged."[41] While traditional carried interest in private equity and impact funds flows to general partners

40. The definition of public interest is rapidly changing.
41. SMITH, WEALTH OF NATIONS, *supra* note 5.

and, occasionally, aligned stakeholders, the CCI requires a portion of the residual value is reallocated to social purpose.

The Article draws on legal principles from trust law, fund governance, and partnership taxation to show how the CCI can be integrated into existing fund structures without undermining fiduciary obligations or investor incentives. It also situates the CCI within emerging developments in impact-linked compensation, extending these innovations from the firm level to the ecosystem level. Through illustrative models, legal analysis, and policy context, the Article proposes the CCI as a scalable tool to democratize the upside of impact and ensure that communities generating long-term value share in the rewards.

II.
The Most Social Entrepreneur

What President Trump's newest theory for economic growth lacks in subtlety, it makes up for in pure power.[42] Shortly after the U.S. government took a 10% interest in the chip manufacturer Intel, President Trump promised more deals to come.[43] The architect behind the deal, Commerce Secretary Howard Lutnick, expressly stated the administration's position, "America should have shares . . . . This is what Donald Trump is all about."[44] Not since the Great Recession has the government taken such interventionist positions in private enterprise.[45] But the Intel deal is just one in a series of deals the administration has struck with private businesses that are important to either national security or somehow buttress policy priorities.

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42. Tony Romm & Ana Swanson, *After U.S. Takes Stake in Intel, Trump Pledges 'Many More' Deals*, N.Y. Times (Aug. 25, 2025), https://www.nytimes.com/2025/08/25/us/politics/trump-intel-economy-strategy.html (When asked what his theory, President Trump responded, "Get as much as I can.").

43. *Id.*

44. Ana Swanson, *How a Top Trump Official Is Using Government Power to Pressure Private Companies,* N.Y. Times (Sept. 10, 2025), https://www.nytimes.com/2025/09/10/us/politics/howard-lutnick-government-private-companies.html [https://perma.cc/ZSX8-QB22].

45. It is notable that AI has, as for now, not been on the nationalization menu. Shirin Ghaffary, *Altman Says OpenAI Doesn't Want Government Bailout for AI,*BLOOMBERG(Nov.6,2025),https://www.bloomberg.com/news/articles/2025-11-06/altman-says-openai-doesn-t-want-a-government-bailout-for-ai.

A. *Literally United States Steel*

1. *Like Steeling Candy from a Long-Standing Ally*

In June 2025, the Trump administration released an executive order approving the acquisition of U.S. Steel by Nippon Steel.[46] The approval was subject to a National Security Agreement (NSA) between the U.S. government Departments of Treasury and Commerce and U.S. Steel, the surviving entity of the merger. In exchange for approving the merger, Nippon Steel would invest $11 billion into U.S. Steel and grant the U.S. government a golden share.[47] Later that month, United States Steel Corporation filed Form 8-K detailing the golden share.[48] The golden share gives President Donald Trump, and only President Donald Trump (while he is serving as President of the United States), the power to appoint "President Trump's Designee" to the board of directors.[49] The golden share also provides that U.S. Steel cannot engage in the following without the express consent of President Trump or President Trump's Designee:

> (a) alter, amend, repeal or waive any provision of this Certificate of Incorporation, except as contemplated by Article XII of the NSA;
> (b) change the Corporation's name from "United States Steel Corporation", change the Corporation's headquarters form Pittsburgh, Pennsylvania, or change the Corporation's domicile to a jurisdiction other than a state, commonwealth, district or territory of the United States;
> (c) reduce, waive or delay any Capital Investment (as defined in Schedule 2 to this Certificate of Incorporation), subject to receipt of necessary approvals and permits on an expedited basis;

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46. Alexandra Alper, *Trump Approves Nippon Steel's $14.9 Billion Purchase of US Steel*, REUTERS (June 13, 2025), https://www.reuters.com/business/us-steel-shares-slip-nippon-steel-faces-trumps-hurdle-over-control-2025-06-13/; *See* Exec. Order No. 26,185, 90 Fed. Reg. 26185 (June 13, 2025).

47. Alper, *supra* note 46.

48. U.S. Steel Corp., Current Report (Form 8-K) (June 18, 2025); *see* U.S. Steel Corp., Fifth Amended Articles and Restated Certificate of Incorporation, art. VI (June 18, 2025) [hereinafter U.S. Steel Corp., Certificate].

49. U.S. Steel Corp., Certificate, *supra* note 48.

(d) (A) prior to June 18, 2027, close, idle or sell the Corporation's Granite City Works or (B) prior to June 18, 2035, close, or idle or sell any other Production Location, except in each case of (A) and (B), any Temporary Idling or response to or as a result of, a Force Majeure Event;

(e) fail to follow the recommendations of the CMAs (as parties to the NSA) with respect to Trade Actions;[50]

(f) effect any material acquisition of a business that is domiciled in the United States that competes with the Corporation or its suppliers;

(g) implement pricing of the Corporation's average spot sales price during any rolling six (6)-month period below eighty-five percent (85%) of the corresponding six (6)-month average for that applicable steel product as publicly published by the U.S. Midwest Domestic Hot-Rolled Coil Steel Index (i.e., Hot-rolled, Cold-rolled, and Coated steel); <u>provided</u>, that, for the avoidance of doubt, the average spot sales price will be calculated monthly and will be based on the average spot price for the applicable steel product for each individual customer transaction in the United States;

(h) accept direct financial assistance from the Japanese government, excluding (a) financing obtained from Japan Bank for International Cooperation (JBIC), Nippon Export and Investment Insurance (NEXI) or other equivalent Japanese government related financial institutions on commercially reasonable terms and (b) financial assistance for research and development in Japan;

50. CMA is the Committee on Foreign Investment In the United States (CFIUS) Monitoring Agency. This is a rare "inception" acronym as an acronym within an acronym. It's the matryoshka doll of acronyms. It's acronyms all the way down. You get it. Also, CFIUS is an interagency body authorized to review and address national security risks arising from certain transactions involving foreign investment in the United States. 14 CFIUS ANN. REP. at ix (2024), https://home.treasury.gov/system/files/206/2024-CFIUS-Annual-Report.pdf [https://perma.cc/4XEC-56R9].

(i) prior to June 18, 2030, reduce the base salary of employees of the Corporation; and

(j) make material changes to the Corporation's existing raw materials and steel sourcing strategy in the United States, unless such changes are intended to benefit the Corporation, its operations or customers, which changes, among others, include: to the extent steel making raw materials or inputs are or become inadequate in quantity or quality; and initial imports to the Corporation to accelerate the transfer of technology or commissioning or qualification of facilities committed to being built in the United States (e.g., grain oriented electrical steel).[51]

The golden share's control is expansive, covering corporate decisions including branding and capital investment, plant closures, labor decisions, acquisitions, price control, materials sourcing, and foreign trade agreements.[52] Some exemptions grant Nippon Steel flexibility to operate based on the best interests of the company.[53]

But perhaps the most important limitation is the sheer scope fo the right granted to the president of the United States or the "President Trump Designee."[54] As it is currently written, when President Trump is no longer acting as president, the golden share and its attendant rights fall to the CMA and its constituent agencies.[55] The right of constituent agencies to force their consent would effectively extend the power of the golden share to the next president, as that president would have the power to appoint the heads of those agencies.

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51. U.S. Steel Corp., Certificate, *supra* note 48.

52. *Id.* (Some of these restrictions seemed based on political consideration, for example U.S. Steel cannot close a specific plant until after the 2026 midterm elections).

53. *Id.* at §1(j) ("Make material changes to the Corporation's existing raw materials and steel sourcing strategy in the United States, unless such changes are intended to benefit the Corporation, its operations or customers, which changes, among others, include: to the extent steel making raw materials or inputs are or become inadequate in quantity or quality; and initial imports to the Corporation to accelerate the transfer of technology or commissioning or qualification of facilities committed to being built in the United States (e.g., grain oriented electrical steel)."). (This provision reads almost like a state constituency statute.)

54. *Id.*

55. *Id.*

The stated purpose of the NSA, as its name suggests, is to further U.S. security and interests. The intent of the golden share is to give the United States the requisite governance interest in U.S. Steel to assure national security is prioritized, and in exchange, the U.S. will allow the merger to move forward. This is pure social entrepreneurship, as the purpose of national security takes priority over financial interests, in that the golden share does not confer financial returns to the holder of the golden share.

The question is, did the Trump administration effectively use the golden share to ensure the social impact of national security and if not, why?

2. *Famous Leftie, Margaret Thatcher*

The golden share is not a new device. The concept of the golden share was first developed and implemented in the United Kingdom under the Thatcher administration.[56] The Thatcher administration privatized several British state-owned entities like Britoil, British Aerospace, British Telecom, and Jaguar.[57] The golden shares in Britoil and Jaguar allowed the British Government to outvote the other shareholders, regardless of how much equity the other shareholders held.[58] France followed suit by adopting the golden share mechanism for companies that implicated national interests.[59] All told, the U.K., France, Turkey, Israel, Malaysia, Belgium, Portugal, Brazil, New Zealand, Venezuela, Ireland, Zambia, Spain, and Hungary have all used the golden share to exert state control over crucial industries.[60]

The golden share's relative peculiarity makes it more speculative to determine the tool's legal contours, but thankfully,

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56. Saule T. Omarova, *Bank Governance and Systemic Stability: The "Golden Share" Approach*, 68 ALA. L. REV. 1029, 1044 n. 65 (2017). [hereinafter *The Golden Share Approach*]. *See also* Andrei A. Baev, *Is There a Niche for the State in Corporate Governance? Securitization of State-Owned Enterprises and New Forms of State Ownership*, 18 HOUS. J. INT'L L. 1, 20 (Fall 1995); Stefan Grundmann & Florian Möslein, *Golden Shares State Control in Privatised Companies: Comparative Law, European Law and Policy Aspects* (Apr. 2003).

57. *The Golden Share Approach*, *supra* note 56, at 1044 n. 65; Baev, *supra* note 56, at 20.

58. Baev, *supra* note 56, at 20.

59. *Id.* at 20–21; *See also* Alice Pezard, Commentary, *The Golden Share of Privatized Companies*, 21 BROOK. J. INT'L L. 85–86 (1995).

60. Baev, *supra* note 56, at 20–22.

Professor Naveen Thomas has provided initial guidance.[61] Thomas categorizes the characteristics of golden shares into four broad buckets: 1) Separation of Voting Rights and Economic Rights, 2) Stock Transfer Restrictions, 3) Requirements to Redeem Transferred Stock, and 4) Golden Shareholder Rights (and Duties).[62]

First, the separation of economic rights and voting rights is a well-established and accepted practice in corporate law in general and specifically in Delaware, the jurisdiction in which the golden share was initially developed.[63] While golden shares represent a maximal version of this concept, there is no reason to believe that an extreme division would not withstand scrutiny.[64] The golden share uses the separation of economic rights from governance rights as a means to protect the purpose for which the holder of the golden share invested.[65] The golden shareholder will never receive economic benefits from the decisions it makes. The holder of the golden share must make decisions, or rather veto decisions made by managers, according to the purpose for which the golden share was granted.[66]

Next on the list are stock transfer restrictions, which are allowed under Delaware General Corporation Law (DGCL), but must serve a purpose that benefits the corporation (which cannot be the perpetuation of existing shareholder ownership) or is not "manifestly unreasonable."[67] Unfortunately, this is almost expressly the reason for restrictions on stock transfers in companies that employ the golden share model.[68] In a golden share corporation, stock restrictions do not expressly restrict transfers, but are expressly used to prevent current shareholders from selling their equity interest to another investor who may not agree with the corporation's prioritization of

61. Naveen Thomas, *Golden Shares and Social Enterprise*, 12 HARV. BUS. L. REV. 157, 183 (2022).

62. *Id.* at 176–82.

63. *Id.* at 176; PURPOSE FOUNDATION ET AL., STEWARD-OWNERSHIP: OWNERSHIP AND FINANCE SOLUTIONS FOR MISSION-DRIVEN BUSINESSES 42 (2019) [hereinafter STEWARD-OWNERSHIP].

64. Thomas, *supra* note 61, at 176–77.

65. *See The Golden Share Approach*, *supra* note 56, at 1052 (Omarova discusses framework for deriving which "triggers" are appropriate for using the veto power of the golden share).

66. *Id.* at 1054.

67. Thomas, *supra* note 61, at 178–79.

68. STEWARD-OWNERSHIP, *supra* note 63, at 43; *see also* Thomas, *supra* note 61, at 176–78.

social purposes.[69] However, the effect of the stock restrictions could be to perpetuate the current shareholders, in that there would never be another shareholder that meets the requirements of the current shareholders.[70] Thomas recommends that a company using golden shares could instead offer a right of first refusal as a modification of the outright ban.[71] One proponent of golden shares suggests allowing some share transfers to mission-aligned or otherwise preapproved organizations.[72]

Thomas's third characterization of golden shares is the corporate redemption requirement.[73] This requirement forces the company to redeem stock impermissibly transferred to outside owners without the consent of the golden share.[74] Like the shareholder transfer restrictions, redemptions are generally permissible under the DGCL.[75] One limitation on redemptions is that a corporation cannot exercise its redemption right if the transaction would fail the impairment of capital test.[76] Additionally, using a redemption to maintain board control is improper.[77] But as with the share transfer restrictions, the purpose of the redemption is to prevent investors who are not mission-aligned from appointing a similarly unaligned board member.[78] Again, it is not clear whether it matters that the restriction serves a

69. STEWARD-OWNERSHIP, *supra* note 63, at 43; *see also* Thomas, *supra* note 61, at 178 (discussing a case wherein the purpose of the share transfer restriction was to, "ensure the corporation ought at all times to have a body of stockholders among whom there should never be any whom the directors find not agreeable," which seems not all that dissimilar from stating "all shareholders must agree to support X social purpose.").

70. Thomas, *supra* note 61, at 178.

71. Thomas, *supra* note 61, at 180.

72. STEWARD-OWNERSHIP, *supra* note 63, at 43.

73. Thomas, *supra* note 61, at 180.

74. *Id.*

75. *Id.*; *see also* DEL. CODE ANN. tit. 8, § 151(b) (2017).

76. Thomas, *supra* note 61, at 180; DEL. CODE ANN. tit. 8, §§ 154, 160(a) (2010 & 2023) (§ 154 covers surplus capital and § 160(a) covers limitations on redemptions); *see also SV Inv. Partners, LLC v. ThoughtWorks, Inc.*, 7 A.3d 973, 988 (Del. Ch. 2010) (discussing that redemptions of preferred equity cannot impair the company's ability to remain a going concern).

77. Thomas, *supra* note 61, at 180–81.

78. STEWARD-OWNERSHIP, *supra* note 63, at 15. tps://purpose-economy.org/file/364 [https://perma.cc/PAM5-CGM3] ("In order to safeguard its purpose, the 'steering wheel' of a steward-owned company, i.e., control over its management, strategy, and key operational decisions, is held by people inside or closely connected to the organization. […] Such companies are not up for sale; instead, they are deliberately passed on to capable and value-aligned successors.").

social purpose if its effect is to maintain board control. Thomas again recommends using the same right of first refusal to skirt this issue entirely.[79]

The rights of the golden shareholders are usually explicitly stated to provide clear barriers to their veto powers.[80] Thomas proposes that golden shares make the holder a controlling shareholder and would thus implicate the golden shares' duties to other shareholders.[81] The rights of the golden shareholders are usually explicitly stated, so as to provide clear barriers to the veto powers.[82] Here, the question arises whether the voting power confers "controller" shareholder status on the golden shareholder.[83] Thomas analyzed this issue and found that merely vetoing specific actions, such as charter amendments, would not cause the golden shareholder to become a controller.[84] However, Delaware recently changed its controlling shareholder standard and the definition of a controlling shareholder transaction under the DGCL.[85] If anything, the changes in Delaware law made the definition of the controller narrower and less likely to contain a golden shareholder.[86] Under the new statute, a controlling shareholder transaction requires the controller to have received a non-ratable benefit, *only* to the exclusion of the minority shareholder.[87] Again, vetoing specific corporate actions in pursuit of social purposes is unlikely to confer a benefit on the golden shareholder, who is not entitled to financial rights anyway. Yet this is not the end of fiduciary duty accountability. The golden shareholder itself could be a fiduciary (either as a corporate entity, unincorporated entity, or trust) to a third-party investor. For example, if

79. Thomas, *supra* note 61, at 182.
80. *The Golden Share Approach*, *supra* note 56, at 1052.
81. Thomas, *supra* note 61, at 183.
82. *The Golden Share Approach*, *supra* note 56, at 1052.
83. Thomas, *supra* note 61, at 183.
84. *Id.*
85. S.B. 21, 153d Gen. Assemb., Reg. Sess. (Del. 2025).
86. DEL. CODE ANN. tit. 8, § 144(e)(2) (2025); *See also* 17 C.F.R. § 230.405 (2024).
87. DEL. CODE ANN. tit. 8, § 144(e)(3) (2025)*; see also* Stephen M. Bainbridge, *Delaware Senate Bill 21: What It Does and What Questions Remain Open* 6 (UCLA Sch. of L., L. & Econ. Rsch. Paper No. 25-02, 2025) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5243857. Bainbridge notes that the definition does not include the second *Sinclair* element, and which may exclude a whole other species of controller transactions from the statutory safe harbor. *Id.*

a golden shareholder is a trust, then it owes a fiduciary duty to the beneficiary.

An early U.S. golden share charter was first developed in partnership between the Purpose Foundation and the general counsel of BLab, Rick Alexander.[88] The intent of the golden share was to provide a powerful but narrowly-focused governance mechanism to social entrepreneurs.[89] This golden share is then usually held in another entity, often a trust or, less commonly, a nonprofit or private foundation.[90] The holder of the golden share must be made to serve as a veto-servicing entity and not have any economic beneficiary owners.[91] Since the golden share holder is not a fiduciary to the corporation itself, it is this third-party fiduciary relationship that provides accountability.

Now we need to answer, or at least ask, several questions. What was the subsidy required to make this deal happen? Did the Trump administration effectively use that subsidy to extract governance and control measures to ensure the purpose of the subsidy was met?

3. *All That Glitters Is Not Gold*

In the June 18, 2025, 8-K, U.S. Steel states that the purpose of their agreement with the U.S. government is national security.[92] That is why it is called the National Security Agreement.[93] The problem is that many of the elucidated transactions in the NSA subject to golden share approval, at least on their face, do not implicate national security.[94] For example, control over the name of U.S. Steel is perhaps a matter of national pride, but probably not a matter of national security. Additionally, setting wage floors for employees, while a social impact goal, is not a matter of national security. Directly mandating U.S. Steel manufacturing sites to remain open is again an admirable social impact, in that those communities will benefit from the employment,

88. STEWARD-OWNERSHIP, *supra* note 63, at 42.
89. *Id.* at 42; *see also* Thomas, *supra* note 61, at 175.
90. STEWARD-OWNERSHIP, *supra* note 63, at 43; *see also* Thomas, *supra* note 61, at 175.
91. STEWARD-OWNERSHIP, *supra* note 63, at 43; *see also* Thomas, *supra* note 61, at 175.
92. U.S. Steel Corp., Current Report (Form 8-K) (June 18, 2025), *supra* note 48.
93. *Id.*
94. *See* U.S. Steel Corp., Certificate, *supra* note 48.

but it is unclear how employment in Illinois, Arkansas, Indiana, Pennsylvania, Minnesota, or Alabama further secures American interests.[95] The NSA also implements steep price controls on hot-rolled, cold-rolled, powder coil, and throwed-rolled steel.[96] Keeping the cost of a basic steel product could have a tertiary impact on national security in that domestic production is nominally more secure. To double down on domestic production, the NSA requires U.S. Steel to continue to source raw materials from U.S. providers and to avoid taking on additional financing from the Japanese government.[97] Many of these provisions would not have been reviewed by CFIUS, so the golden share did not provide additional national security protection in that CFIUS would have likely insisted on the same changes or would have used its constituent agencies to enforce similar terms to that of the golden share.[98]

The golden share's veto power appears to extend beyond what is required to achieve the stated purpose of national security.[99] The golden share provides direct control over prices, capital expenditures, and employee wages to prop up a politically salient U.S. institution.[100] The political importance is of particular note because the veto power does not prevent the

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95. *Id.*

96. *Id.*

97. *Id.*

98. Congress expanded CFIUS purview. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, §§ 1702(c)(1)-(4), 132 Stat. 1636, 2176 (2018); *see also* Exec. Order No. 14,083, 3 C.F.R. 14083 (2023) (elaborating that critical U.S. supply chain resiliency is a national security concern and the effect a specific transaction will have on the broader industry trends toward aggregation); Order Regarding the Proposed Acquisition of United States Steel Corporation by Nippon Steel Corporation, 90 Fed. Reg. 2605 (Jan. 3, 2025); CATHLEEN D. CIMINO-ISAACS & KAREN M. SUTTER, CONG. RSCH. SERV., IF10177, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) (2025) (reporting to Congress that CFIUS recommended to block both the U.S. Steel merger with Nippon Steel and the ByteDance acquisition of musical.ly, both of which were not enforced).

99. Stephen Heifetz, *The Nippon-U.S. Steel Deal, a Golden Share, and Magic Beans*, COUNCIL ON FOREIGN RELATIONS (July 16, 2025), https://www.cfr.org/article/nippon-u-s-steel-deal-golden-share-and-magic-beans [https://perma.cc/GH5Z-2SS4].

100. *Transcript of President Trump Remarks About the U.S. Steel Deal in Pennsylvania*, SENATE DEMOCRATS (May 30, 2025), https://www.democrats.senate.gov/newsroom/trump-transcripts/transcript-president-trump-remarks-about-the-us-steel-deal-in-pennsylvania-53025 [https://perma.cc/7G4L-HMTD].

shuttering of factories in perpetuity, but merely until after 2027.[101]

Many other jurisdictions have used the golden share to exert control over private enterprises, and the Trump administration seeks to do the same.[102] Yet, the administration deviated from the sequence followed by other jurisdictions: the companies were state-owned first, and *then* became golden share companies.[103] This is important because the public-to-private structure does not result in expropriated private property. Instead, the Trump administration began with a private enterprise in U.S. Steel and a foreign, privately-owned entity in Nippon Steel and extracted a golden share for the government in exchange for permitting the merger despite CFIUS previously previously preventing the merger for national security concerns.[104] It is one thing to open a state-owned company to commercial investment, and the discipline that comes along with that infusion of equity investors. It is quite another to shoehorn the government into a deal that then ties the hands of the very company the administration wishes to save.

Did this transaction meet the rough heuristic of providing a subsidy to the corporate entity in exchange for control over social impact-relevant governance decisions? For this deal, it is difficult to say. Returning to the heuristic above, there was no benchmark analysis done, and so there was no assessable gap between market and impact, à la the TIAA-CREFF delta between a fully profit-driven fund and one that includes social impact considerations. The misalignment between the stated purpose and the golden shareholder's actual rights further obscures the assessment. Let us assume the real purpose of the deal is to prop up a politically salient manufacturer to keep manufacturing jobs in communities where jobs would otherwise be lost. Then, the subsidy was the merger itself. This means that the Trump administration used national security itself as the risk capital to extract the golden shares in pursuit of Rust Belt economic development.

Despite the misalignment between the stated purpose of the golden share and the terms of its powers, there is still

101. U.S. Steel Corp., Current Report (Form 8-K) Exhibit 3.1 (June 18, 2025).
102. Baev, *supra* note 56, at 20–22.
103. *Id.*
104. *See* sources cited, *supra* note 98.

some level of accountability. Unlike other uses of the golden share, where there is an eventual backstop of accountability, either in the form of a fiduciary relationship between trustee and beneficiary or between a nonprofit board member and the nonprofit corporation, here the final level of accountability is the electorate. If people do not agree with President Trump's veto decisions, they can express that displeasure at the ballot box. Yes, it is unlikely that a single veto will give rise to mass electoral pushback. However, this is still a better alternative than a foundation, public charity, or trust, which may be accountable only to the state attorney general.

A few high-level takeaways can be drawn from this assessment. First, the sequence of events matters. Transitioning from public to private is crowding in the market, which can be beneficial. But using government power to extract a concession from an existing public company looks less free-market friendly. The purpose of making the investment and the enumerated powers of the golden shares must be tightly aligned. If the grant of the share is meant to protect the environment, housing, or national security, then the terms of the shares must have a rational connection to that purpose, and probably to the collateral protection as well. But much beyond that narrow scope, it begins to fall into nationalization and not merely impact investment for the purposes of providing a subsidy in exchange for impact. Democratic accountability might be more effective than using the nonprofit tax code and state corporate or consumer protection law. At the very least, the Trump administration's insistence on calling it the President Trump Golden Share makes it clear whom to hold accountable for the decision. Accountability is less clear when the share is held by a small organization with no public visibility and over which they have no governance rights. Finally, there must be an investment of actual money—otherwise the subsidy becomes something more difficult to assess or something beyond political accountability.

B. *Animal Magnetism*

1. *MP Materials Is the Only Game in Town*

U.S. Steel is not the only deal of this type. In July of 2025, MP Materials Corp. (MP Materials) entered a "transformational public-private partnership" with the Department of

Defense.[105] MP Materials was formed to revive an existing rare earth mineral mine called Mountain Pass.[106] As part of this agreement, the U.S. Department of Defense (DoD) has agreed to invest $400 million in a Series A Preferred Stock issuance at a 7% annual dividend.[107] The DoD also committed up to another $350 million in Series A Preferred stock investments and a $150 million loan, financed by JPMorgan and Goldman Sachs.[108] The Trump administration's stated purpose for this deal is to decrease American dependence on Chinese critical materials production by increasing production in the United States by subsidizing a single firm, MP Materials.[109]

Direct financial investment was not the only form of subsidy the DoD extended to MP Materials. As part of the "Material Definitive Agreement," the DoD agreed to a Price Protection Agreement, which provides that the DoD will, at the end of each quarter, pay the shortfall of what MP Materials sells Neodymium-Praseodymium (NdPr) for at a set price of $110 per kilogram.[110] However, once the subject production facility is fully operational and MP Materials can sell NdPr for more than $110 per kilogram, the DoD will recover 30% of any price over the $110 per kilogram floor.[111] This effectively sets the floor for the price of NdPr, providing certainty for the company, investors, and other financiers.[112] In exchange for this security, the DoD receives financial distributions.[113] But, that is not attached to what the DoD actually provides in the form of

105. MP Materials Corp., Current Report (Form 8-K) (July 9, 2025).

106. *About*, MP MATERIALS, https://mpmaterials.com/about/ [https://perma.cc/DBH8-UEGS] (last visited Feb. 19, 2026).

107. MP Materials Corp., *supra* note 105.

108. *Id.*

109. Ernest Scheyder, *Pentagon to Keep Investing in US Critical Minerals Projects, Defense Official Says*, REUTERS (July 15, 2025), www.reuters.com/world/china/pentagon-keep-working-with-us-rare-earths-projects-us-defense-official-says-2025-07-15/ [https://perma.cc/J763-9KW4]; *see also* MP Materials Corp., *supra* note 105, at 2.

110. MP Materials Corp., *supra* note 105, at 2.

111. *Id.*

112. Note this is not based on actual sales of NdPr, but what is called the Benchmark Quarterly Average Volume Weighted Benchmark defined as, "*the volume average realized sales price for each NdPr Kilogram Equivalent that is included in the Sold NdPr Products (as defined below) for the applicable Calendar Quarter, as determined in accordance with the terms of this Agreement and the NdPr Calculation Principles.*" MP Materials Corp., Price Protection Agreement (Form 8-K) Exhibit 10.6 (July 9, 2025).

113. MP Materials Corp., *supra* note 105, at 3–6.

price protection payments, and MP Materials must prioritize sales of NdPr to magnet manufacturing.[114]

The DoD also entered into an "Off Take Agreement," under which the DoD retains the right to all magnets produced by MP Materials at its magnet production plant, referred to as the "10X Facility."[115] The Off Take Agreement obligated the "DoD" to make quarterly payments for all magnets offered to the DoD by MP Materials, subject to restrictions.[116] MP Materials can sell the magnets to other third-party purchasers, but those sales are predicated on the consent of the DoD.[117] Additionally, the DoD is required to pay MP Materials a quarterly "Magnet Facilitation Payment" equal to 25% of an estimated threshold EBITDA, derived from the production costs and magnet prices.[118] MP Materials may "syndicate" sales of magnets to third-parties, barring consent from the DoD.[119] As if that were not enough, the DoD will make annual payments not to exceed $30 million annually to cover the costs associated with engineering, development, and startup of the 10X Facility.[120] In exchange for guaranteed purchase of NdPr, the DoD is entitled to receive the first $30 million of any EBITDA generated over the set EBITDA threshold amount and 50% of all EBITDA after the initial $30 million.[121]

There is an argument to be made that the warrant instrument the DoD negotiated with MP Materials should provide another source of return to the U.S. taxpayer.[122] The current warrant exercise price is $30.03, which was the price MP Materials' common shares were trading when the agreement was announced.[123] Following the announcement, MP Materials'

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114. MP Materials Corp., *supra* note 105.
115. MP 10X Dev., LLC, Offtake Agreement (Form 8-K) Exhibit 10.5 (July 9, 2025).
116. *Id.* at art. VI, § 6.1.
117. *Id.* at art. III, § 3.2.
118. This EBITDA Threshold is set every year, but as an example MP Materials estimates an annual EBITDA of $140 million which would result in $35 million payments.
119. MP 10X Dev., LLC, Offtake Agreement, supra note 115, art. III, § 3.2.
120. *Id.* at art. VI, § 6.4.
121. *Id.* at art. I.
122. MP Materials Corp., Warrant to Purchase 11,201,659 Shares of Common Stock of MP Materials Corp. (Form 8-K) Exhibit 10.3 (July 11, 2025).
123. *Id.* at 2; *See also* MP Materials Corp. Stock Price, YAHOO! FINANCE, https://finance.yahoo.com (search in search bar for "MP Materials Corp.

common stock traded as high as $76.58 per share.[124] Even at the price of $48.50 (the price at which this article is going to print), the DoD's interest represents roughly $245 million in unrealized gains.[125]

The instant spread in the warrants could be undone by the massive subsidy required by the Off Take Agreement. MP Materials estimates the price of NdPr has only twice exceeded $110 per kilogram, once in late 2011–2012 and again in 2022.[126] For the past several years, the price of NdPr sagged because of overproduction.[127] In August of 2025, NdPr price per kilogram rallied to a multi-year high, but still only reached $88 per kilogram.[128] This rally was almost entirely due to MP Materials' halting shipments of NdPr to China and decreasing supply in that market.[129] Even if the price per kilogram of NdPr reaches and stays at $88, it would require a massive subsidy from the United States to reach $110.

More concerning is how the investment seemed to have a deleterious impact on MP Materials' weighted average cost of capital (WACC). In the months leading up to the deal, MP Materials' cost of equity was well above 8%, while its cost of debt was around 5%.[130] At the time of publication, MP's WACC is estimated at over 13%.[131] There could be several reasons why the cost of capital increased, but it might have to do with the increased risk associated with operating in the rare earth minerals industry and receiving a massive equity investment from the U.S. government that could, and will, limit MP Materials'

(MP)"; then follow hyperlink) (last visited April 7, 2026) [hereinafter MP Materials Stock].

124. MP Materials Stock, *supra* note 123.

125. *Id.,* At the time of publication, MP materials is trading at $58.73 per share.

126. *MP Investor Materials*, MP MATERIALS, https://www.sec.gov/Archives/edgar/data/1801368/000119312525157310/d43796dex992.htm (last visited Sept. 24, 2025) [hereinafter *MP Investor Materials*].

127. Eric Onstad & Amy Lv, *Rare Earth Prices Hit Two-Year Peak After MP Materials Stops China Shipments,* REUTERS (Aug. 26, 2025), https://www.reuters.com/sustainability/climate-energy/rare-earth-prices-hit-two-year-peak-after-mp-materials-stops-china-shipments-2025-08-26/.

128. *Id.*

129. *Id.*

130. *MP Materials' Cost of Equity*, ALPHASPREAD, www.alphaspread.com/security/nyse/mp/discount-rate (last visited Nov. 16, 2025).

131. *WACC Calculator: MP Materials Corp*, GURUFOCUS www.gurufocus.com/calculator/wacc-calculator?ticker=MP (last visited April 7, 2026).

managerial freedoms.[132] Regardless of the extent to which different factors contributed to the increase in WACC, even MP Materials thinks the investment represents unique risks.[133]

2. *Has Anyone Told the White House There Are Two Types of Warrants?*

It is perhaps easier to break this deal between the DoD and MP Materials down into the following pieces: (1) preferred equity, (2) warrant, (3) loan, and (4) off take agreement with the price floor. I will review them in that context. It may seem a bit circuitous because the impact field itself has typically borrowed from the commercial context. Nonetheless, in this paper, impact investing and social entrepreneurship will be treated as default.

First, using preferred equity in impact investing is nothing new and can be particularly effective when combined with what would be considered a below-market dividend, either in pure rate or other terms. Aunnie Patton Power's *Adventure Finance* provides a case study where a social entrepreneur offered a preferred equity interest to their most dedicated customers.[134] The preferred equity terms included the following: a fixed stock price, a five-year minimum holding period, no voting rights, 5% return, and a "no exit" clause.[135] From the description, it is not clear whether the five-year holding period was a bilateral agreement with call protection, or whether the company could call the preferred equity at any time.

The "no exit" was explained in more detail. The "no exit" term made it clear that preferred equity holders would not participate in the upside if the company was ever purchased

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132. ASWATH DAMODARAN, INVESTMENT VALUATION 176 (3d ed. 2012) (explaining the three main determinants of *beta* (which can increase the WACC) are 1) how sensitive the company is to macroeconomic cycles, 2) operating leverage, 3) and financial leverage). *See also Why MP Materials Stock is Sinking So Sharply*, TIPRANKS (Mar. 30, 2026) www.tipranks.com/news/catalyst/why-mp-materials-stock-is-sinking-so-sharply (discussing the manifold headwinds faced by MP Materials).

133. MP Materials Corp., supra note 105 (discussing how the agreement may not hold up over time or how the covenants in the agreement documents will restrict management's ability to make material decisions, or even how the conversion or exercise of the Series A Preferred Stock will dilute current common shareholders, among other risks).

134. AUNNIE PATTON POWER, ADVENTURE FINANCE 86–88 (2021).

135. *Id.* at 86.

or experienced another liquidity event, i.e., if there was an exit.[136] The shareholders would receive the original capital they invested and any of the 5% dividend, depending on how that was negotiated.[137] The bylaws required that all investors receive only their invested capital, with the net proceeds contributed to a similarly mission-aligned organization.[138] Especially when considering the preferred equity holder was also the consumer of the good, which means that that investor was really funding the enterprise for the purpose of creating a product that did not currently exist and less so for the financial return from the investment.

This restriction on the upside is a good illustration of an alteration to a standard commercial term that would make the preferred equity "impact." For commercial preferred equity, it is not uncommon to intentionally defer payments of dividends to preferred equity holders in order to slowly build value at the liquidity event or just accrue owed dividends through cumulative terms.[139] For cumulative preferred stock, every period the preferred equity dividend is not paid, the payment moves to the next period and must be paid before dividends are distributed to more junior equity.[140] For example, if a Q1 dividend payment was not made, now in Q2, both Q1 and Q2 payments must be made before dividends flow to common equity holders. Paid-in-Kind ("PIK") is a type of preferred equity that increases in liquidation preference, meaning that upon a liquidity event, the holder receives cash or common shares for the unpaid dividends.[141] Thus, preferred equity can both build a lucrative

136. *Id.*
137. *Id.*
138. *Id.*
139. Michael Woronoff & Jonathan Rosen, *Effective vs. Nominal Valuations in Venture Capital Investing*, 2 N.Y.U. J.L. & BUS. 101, 121 (2005). For a more in-depth discussion on the relative strengths and weaknesses of preferred equity, *compare* William W. Bratton & Michael L. Wachter, *A Theory of Preferred Stock*, 161 U. PA. L. REV. 1815 (2013) *with* Leo Strine, *Poor Pitiful or Potently Powerful Preferred?*, 161 U. PA. L. REV. 2025, 2026 (2013).
140. *Model Term Sheet*, NAT'L VENTURE CAP. ASS'N (Jan. 2019), https://nvca.org/wp-content/uploads/2019/06/NVCA-Model-Term-Sheet-1.doc ("In some cases, accrued and unpaid dividends are payable on conversion as well as upon a liquidation event. Most typically, however, dividends are not paid if the preferred is converted").
141. *Id.* ("Another alternative is to give the Company the option to pay accrued and unpaid dividends in cash or in common shares valued at fair market value. The latter are referred to as "PIK" (payment-in-kind) dividends").

liquidation preference while alleviating the pressure of the dividend, especially for a cash crunched startup, mission-driven or otherwise. However, the impact of the preferred equity in the above example did the opposite—it intentionally cut off upside for a steadier and more modest dividend.

Second, a warrant is an instrument that allows the holder to purchase common shares of a company at a specific exercise price.[142] Warrants are usually exercisable at liquidity events, but there can be other triggers as well.[143] Warrants are meant to increase an investor's common share ownership, usually at a much lower price than the company's valuation at the time of the triggering event.[144] For example, a preferred equity holder might also insist on receiving a warrant to purchase common shares at $20 per share, the price at the time of the preferred equity investment. But then there is another round of funding, and the price per share is now $30; the preferred equity holder will exercise their warrants at $20 per share. This instant return is great for the warrant holder, but could disincentivize follow on investment. In fact, this built-in spread could be why warrants are negatively correlated with debt financing and positively correlated with less venture investment.[145]

A warrant could be applied in the impact context in three ways. First, the nature of the warrant allows the issuing company to defer dividend payment to a later date, which helps with cash flow management, a crucial advantage for young impact-oriented startups. Yes, warrants become more expensive for the issuing company in the event of a subsequent round of financing, an IPO, or acquisition—but that is known in the industry as a champagne problem.

The next way a warrant could be leveraged in an impact context is through clever use of the triggering event. As described above, warrants are negatively correlated with

142. *Model Form of Warrant to Purchase Common Stock 1*, New Venture Cap. Ass'n, https://nvca.org/wp-content/uploads/2024/07/Model-PIPE-Form-of-Common-Warrant-US-Issuer.docx (last visited Sep. 25, 2025).

143. Spencer Williams, *Venture Capital Contract Design: An Empirical Analysis of the Connection Between Bargaining Power and Venture Financing Contract Terms*, 23 Fordham J. Corp. & Fin. L. 106, 140 (2017).

144. *Id.* at 141; Myron Mallia-Dare and Genesa Olivieri, *Sweetening the Deal: Using Warrants to Get the Deal Done*, A.B.A. (Oct. 8, 2021), https://www.americanbar.org/groups/business_law/resources/business-law-today/2021-october/sweetening-the-deal.

145. Williams, *supra* note 143, at 156.

attracting follow-on financing, whether debt or equity.[146] This is likely because it places the warrant holder in a much better position than subsequent investors, giving warrants a stick quality in the old "carrot and stick" analogy. The warrant could be used as a stick to prevent the company from doing something that would be commercially lucrative, but outside of the scope of the social mission. In the previous example, a fully loaded warrant holder would have a legal right to capture a financial windfall by enforcing the liquidity preference if the transaction did not meet the social purpose, but that trigger could be limited to only transactions that did not serve the social purpose.

The alternative to the stick is the carrot. The degree to which the accrued liquidity preference is forgiven or deferred could be another term where impact investors can decrease their cost of capital. This has the advantage of giving the warrant holder the legal power and right to collect a financial windfall or waive the right if it serves the social purpose, hence the carrot.

Third, using a loan for impact is perhaps the most straightforward and well-trod mechanism in social entrepreneurship. The simplicity of the loan terms, rate, maturity, security, and subordination have resulted in a vast constellation of impact-based iterations. Diving into the depths of impact lending is beyond the scope of this paper.

Finally, the last way warrants could be used to recapture government subsidies earned through a guarantee structure like an off take agreement or an Advanced Market Commitment. Off take agreements are used by the DoD, and like other advance purchase agreements or "take-out" financing, these agreements can substantially decrease risk for early investors, especially investors in a capital-intensive endeavor like mining rare earth minerals.[147] 50 U.S.C. § 4533(a)(1) authorizes the president:

> To create, maintain, protect, expand, or restore domestic industrial base capabilities essential for the national defense, the President may make provision-

146. *Id.*

147. Dep't of Defense, *Introduction to the Defense Production Act Title III*, NAT'L DEF. INDUS. ASS'N, https://www.ndia.org/-/media/sites/ndia/press-media/dpa_title_iii_trifold.pdf (last visited Nov. 18, 2025).

(A) for purchases of or commitments to purchase an industrial resource or a critical technology item, for Government use or resale;

(B) for the encouragement of exploration, development, and mining of critical and strategic materials, and other materials;

(C) for the development of production capabilities; and

(D) for the increased use of emerging technologies in security program applications and the rapid transition of emerging technologies-

(i) from Government-sponsored research and development to commercial applications; and

(ii) from commercial research and development to national defense applications.[148]

There are other restrictions on how to price purchases, such as whether purchases and resales can be done at a loss, with indemnification, etc.[149]

While the restrictions are necessary, what is truly interesting is the use of pre-purchase mechanisms writ large and how this statute even emulates Advance Market Commitments (AMCs).[150] An AMC is essentially a public promise by sponsors to purchase a certain number of products at a particular price point, if those products meet the required technical specifications.[151] The AMC guarantee lowers the risk of developing capital-intensive and unproven innovations.[152] AMCs are particularly useful in jumpstarting entirely new markets for products.[153] Perhaps the most famous example of AMC implementation was Operation Warp Speed, the Trump

148. 50 U.S.C. § 4533(a)(1)(A)-(D).

149. 50 U.S.C § 4533.

150. Ruth Levine, Michael Kremer & Alice Albright, MAKING MARKETS FOR VACCINES – IDEAS TO ACTION (2004) [hereinafter MAKING MARKETS] (creating the term Advanced Markets Commitment).

151. *Id.* at 4–5.

152. *Id.* at 5.

153. Alan Ho & Jake Taylor, *Using Advance Market Commitments for Public Purpose Technology Development*, BELFER CENTER FOR SCIENCE AND INT'L. AFFAIRS, https://www.belfercenter.org/publication/using-advance-market-commitments-public-purpose-technology-development.

administration's successful program to develop a COVID-19 vaccine and produce it at scale.[154]

The off take agreement or the AMC both provide guaranteed revenue through a price floor. This floor mitigates the investment risk in order to crowd in other investors. A warrant, when used by the same investor providing the subsidy, recaptures at least some of that subsidy through the residual interest. This two-pronged approach blunts the cost of the subsidy born by the impact investor without compromising the catalytic effect of the price floor.

3. *Industrial Policy Without the Industry or Policy*

While the Trump administration is being ambitious and creative, it is also completely incoherent. If the purpose of supporting rare earth mining and refinement in the U.S. is to benefit the broader industry, then the guarantee should extend to the industry as a whole, not merely to one (or a select few) firms. Moreover, the subsidy must match the need and be structured to assure the social impact, or public benefit is actually produced, and there must be a final accountability measure.

First, if the purpose is to kickstart an entire industry for mining and refining rare earth and critical minerals, the best practice would be to take a sectoral approach that ladders up to clear national-level objectives. Then provide capital through both incubation and competitive programming over several years.[155] The MP deal was lightning out of the clear blue. The purpose and investment structure of that deal are aligned, but without a larger program or investment thesis, their allocations quickly take on an arbitrary appearance.

Second, the subsidy should be tied to the specific need. The MP Materials deal provides a subsidy through the price floor, off take agreements, debt, and direct investment.[156] This looks a lot like a vendor finance deal where the seller of a good will lend money to the buyer who then uses those proceeds to purchase the good. In this situation, the structure is the opposite. The United States takes an equity position in the

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154. Sarosh Nagar, Anil Cacodcar & Aaron S. Kesselheim, *Advance Market Commitments and Their Role in Public Innovation*, 53 J. OF L. MED. & ETHICS 478, 479–80 (2025).

155. *See generally* MAKING MARKETS, *supra* note 150, at 4 (discussing how to implement AMCs that do not result in a winner-take-all market).

156. MP 10X Dev., s*upra* note 115.

company, providing an infusion of cash, and then provides a source of reliable revenue to the company in the form of the off take agreement.[157] This revenue will theoretically flow back to investors in the form of dividends and increased stock appreciation, including the recent U.S. investors. This is an interesting way to recapture some of the value of the off take agreement and any other revenue-generating activities that come out of subsequent deals. However, this "both sides" subsidy is massively inefficient and does not fit the need. The need for MP Materials is to raise the price of NdPr per kilogram to a level that supports MP Materials past and future production. The DoD could have simply promised to purchase the minerals and magnets through an off take agreement and then allow MP Materials the freedom to raise private capital from that guaranteed revenue stream. This way, the Trump administration could have offered an AMC to all critical materials mining and refining going concerns, and not simply MP Materials.

This would have also prevented the third and final problem, which is uncertainty as to where the dividends will go. Direct equity investment might be an additional appropriate tool, but in the case of a public entity making the investment, it must be made clear and transparent where any financial return will go. As of now, it is unclear what the DoD will do with financial returns. Perhaps it will flow back into the fund from whence it came, but this is taxpayer money, and the waterfall should be made clearer.[158]

C. *Intel Might Be Better off Buying Potatoes*[159]

1. *The Ultimate Data Room: Truth Social*

The current Intel CEO Lip-Bu Tan's tenure was not but a few months old when President Trump requested his resignation

157. *Id.*

158. Alice Wu, *Unpacking the Department of Defense and MP Materials Critical Minerals Partnership*, FED'N OF AM. SCIENTISTS (July 15, 2025), https://fas.org/publication/unpacking-dod-and-mp-partnership/ (discussing the details of the deal and whether this is a model for the future).

159. *See* Video posted by Wear Haha, YOUTUBE, *Mitch Hedberg - Pringles Joke* (Oct. 11, 2019), https://www.youtube.com/watch?v=KPtmyx6VbgM (Hedberg's account of Pringle's strategic pivot from a tennis ball producer to a leading brand in the food industry).

in a Truth Social post.[160] This post must have been particularly troubling, as the U.S. government was withholding a substantial portion of a $10 billion grant awarded to Intel under the previous administration.[161] Mr. Tan quickly flew to Washington and met directly with President Trump, Commerce Secretary Howard Lutnick, and Treasury Secretary Scott Bessent.[162] The meeting was a success in that Tan convinced President Trump that supporting Intel, and Tan, was in the best interest of the United States. But that support came with a price tag.

The cost of the Trump administration's support was 433.3 million shares of common stock at $20.47 per share, representing a 9.9% ownership interest in Intel.[163] On the day of the announcement, Intel stock closed at $24.80 per share.[164] The Department of Commerce (DoC) also received a five-year warrant exercisable at $20 per share, which would net the U.S. government an additional 5% ownership in common shares.[165]

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160. Alexandra Hutzler & Max Zahn, *Trump Calls on Intel CEO to Resign*, ABC NEWS (Aug. 7, 2025), https://abcnews.go.com/Business/trump-calls-intel-ceo-resign/story.

161. Press Release, Intel, Intel and Trump administration Reach Historic Agreement to Accelerate American Technology and Manufacturing Leadership (Aug. 22, 2025), https://www.intc.com/news-events/press-releases/detail/1748/intel-and-trump-administration-reach-historic-agreement-to [hereinafter *Intel Press Release*]. The total amount is actually $11.1 billion when counting the grant dollars already deployed and the common equity investment. The grant was two grants from different programs, the CHIPS Act and the Secure Enclave Agreement. The equity investment was based off the amount of grant dollars still owed to Intel. *Id.*

162. Robbie Whelen et al., *Inside Intel's Tricky Dance with Trump*, WALL ST. J. (Aug. 24, 2025), https://www.wsj.com/tech/inside-intels-tricky-dance-with-trump-c03f729c.

163. Intel Press Release, *supra* note 161.

164. *Intel Corp. Stock Price*, YAHOO! FINANCE, [hereinafter *Intel Stock Price*], https://finance.yahoo.com/quote/INTC/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAMUr7KGWMYLv49J4tL433gkNzg1zS0Azx-QeTESNdo6RJ1VNlf91Ss2k9sF-1w8-iAT7jpQcReuQQJOfZLulgV_-cszT83CZHO9AwxlUfXjZ174LbRPnR8s_mVweNOXHguKkGPCECYzMAX-J5jl_bF6mgVjW8RV6E1zl0N3-oD6k (last visited Sept. 25, 2025).

165. Intel Corp., Current Report (Form 8-K) (Aug. 22, 2025) [hereinafter Intel August 2025 8-K]; Intel Corp., Warrant to purchase 240, 516, 150 Shares of Common Stock (Form of Warrant to Purchase Common Stock) (Aug. 2025). [hereinafter Intel Form of Warrant] (foundry business is not defined in the Form of Warrant appendix or the 8-K). *See also* Intel Press Release, *supra* note 161.

The warrant is triggered if Intel owns less than 51% of the foundry (manufacturing chips on contract) business.[166] As with the MP Materials deal, the face value of the deal creates an immediate spread for the U.S. taxpayer.[167]

Intel emphasized to investors that the new agreement releases the company from *some* of the grant restrictions implemented by the Biden Administration.[168] While that technically might be true, in that the literal contractual obligations to fulfill specific terms of the grant agreements are gone because the grants are gone, many of the restrictions functionally remain. For example, pursuant to the original Direct Funding Agreement (DFA) under the Creating Helpful Incentives to Produce Semiconductors Act (CHIPS Act), Intel was required to retain a 50.1% ownership interest in its foundry business, a requirement the Trump administration also imposed.[169] The DFA imposed an "Excess Earnings Transfer" that forced Intel to share unlevered cash flow over a certain threshold, up to 75% of the total funding received.[170] But, as an equity investor, the Trump administration now enjoys the ultimate Excess Earnings Transfer—the dividend. Both deals explicitly disfavor some "change of ownership" transaction.[171] It appears, at this time, the most important restrictions remain, either explicitly in the agreement documents or implicitly in the fact that the United States now owns shares in the company and will exercise voting rights to reconcile corporate decisions with U.S. policies.

The U.S. investment in Intel bolstered investor and industry partner confidence. On August 11, Tan met with Trump, with Intel common stock closing the market at a 7% increase over the opening price.[172] The stock then went on a four-day rally, during which the *Wall Street Journal* reported that the United States and Intel were in discussions for a large equity investment.[173] Intel's ascent was bolstered by a timely announcement from

166. Intel August 2025 8-K, *supra* note 165; *see also* Intel Form of Warrant, *supra* note 165; *Intel Press Release*, *supra* note 161.
167. *MP Materials Stock*, *supra* note 123.
168. Intel August 2025 8-K, *supra* note 165; *Intel Press Release*, *supra* note 161.
169. Intel August 2025 8-K, *supra* note 165.
170. Intel November 2024 8-K, *supra* note 169.
171. *Id. See* Intel August 2025 8-K, *supra* note 165.
172. Robbie Whelan, Lauren Thomas & Amrith Ramkumar, *The U.S. Is Discussing Taking a Stake in Intel*, WALL ST. J. (Aug. 14, 2025), https://www.wsj.com/tech/us-stake-intel-1ff24500.
173. *Id.*

SoftBank that it was purchasing $2 billion in Intel common stock as well.[174] Softbank's purchase price was set at $23 per share.[175] Just over a month later, on September 22, Nvidia announced it too would invest $5 billion in Intel common shares at $23.28 per share.[176] Additionally, the two companies agreed to partner on future products.[177] The Nvidia investment helped Intel stock close at $30 per share, which is great for the "American Taxpayer Investor," but may underscore Intel's fundamental dependency on Nvidia.[178] As of early January of 2026, Intel's stock has increased in value over the past year by 119%.[179]

The two parties also negotiated corporate governance deal points. U.S. representative shareholder (the DoC) must vote their shares in favor of the board nominees and any proposals recommended by Intel's Board of Directors.[180] The DoC also must vote against any other nomination or proposal not recommended by the Board of Directors.[181] The DoC is free to vote in a manner that would avoid violating applicable law, would not further restrict Intel, and would protect the agreement between the DoC and Intel.[182]

One of the most important issues in the deal is not legal or even corporate governance, but is definitively strategic. Before the presidential negotiation process, Tan was struggling with a

174. Robbie Whelan & Amrith Ramkumar, *SoftBank Invests $2 Billion in Intel as U.S. Considers Taking 10% Stake in Chip Maker*, WALL ST. J. (Aug. 18, 2025), https://www.wsj.com/tech/intel-us-government-stake-22a7f987.

175. *Id.*

176. Intel Corp., Current Report (Form 8-K) (Sept. 15, 2025); Jeremy Bowman, *Intel vs. Nvidia: Which Stock Wins More From This $5 Billion Investment,* YAHOO! FINANCE (Sep. 22, 2025), https://finance.yahoo.com/news/intel-vs-nvidia-stock-wins-103000789.html.

177. Bowman, *supra* note 177.

178. *Id. See also Intel Corp. Stock Price*, *supra* note 164.

179. YAHOO! FINANCE, https://finance.yahoo.com/quote/INTC/ (last visited Mar. 3, 2026).

180. Intel August 2025 8-K, *supra* note 165.

181. *Id.*

182. *Id.* These restrictions seem particularly suited to protect an embattled management team and BoD from any activist investors lurking about looking for an opportunity to pounce. The restrictions could have required the DoC to mirror the vote of the shareholders, but specifically require the DoC to support the board.

long-term strategy for Intel.[183] Intel has been a laggard in the stock market for some time.[184] While the Trump administration's investment replaces many of the Biden administration's grant restrictions, this deal left in place the requirements for continued ownership and operation of the foundry, which would prevent Intel from spinning out the foundry business.[185] Now Intel is betting big on both a new chip design, Panther Lake, *and* a new manufacturing process, "18A."[186] At its pinnacle, Intel would use process improvements to update old chip designs and then design new chips based on the process improvements.[187] Now, Intel is innovating both process and chip design at the same time and doubling its exposure to risk of failure.[188] One single particle of dust can ruin a chip; for example, the best chip manufacturer in the world, Taiwan Semiconductor Manufacturing Company (TSMC) produces 30% of its most advanced chips without any flaws.[189] As of late 2024, Intel reported that fewer than 10% of its Panther Lake chips were manufactured without flaws.[190]

Intel's motivation for taking this dual approach is less about selling cutting-edge chips (although that certainly is a motivation) and is more about establishing an alternative manufacturer of chips that can handle the compute demands of AI.[191] Intel has staked its future on a bet that it can compete with TSMC as the global leader in chip manufacturing. If it succeeds, it will decrease global reliance on a singular chip manufacturer within spitting range of the People's Republic of China.

This deal may have kept Tan in his job for now and given the board some ammunition against activist investors, but it is

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183. Asa Fitch & Dan Gallagher, *Forget the White House Sideshow. Intel Must Decide What It Wants to Be.*, WALL ST. J. (Aug. 12, 2025), https://www.wsj.com/tech/intel-ceo-business-strategy-25377123.

184. Whelan, *Inside Intel's Tricky Dance*, *supra* note 162.

185. Intel August 2025 8-K, *supra* note 165.

186. Tripp Mickle, *Intel's Big Bet: Inside the Chipmaker's Make-or-Break Factory*, N.Y. TIMES (Oct. 9, 2025), https://www.nytimes.com/2025/10/09/technology/intel-chip-factory-fab52.html.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. Don Clark, Tripp Mickle & Steve Lohr, *Intel's Chief Executive is Out Amid Chipmaker's Struggles*, N.Y. TIMES (Dec. 2, 2024), https://www.nytimes.com/2024/12/02/technology/intel-ceo-pat-gelsinger.html.

unclear how this assists Intel in becoming a relevant player in the chips (computers, not Pringles) industry.

2. *Intel's Gambit*

The Intel deal is not as complicated or circumspect as the U.S. Steel deal or as robust and complicated as the MP Materials. The two most important provisions in the Intel deal are the board mirror voting provisions and the requirement to keep both the design and manufacturing business lines together.

To begin, the board mirror voting provision will blunt the power of the U.S. equity position. It will force the U.S., the largest single shareholder, to vote with the board, insulating the board from activist investors and shareholder pressure. Yet it is even worse than that. Without board seats, the board mirror-voting provisions cede the entire voting power of U.S. shares to the *next* most powerful investor with board seats. A large shareholder, or group of shareholders, can control the U.S. voting power through the board of directors, effectively buying a controlling interest in Intel without paying for it. This is exactly what may occur, considering Nvidia's multi-trillion market capitalization, the recent investment in Intel, and future product partnerships will make it the second most important investor and, in the absence of a U.S. representative on the board, the most influential board member.[192] This arrangement could prove particularly problematic in a conflicted transaction that must be cleansed either by a majority of the independent board or uninterested shareholders.[193] The U.S. block of equity could be used to cleanse a transaction that is antithetical to the broader interests of the United States.

The second issue is the requirement for Intel to persist in the dual-track strategy of both design and manufacturing. Commenters are not certain that Intel should keep both design and manufacturing business lines together in one company.[194] Now, the terms of the U.S. investment, specifically around the

192. Jeffrey Neal Johnson, *Sleeping With The Enemy: Inside the NVIDIA-Intel Deal*, NASDAQ (Dec. 31, 2025), https://www.nasdaq.com/articles/sleeping-enemy-inside-nvidia-intel-deal.

193. DEL. CODE ANN. tit. 8, § 144.

194. Investing.com, *Tech analysts explains why Intel should be split apart and how to do it*, YAHOO FINANCE (Mar. 5, 2025) https://finance.yahoo.com/news/tech-analyst-explains-why-intel-132943025.html.

divestiture of foundry business, could prevent Intel from pursuing the most strategically advantageous pathway.[195]

Yes, supporting the reestablishment of U.S.-based critical chip manufacturing is a reasonable public good and policy objective. However, it raises the question: why does the Trump agreement require that Intel keep both the design and foundry business lines within the same corporate structure, when the social purpose of the investment is to bring back the manufacturing of chips to the United States? Forcing Intel to stick with the dual approach could further disadvantage Intel, as its main competitor, TSMC, is not a chip designer, but merely manufactures chips for companies like Nvidia, which in turn designs and markets the chips created by TSMC. Predetermining the best strategy for a private company, despite what on-the-ground realities dictate, is the worst aspect of nationalization.

Despite this restriction, the general critique of the deal is that it is not restrictive enough. In fact, Senator Elizabeth Warren derided the deal as a handout to Intel and a betrayal of U.S. taxpayers and workers.[196] That is not to say Senator Warren is not generally supportive of the idea of the United States receiving a financial interest in companies that receive support from U.S. taxpayers. In 2022, Senator Warren, along with Senator Bernie Sanders, submitted an amendment to the CHIPS Act that would have required the Commerce Secretary to accept either equity, warrants, or senior debt in any company that received financial assistance from the United States.[197] In exchange for that investment, the company would be restricted, for five years, from offshoring jobs, executing share buybacks, or actively preventing the workforce from organizing labor unions.[198] These protections would have set a floor for Intel, in that they would have prevented U.S. dollars from going through the front door

195. Asa Fitch, *Terms of Intel Stake Put a Big Hurdle in the Way of Its Turnaround —Heard on the Street*, WALL ST. J. (Aug. 25, 2025), https://www.wsj.com/live-coverage/stock-market-today-dow-sp-500-nasdaq-08-25-2025/card/terms-of-intel-stake-put-a-big-hurdle-in-the-way-of-its-turnaround-heard-on-the-street-ba5KQTN1kgmN86p4DEs2.

196. *Warren Presses Commerce Secretary on Trump's Deal to Give the U.S. 10% Stake in Intel*, U.S. S. COMM. ON BANKING, HOUS., AND URB. AFF'S. (Sep. 4, 2025), https://www.banking.senate.gov/newsroom/minority/warren-presses-commerce-secretary-on-trumps-deal-to-give-the-us-10-stake-in-intel?.

197. S. Amend. 5145 to S. Amend. 5135 to H.R. 4346, 117th Cong. (2022).

198. *Id.*

of the company and then being used either to line investors' pockets or to actively harm U.S. workers.

It may have been difficult to extract those same provisions when the money was already granted to Intel, but the Trump administration did not have to concede control to the management team or the next largest controlling shareholder. A more effective use of public dollars would exclude relatively arbitrary and specific requirements, like that of maintaining both foundry and design business lines, and make more explicit the purpose of the investment, the reshoring of chip manufacturing capacity. To that end, the administration should allow Intel the operational freedom to focus its business but maintain the threat that if they fail to achieve parity with TSMC's chip process and land a large chip client, the Trump administration will vote its shares for new management. Now, the administration and the American people are tied to a management team that is itself tied to a dual strategy trying to compete with arguably two of the most important companies in the world, Nvidia and TSMC, simultaneously.

3. *Intel Themes*

Senator Warren's critique is understandable and not without merit. There can and should be express, ex ante terms that make clear what will and will not be permissible if a company accepts federal investment. For example, no share buybacks for five years. Those terms should not be set in statute. The restrictions should be advertised up front as part of the larger strategic investment program, but then enforced through further private ordering, like in a shareholder agreement. Senator Warren's critique fails to utilize the equity investment like an investor would—as a carrot to incentivize desired behavior—and more like a lawyer would—as a positional bargaining advantage to extract concessions.

The real lesson from the Intel deal is this: all grant capital is 100% risk capital. Using investments instead of grants, where appropriate, will yield the socially desirable outcome of U.S.-based chip manufacturing and a financial return for U.S. taxpayers. First, possessing a residual interest in the company means any financial return is better than that received for a grant. Second, the rights and obligations that flow with equity ownership can discipline a private company, especially if there is a subsidy in the form of lower cost of capital. The investment cannot completely replace the administrative state, but it can go a long way toward aligning private interests with the public good. The real win is if Intel does turn its performance around, then the U.S. taxpayers will receive a dividend instead of nothing.[199]

This is the final lesson: the dividend is the ultimate regulator. Dividends derived from an action that is not aligned with the social purpose generate resources and returns that can be used to either mitigate the harm or vote against it altogether. Take the following example: Intel decides that it is in the best interests of the company and its shareholders to spin out the manufacturing business into a separate corporate entity. This spin out produces a lucrative windfall for the shareholders and facilitates the success and growth of Intel as the sole U.S.-based chip design and manufacturing company. The downside is that several thousand workers lost their jobs. Instead of requesting Intel remain in a disadvantageous position to preserve jobs, the U.S. investment should calculate what the potential return is for their investment and fund a program to help those displaced by the spin out, focused on the individuals directly impacted by the spin out.[200]

III.
Community Carried Interest

A. *The CCI*

The Community Carried Interest (CCI) is named after carried interest, the mechanism used by private equity firms to signal their incentives are aligned with the limited partner (LP) investors from which they are soliciting funding.[201] The theory behind the traditional carried interest is that sponsors or general partners will earn a small fee to keep the lights on while they allocate the LPs' capital into the portfolio investments.[202] GPs and sponsors also must provide their own capital, usually

199. Intel would argue that having a U.S. based chip designer and manufacturer is a sufficient public purpose to justify making a non-dilutive grant to a private company.

200. This program could even be set up in advance for just such a contingency. The program could be funded by taking out a loan based on the value of the shares.

201. Victor Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Funds,* 83 N.Y.U. L. Rev. 1, 8 (2008).

202. *Id.*

around 20% of the total capital, as another incentive to make money for the LP.[203] As the investments make a return, the LPs make their hurdle rate first, and then, after that, the sponsor and LP split the returns.[204]

The CCI takes the basic carried interest structure and divides the sponsor's role into two. The first role, filled by the impact investor, provides the catalytic capital for the investment and sets the terms under which commercial capital will invest into the fund. Second, the community, ecosystem, industry, or impacted individuals (stakeholders) act as the other role of the sponsor, in that it would provide investable deals to the fund. This is possible if the fund makes the investment terms clear and publicly visible. Finally, the impact investor forgoes some or all of their financial return and feeds that back to a specified purpose or place.

The CCI converts stakeholders affected by the investment into residual interest holders of the investment. The CCI does this by drawing from the Kovvali and Macey's insights from public utilities.[205] The CCI requires the impact investor (either government or private investor) to cap the financial return, at least for themselves, and thus lower the risk of the investment. The CCI then explicitly ties the de facto or residual ownership to a financial benefit. In the utility example, this would be lower-cost or better utility service. The financial benefit could also be a pro rata interest in a cash distribution originally intended for the impact investor. Thus, the stakeholders benefit from any financial windfall that might occur from the initial investment. This rounds out the conversion of the "community" into a sponsor.

Below are several propositions derived from both the lesson's learned from the above Trump administration's deals.

1. *Sources and Uses – Flexibility*

The sources and uses of the funding is a crucial element of the CCI. The sources must be reliable, flexible, and below the market cost of capital. Below market does not mean the investment is not lucrative or does not generate a return. The subsidy through concessionary capital can vary depending on

203. *Id.*
204. *Id.* at 22.
205. *Public Business, supra* note 25.

the strategy. Each source of capital will come with its attendant requirements, needs, and restrictions.[206] In the Universal Fund, capital is raised via donations from private sources.[207] In Professor Omarova's National Investment Authority, the government would sell government-guaranteed bonds.[208] Either is fine, so long as management has the ability to move flexibly and strike deals with commercial capital. The moment of accountability would come not from ex ante approval of every investment, but ex post analysis of how well the CCI entity delivered on its stated social purposes.

2. *Clear Purpose – Accountability*

Accountability, however, requires a clear and discrete public purpose. Further, the purpose should be achievable through a variety of solutions to provide the most flexibility to the stakeholders and broaden the pipeline of investable opportunities. A clear and actionable purpose engenders accountability and establishes legitimacy. A clear purpose makes assessment of the deals possible. If the purpose is to invest in green infrastructure, then the terms of the investment should relate to the use or protection of natural resources. For example, the Trump administration couches all three of the above investments in the mantle of national security.[209] Setting aside the legitimacy of national security as a motivating purpose, it will be difficult to determine whether national security improved or whether the investment had any causal link to that improvement. Moreover, the terms of the deals themselves belie other purposes beyond national security, such as keeping plants open in the U.S. Steel deal.[210]

3. *From National to Local – Legitimacy*

The CCI should either originate from the same locality as the investments or at least directly incorporate local stakeholders into its structure. Localism begets immediacy and salience for the stakeholders most impacted by the investment. Localism

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206. *See* Evan Absher, *Social Purpose REIT*, 34 J. of AFFORDABLE HOUS., 53, 64–69 (2025).
207. *Citizen Capitalism*, s*upra* note 14.
208. *NIA*, *supra* note 19, at 5.
209. CFIUS ANN. REP., *supra* note 50; MP Materials Corp., *supra* note 105; Intel August 2025 8-K, *supra* note 165.
210. U.S. Steel Corp., Current Report, *supra* note 48.

also helps the CCI avoid national-level narratives that tend to calcify support or opposition. Finally, proactive participation and self-selection by local stakeholders, whether public or private, are required for "democratic" legitimacy.

Professors Robert C. Hockett and Saule T. Omarova in their paper, *Private Wealth and Public Goods: A Case for A National Investment Authority,* expand on the orthodox theory of the "public good" to include the concept of a "collective good.[211] The collective good is something that will only be produced by "persons acting in their collective capacities, in a concerted fashion."[212] Like the more narrow public goods, collective goods also suffer from the collective action problem.[213] Hockett and Omarova specify two "species" of collective action, capturability—the ability for any one individual to capture the benefit of the good, and controllability—the ability for ant one individual to control the requisite inputs and factors necessary to produce the collective good.[214] Finally, the authors articulate that both species are subject to a temporal dimension in that the longer it takes the good to produce the benefit, the more difficult it is to capture the benefit and therefore a durable institution is required to capture the long-term benefit.[215]

I would add to the time-diffusion dynamic a geographic diffusion as well. During the Biden administration, voters gave little or no credit to President Biden for the generational spending on public and collective goods.[216] A priori partisan leanings seem to determine how voters perceive legislative accomplishments.[217] But this is at a national scale. A locally run and sourced "fund" would not come with the same valiance as a federal program. It would be created by the state or local

211. Robert C. Hockett & Saule T. Omarova, *Private Wealth and Public Goods: A Case for a National Investment Authority*, 43 J. CORP. L. 437, 446 (2018) [hereinafter Public Good].

212. *Id.*

213. *Id.* at 447.

214. *Id.*

215. *Id.* at 447–450.

216. Steven Shepard, *Poll: Biden touts his 4 major infrastructure and clean energy laws. Voters doubt they're working.*, POLITICO (May 8, 2024) https://www.politico.com/news/2024/05/08/poll-biden-infrastructure-clean-energy-laws-00155717?.

217. Katherine Levine Einstein, Kris-Stella Trump & Vanessa Williamson, *The Polarizing Effect of the Stimulus: Partisanship and Voter Responsiveness to the American Recovery and Reinvestment Act,* 46 Presidential Stud. Q. 264, 269–70 (2016).

jurisdiction, free of the national narrative. More importantly, it would drastically reduce the "distance" between the investment in and benefit from the collective good.

This is where the Trump administration's approach falters. For example, the U.S. Steel NSA specifically articulates different local communities that are protected against the typical globalization two-step of corporate merger and then local factory shutdown.[218] In fact, Trump recently exercised the veto right of the golden share to prevent U.S. Steel from shuttering a plant in Granite City, Illinois.[219] The only real attention the golden share has received has been remonstration from the more libertarian right.[220] Perhaps it would have been more effective and less politically charged had the golden share been given to the local chapter of the United Steel Workers. At the very least handing a veto right to the most impacted stakeholders would have addressed, in part, the controllability problem of collective goods.

4. *Ownership Redounds to the People – Impact*

Hockett and Omarova's second species of collective action problem was the capturability of the benefit of the collective good.[221] No individual can exclusively hold the benefit of the collective good, which disincentivizes private investment.[222] For example, a bridge that connects two communities is public and diffuse because anyone can use the bridge, which results in economic benefit to those who cross the bridge or, secondarily, those associated with the bridge crossers.[223] This is why state and federal governments usually fund the construction of bridges. Placing a toll or usage fee on the bridge monetizes the diffuse benefit by requiring those who do cross the road to

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218. U.S. Steel Corp., Current Report (Form 8-K) (June 18, 2025), *supra* note 48.

219. Nino Paoli, *Trump is Already Wielding His 'Golden Share' Authority at U.S. Steel, Overriding the Company's Plans for an Illinois Plant, Report Says*, YAHOO! FINANCE (Sept. 20, 2025), https://finance.yahoo.com/news/trump-already-wielding-golden-share-225826240.html.

220. Eric Boehm, *Trump's Controlling Stake in U.S. Steel Is Indefensible Socialist Nonsense*, REASON (June 26, 2025) https://reason.com/2025/06/26/trumps-controlling-stake-in-u-s-steel-is-indefensible-socialist-nonsense/?utm_campaign=reason_brand&utm_content&utm_medium=social&utm_source=facebook&utm_term.

221. *Public Good*, *supra* note 212, at 447.

222. *Id.* at 451.

223. *Id.*

distribute some of the economic benefit back to the public and therefore synthesize capturability.[224] The synthetic capturability is used to attract private investment in collective goods, which then converts them into public-private collective goods.[225] Hockett and Omarova argue that synthesizing capturability for collective goods is justified when it comes to major infrastructure projects, particularly infrastructure for clean energy and crisis resilience.[226]

The CCI extends capturability to the most impacted stakeholders. To begin, nothing within the theory of collective goods prevents synthesized capturability from being shared with external stakeholders, along with private investors. The problem is determining with whom the synthetically captured benefit is shared and why. Within the context of private law, Kovvali and Macey provide a useful theoretical underpinning to determine which individuals and stakeholders should receive the synthetically captured collective good benefit.[227] Due to the relationship of the entity and the state, any consumer who has been made into a residual owner of the entity could qualify to receive more synthesized benefits. For example, in the bridge example, residual owners would be anyone living in the jurisdiction that financed the bridge because they would be the stakeholders most impacted by improvements to the bridge or decreases in toll rates. The bridge would still have "outside" customers sufficient to generate excess revenue.[228]

The Trump administration deals, while not perfect, are perhaps most effective at distributing synthetically captured diffuse collective good benefit. The golden share within the U.S. Steel merger synthetically captures the benefit of the merger in that it prevents the surviving entity from shutting down two factories, which captures revenue and funnels it to the workers. The merger might have diffuse national security benefits, but the

224. *Id.* at 452.

225. *Id.*

226. *See generally Public Good*, *supra* note 212.

227. *Public Business*, *supra* note 25. Within public law the beneficiaries of the toll on a bridge are the people living in the jurisdiction.

228. It is possible to imagine an even more narrow definition of residual interest to those that were forced to contribute property either through a direct transfer, e.g., eminent domain, or suffered a diminution in property value due to increased traffic or other material change. Perhaps, there is a dual class of stock with prioritization of stakeholders most directly impacted sitting above those that were more indirectly affected.

workers specifically benefit by remaining employed. Through the vehicle of equity ownership, both the MP Materials deal and the Intel investments capture the diffuse public benefit of a viable rare earth minerals mining operation and U.S.-based chip manufacture. If the companies succeed, the nation will benefit from the stated public purpose, but also financially as well. The issue remains, however, to whom do the benefits flow, and how are they empowered to use those benefits? The Trump administration is not clear on this, but it is not too late to articulate how financial returns will flow.

5. *The CCI Must Include Commercial Capital – Scale*

Hockett and Omarova expound on the Reconstruction Finance Corporation (RFC) as a predecessor to the NIA.[229] Hockett and Omarova posit five factors that directly contributed to RFC's success, but two factors dealt directly with the large scale of RFC and RFC's innovative approach to deploying and raising capital.[230] First, the RFC was massive.[231] The scale allowed the RFC to finance large public works initiatives through other New Deal agencies, directly finance private industry, and keep skittish private lenders from retreating from the market too early.[232] Second, the RFC showed real innovation in both how it deployed capital and how it raised capital.[233] Much like the examples above, RFC would routinely purchase shares of preferred equity in private enterprises and use the attendant power in corporate governance.[234] The RFC issued debt and other securities as a way of raising additional capital outside of the original congressional appropriation.[235] The RFC would also use proceeds from repaid loans to recycle back into future investments. The folding in of private capital was then replicated in other institutions such as Fannie Mae and the Commodity Credit Corporation.[236] All of the above activity essentially acted as crowding in of private capital, either by stabilizing a market to keep private capital engaged or through issuing securities to the

229. *Public Good*, *supra* note 212, at 458.
230. *Id.*
231. *Id.* at n.102.
232. *Id.*
233. *Id.* at 461.
234. *Id.*
235. *Id.* at 462.
236. *Id.*

capital markets. The upside is that RFC-stabilized investments are sufficient to leverage private capital.

For the above deals, the Trump administration has not raised private capital to fund the above investments. Nor has it housed the investments in an entity like that of the RFC or a GSE like Fannie Mae or Freddie Mac. What it has done is made investments that have, either intentionally or coincidentally, crowded in outside private capital.[237] The U.S. investment into Intel certainly stabilized the company sufficiently to attract follow on investment from Nvidia.[238] Unfortunately, that outside investment could have a deleterious effect on the corporate governance power of the U.S. interest.[239] The Trump administration's failure to intentionally crowd in capital means that it accidentally gave away its investment.

6. *So What?*

The Trump administration is availing itself of many of the tools and theories one could call impact investing. However, without a theory of power and a strategy to realize stated goals, the individual suffers. Below is a examination of a strategically coherent and theoretically consistent example of impact investment that accomplishes all the above objectives.

IV.
Proposition 123

In November of 2022, Colorado voted 52% in favor of Proposition 123, a landmark measure that would annually divert 0.1% of the state's taxable income to create the Affordable Housing Finance Fund (AHFF).[240] Given that the measure was passed in late 2022, only half of the revenue was available for the 2023-24 program, but that still amounted to $97 million for affordable housing.[241] However, this amount was nothing in

237. *See supra* Part II.
238. *See supra* Part II.C.1.
239. *See supra* Part II.C.1.
240. Tatiana Flowers & Jesse Paul, *Colorado Voters Approve Ballot Measure Setting Aside Nearly $300 Million Each Year for Affordable Housing*, Colorado Sun (Nov. 14, 2022), https://coloradosun.com/2022/11/14/affordable-housing-colorado-prop-123-results/.
241. Affordable Housing Financing Fund, Proposition 123: Affordable Housing Financing Fund Fiscal Year 2023-2024 Annual Report 2 (2024) [hereinafter AHFF 23–24 Report].

the face of the demand for financing. During the same time, almost $735 million of development proposals were submitted to the state.[242] Despite the lower-than-expected revenue for the first year, the program financed 35 projects expected to produce 2,730 units of affordable housing and 3,610 modular/off-site units constructed annually for the next three years.[243] Proposition 123 and AHFF are remarkable because they represent a widely successful example of impact investing that combines public financing and private ordering to drive social impact in the form of affordable housing and direct wealth creation through the Tenant Equity Vehicle (TEV).[244] Through the clever and straightforward combination of private ordering and public finance two elements, Colorado has shown how a government and private impact investors can use impact investing to fairly create and distribute the benefit of a collective good, like housing.

Proposition 123, now C.S.R. § 29-32-101 *et seq.*, comports with the above proposed CCI framework: it (1) identifies a source of funding with the legal authority to behave like that of a private actor, (2) clearly articulates a public purpose that is measurable by focusing on housing, (3) reduces the program to a local implementation level through an opt-in structure, (4) introduces (as an aspiration) terminal ownership to the people, (5) crowds in commercial capital at the deal level through individual deals, and (6) is managed by the appropriately situated and incentivized professional managers.

A. *Flexibility: Sources and Uses*

Colorado's solution to this problem is both clever and deserving of analysis even if the context is somewhat unique to Colorado.

The Colorado Constitution is subject to the Taxpayer Bill of Rights (TABOR).[245] At a high level, TABOR places a cap on how much money the state may spend in any given fiscal year,

242. *Id.*
243. *Id.*
244. There is a constellation of organizations and programs involved in running this program. For the sake of clarity this paper will refer to high level participants only.
245. COLO. CONST. art. X, § 20.

and any revenue collected over that must be refunded to the taxpayers in the following fiscal year.[246] Exceeding the limitations requires specific voter approval.[247] In just the last few years, the Colorado state legislature has either provided direct cash refunds or decreased the income tax rate.[248] In 2023, Colorado paid out $3.5 billion in refunds and was set to make an average annual payment of $2 billion from 2022 through 2027.[249]

Proposition 123 dips into that refund and directs 0.1% of total income tax collected out of the refund pool back into affordable housing programs.[250] The funds are also excluded from the Colorado constitutional requirement that all appropriated funds be spent in a single fiscal year.[251] This flexibility allows AHFF to invest opportunistically in the best deals, rather than forcibly deploying capital to substandard projects.[252] Additionally, any interest or returns earned by the fund remain within the fund and do not revert to the state's general fund.[253] So as the fund succeeds and investments flow back to fund, it will grow in size and is able to redeploy the capital back to its purpose of producing more housing in Colorado.[254] 40% of the funds from Proposition 123 flow to the Department of Local Affairs to run supportive grant-making programs while sixty percent of the funding falls directly into the AHFF.[255]

AHFF is empowered to deploy their capital in three products: (1) land banking, (2) affordable housing equity, and (3) concessionary debt.[256] Land banking provides forgivable loans to local governments and nonprofits with a track record

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246. *Id.* § 20(7)(a)-(d).
247. Anna-Liisa Mullis, *Dismantling the Trojan Horse:* Mesa County Board of County Commissioners v. State, 82 U. Colo. L. Rev. 260 (2011).
248. *TABOR Refund Information*, Colo. Dep't of Revenue, https://tax.colorado.gov/past-tabor-refunds (last visited Nov. 18, 2025).
249. Andrew Kenney, *Why Are TABOR Refunds So Huge Lately? And Will They Stay That Way?*, CPR News (Sep. 21, 2023), https://www.cpr.org/2023/09/21/colorado-why-are-tabor-refunds-so-huge-lately/.
250. Colo. Rev. Stat. § 29-32-102(1) (2022); Jesse Bedayn, *Colorado Voters Approve Proposition 123, Dedicating $300 Million Annually to Affordable Housing*, The Associated Press (Nov. 14, 2022), https://www.cpr.org/2022/11/14/colorado-votes-to-dedicate-300-million-annually-to-housing/.
251. Colo. Rev. Stat. § 29-32-102 (2022) .
252. *Id.*
253. *Id.* at § 29-32-103(2).
254. *Id.*
255. *Id.* at § 29-32-104.
256. *Id.* at § 29-32-104(1)(a)-(c).

of developing land for affordable housing.[257] The loans are forgiven if the borrower develops the land within 10 years.[258] If the developer does not develop the land in that time, it must pay back the loan, but then can do what it wants with the parcel.[259] Affordable Housing Equity is tailored to new low-to-moderate-income multi-family rental developments and to preserving affordable mixed-income units.[260] The equity investments are to be made at "below the prevailing market returns,"[261] and the fund further prioritizes mixed-income, high-density affordable housing units, but it does require recipient projects to include either mixed-income units or be high-density.[262] Perhaps most importantly, the Affordable Housing Equity program funds what is called the Tenant Equity Vehicle ("TEV"), which will be covered in more detail below.[263] Finally, Proposition 123 permits the AHFF to provide concessionary debt financing to several different purposes, such as initial development financing, gap financing, preservation, and perhaps most interestingly, financing for modular and factory-built units.[264] The program requires the fund's administrator to consider environmental sustainability "as appropriate."[265]

Proposition 123 also directs grant funding to local governments to facilitate homeownership through down payment assistance, assist people experiencing homelessness, and bolster local planning to facilitate housing development.[266] The down payment assistance program provides grant funding to first-time homeowners with an emphasis on first-generation homebuyers.[267]

With this vast pool of capital and broad remit comes with a few limitations. The state legislature may reduce the appropriation to the AHFF if there is no TABOR-created surplus in a given fiscal year.[268] The definition of "affordable" is set at

257. *Id.* at (1)(a).
258. *Id.*
259. *Id.*
260. *Id.* at § 29-32-104(1)(b). AMI is a Department of Housing and Urban Development
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.* at § 29-32-104(1)(c).
265. *Id.* at § 29-32-104(2).
266. *Id.* at § 29-32-104(3)(a)-(c).
267. *Id.* at § 29-32-104(3)(a).
268. *Id.* at § 29-32-104(5).

or below 60% Area Median Income (AMI), with the amount each resident pays in rent and utilities not to exceed 30% of monthly income.[269] The AHFF must report to the relevant state legislative committees on several metrics, including the number of applicants, projects funded and denied (with reasons for denial), the anticipated number of households served, the number of units financed, and the geographic distribution of investments.[270] The Colorado state legislature has given the AHFF all the legal grounds needed to pursue this goal in the manner it deems most appropriate. There is no process for process's sake, merely accountability coupled with autonomy.

B. *Accountability: Clear and Narrow Purpose*

The AHFF's statutory purpose of building affordable housing is reinforced by the terms of investments made and the concessions required to be considered for investments. AHFF does this not by overly regulating compliance but by incentivizing behavior with subsidized investment and public commitments.

The first AHFF source of capital is nondilutive grant capital and loans to assist local communities with preparation to receive follow-on AHFF funding.[271] Additionally, the program provides grant funding supports local planning capacity grants and helps fund homeownership programs, as well as programs for to combat homelessness.[272] If there are more qualified homeowners in a community due to the grant-funded programs, a builder may decide to begin a project to meet the newly minted demand. That development then becomes an investment AHFF can support with concessionary capital.

The AHFF's investment terms serve double duty in achieving the AHFF's purpose. First, by statute, AHFF investments must be "below market" or concessionary.[273] The land banking loan is forgivable if the organization successfully progresses the project for affordable units.[274] If the land is not developed

269. *Id.* at § 29-32-101(2).
270. *Id.* at § 29-32-104(4)(a)-(c).
271. *Id.*
272. *The Colorado State Affordable Housing Fund: Proposition 123*, COLO. DEP'T OF LOCAL AFFAIRS, https://cdola.colorado.gov/prop123 (last visited Nov. 18, 2025).
273. COLO. REV. STAT. § 29-32-104(1)(a)-(c) (2022).
274. *Id.* at § 29-32-104(1)(a).

within the statutorily required timeline, the borrower of the parcel appears to have a choice as to which remedy will control.[275] As the statute is currently written, it appears that the borrower can either repay the loan at a negotiated interest rate or hand over the parcel's deed to a state agency or other organization that will develop the parcel.[276] If the borrower decides to repay the loan, then it can use the parcel for whatever purpose it would like.[277] This provision provides an opportunity to price the option to hold the land for five to ten years, with the assumption that some development is better than no development.

The second bucket through which the AHFF provides capital is the equity investment program.[278] This program must invest in affordable multi-family rental projects.[279] The administrator must prioritize dense, mixed-income, and environmentally sustainable developments, but is not required to invest in only projects that match those characteristics.[280] However, nothing in the statute would prevent the program from investing in existing developments to keep them affordable.[281] How affordability is calculated provides additional flexibility for the project to meet the programmatic goals of the AHFF. Here is the operative language:

> The average designated imputed income by household size for projects funded by the program must not exceed 90% of the area median income as established by the United States Department of Housing and Urban Development and published by the department or a statewide political subdivision or authority on housing, and regulated units in the project must have

275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.* at § 29-32-104(1)(b).
279. *Id.* at § 29-32-104(1)(a).
280. *Id.*
281. Perhaps units rolling out of compliance period for the Low-Income Housing Tax Credit (LIHTC) program. The Public and Affordable Housing Research Center estimates that almost 4,000 LIHTC units could lose their affordability in the next five years. *Preservation Risk Dashboard: Colorado,* PUB. AND AFFORDABLE HOUS. RSCH. CORP. (PAHRC) AND NAT'L LOW INCOME HOUS. COAL. (NLIHC) https://preservationdatabase.org/wp-content/uploads/2025/09/Colorado-Preservation-Risk-Dashboard.pdf (last visited Nov. 18, 2025).

> a gross rent limit that does not exceed thirty percent of the imputed income limitation applicable to the units.[282]

The averaging of imputed incomes allows the developer the flexibility to still charge market rate for some units, while discounting others. This gives the developer and the AHFF the ability to clearly assess the gap between what the development would make without any affordable units and how much it will make if the average imputed income does not exceed 90% AMI. Now the AHFF can invest "below prevailing market" to offset the loss of income.[283]

The third bucket through which the AHFF provides capital is its concessionary construction or short-term loan.[284] This program can also fund multi-family rentals, short-term gap financing, and affordability preservation.[285] This program may also provide financing directly to manufacturers of modular or factory-built homes.[286] With the ceiling set at an average imputed income of 60% of AMI, the affordability requirement for concessionary debt is lower than that of the equity program.[287] The administrator must again prioritize dense, mixed-income, and environmentally sustainable projects.[288] The loans, like the equity, will be made with a below-market interest rate.[289]

The project-level concessions are not the only terms the AHFF negotiates in exchange for below-market funding. To even be considered for funding from the AHFF, the relevant political subdivision must provide a baseline measurement for existing housing units and commit to either a one-year 3%, two-year 6%, or three-year 9% increase in units over that baseline.[290] In the first three-year cycle, 217 jurisdictions

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282. COLO. REV. STAT. § 29-32-104(1)(b) (2022). While not expressly defined in the statute, I assume that regulated units refers to units subject to some form of affordability restriction analyzed below.
283. *Id.*
284. *Id.* at § 29-32-104(1)(c).
285. *Id.* at § 29-32-104(1)(c)(I)-(III).
286. *Id.* at § 29-32-104(1)(c)(IV).
287. *Id.* at § 29-32-104(1)(c)(V)(A).
288. *Id.* at § 29-32-104(1)(c)(B)(2).
289. *Id.* at § 29-32-104(1)(c)(V)(A).
290. *Id.* at § 29-32-105(1)(a). *Meeting Proposition 123 Commitments: Unit Count & Expedited Review Guidance*, COLO. DEP'T OF LOCAL AFFAIRS 7 (October 2025), https://docs.google.com/document/d/1DtTR06Z6yhqXP9l36QKmOdLbTQtaT7A9b9T-dKTzlr2c/edit?tab=t.0#heading=h.7o2l8ye2g3ra.

in Colorado committed to increasing affordable housing by 22,988 units statewide.[291] If the AHFF adds 23,000 affordable units every three years, it will completely address Colorado's affordable housing gap in under 18 years.[292] Moreover, community commitments are publicly available, making it a strong accountability mechanism.[293] It forces communities to publicly assert a realistic growth goal and live up to that expectation. It also provides a singular goal behind which the community may rally. Now, the entire program can be assessed by the stakeholders without intermediation.

The AHFF also requires communities to change local land-use policies to expedite permitting for developments in which more than 50% of the units are affordable.[294] The process for "any application for a special permit, variance, or other development permit, excluding subdivisions" may not take longer than ninety days.[295] This process is called the "fast track process" and is notably not exclusively for projects in which the AHFF has invested or provides financing.[296] As the statute is currently drafted, it seems that each decision cannot take longer than 90 days, but the overall process may still take longer. This means that 217 jurisdictions have tackled their regulatory regimes to permit more affordable housing in their communities. For example, the City and County of Denver engaged in an entire system review and redesign.[297] To help pilot this process, Denver created the Affordable Housing Review Team (AHRT).[298]

291. *Commitment Filings*, COLO. DEP'T OF LOCAL AFFAIRS, https://cdola.colorado.gov/commitment-filings (last visited Nov. 18, 2025).

292. *See 2025 Colorado Housing Profile*, NAT'L LOW INCOME HOUS. COAL., https://nlihc.org/sites/default/files/SHP_CO.pdf (last visited Nov. 18, 2025) (Colorado estimates it must produce or make affordable 134,000 units to meet the demand).

293. *Commitment Filings*, *supra* note 292.

294. COLO. REV. STAT. § 29-32-105(2)(a) (2022).

295. *Id.* There are several exceptions and carve outs from this requirement. Some allow developers to extend the process, while others permit local staff to reasonably extend the deadline. *Id.* at § 29-32-105(2)(b)-(c).

296. *Id.* at § 29-32-105(2)(a).

297. *See City of Denver, Prop. 123 Fast Track Process*, CITY OF DENVER (Aug. 20, 2025), https://denvergov.org/files/assets/public/v/1/community-planning-and-development/documents/ds/presentations/250820_fast_track_open_house.pdf.

298. *Affordable Housing Review Team*, CITY OF DENVER, https://www.denvergov.org/Government/Agencies-Departments-Offices/Agencies-Departments-Offices-Directory/Community-Planning-and-Development/Plan-

This team is overseen by relevant internal city departments.[299] The City of Fort Collins applied for a grant from Colorado's Department of Local Affairs (DOLA) to use the "lean" process improvement methodology to lower its approval time.[300] The City of Golden's City Council considered simply reducing the process outright.[301]

Finally, the AHFF requires local projects to demonstrate how the units will remain affordable.[302] For both the equity and concessionary debt programs, projects must enter into a regulatory agreement with the relevant state agency.[303] The terms of the regulatory agreements are not included in the statute. However, DOLA provided a nonexhaustive list of potential mechanisms, land use restriction agreements, community land trusts, and deed restrictions that would qualify as meeting Proposition 123 compliance requirements.[304] Regardless of the mechanism, the property must remain affordable for at least 30 years.[305] Interestingly, the projects that receive funding from the equity program will be considered "qualified properties"

Review-Permits-and-Inspections/Zoning-Permits/Site-Development-Plan-Review/Affordable-Housing-Review-Team (last visited Nov. 19, 2025).

299. *Id.*

300. FORT COLLINS, COLO., ORDINANCE NO. 059 (May 21, 2024); *see also A Brief History of Lean*, LEAN ENTERPRISE INSTITUTE https://www.lean.org/explore-lean/a-brief-history-of-lean/ (last visited Mar. 3, 2026).

301. Memorandum from Karl Onsanger, Planning Supervisor, Golden, Colo., to Carly Lorentz, Deputy City Manager, Golden, Colo., (May 14, 2024) https://goldenco.granicus.com/MetaViewer.php?clip_id=5357&meta_id=134944&view_id=2. Interesting Golden staff believe that a "zoning-by-right" option was limited without a rezoning or other major public approval process. *Id.*

302. *Infra* note 348.

303. *Proposition 123: Equity Program*, COLO. OFF. OF ECON. DEV. AND INT'L TRADE, https://coloradoaffordablehousingfinancingfund.com/wp-content/uploads/2025/08/Prop123-CO-AHFF-EquityProgramGuidelines-V4.pdf (last visited Nov. 19, 2025) [hereinafter *Equity Program Guidelines*]; *see also Multifamily Finance*, COLO. OFF. OF ECON. DEV. AND INT'L TRADE, https://coloradoaffordablehousingfinancingfund.com/concessionary-debt/multifamily-finance/ (last visited Nov. 19, 2025) [hereinafter *Debt Program Guidelines*].

304. *Document Examples for Proposition 123*, Colo. Dep't of Local Aff's., https://docs.google.com/document/d/13S7aj11ViHhQNfFqG4pEVxb78hiV6RQxon57XqF2cZY/edit?tab=t.0#heading=h.l9i1co4a5qpu (last visited Nov. 19, 2025).

305. *See Equity Program Guidelines*, *supra* note 304; *see also Debt Program Guidelines*, *supra* note 304.

under C.S.R. § 29-4-1202, which entitles the local jurisdiction a right of first refusal for thirty days.[306]

Much like that of a board of directors setting attainable metrics for their management team, the metrics of Proposition 123 do not prescribe the "how," but merely the "what." But they are clearly related to the fund's purpose and can then be analyzed and debated by supporters, detractors, regulators, and the legislature. The outcomes of more housing will be measured against the cost of the program along with the private capital leveraged across the portfolio.[307]

Some may ask whether the metrics and processes are to protect taxpayers' money from misappropriation. However, that leads to ex ante control robbing the AHFF of crucial speed and flexibility. Yes, in most government programs (which are predicated on grants), protecting taxpayers' dollars through rigorous and thorough process is prudent. But the simple metrics of the Proposition 123 illuminate a different understanding of risk. The first risk is that the program fails to deliver housing.[308] The second risk is to protect taxpayer dollars not against loss, but against misallocation to projects that do not actually produce affordable units. To that end, the simple metrics, coupled with the financing mechanisms themselves, provide stakeholders with as much protection as is prudent without choking the operational capacity of the AHFF. If the development fails, then the debt is recoverable, if not entirely, then partially as a creditor. If the project succeeds but does not produce sufficient affordable units, the worst thing that can

306. *See Equity Program Guidelines*, *supra* note 304; COLO. REV. STAT § 29-4-1202(1)-5 (2024).

307. For reference, [...] In the reports, the office and the division shall include the following information about each affordable housing program: (a) The applicants for funding, the projects funded, and the projects that were denied, along with the reason for the denial; (b) The anticipated or actual number of households served and the number of affordable housing rental units and for-sale units funded; and (c) The geographic distribution of the funding

308. *See* Bedayn, *supra* note 251; *see also* Peter Lifari & Chris Brown, *2022 Colorado State Ballot Proposition 123: "Dedicated State Income Tax Revenue for Affordable Housing*, COMMON SENSE INST. COLO. (Sep. 14, 2022), https://www.commonsenseinstituteus.org/colorado/research/housing-and-our-community/2022-colorado-state-ballot-proposition-123-dedicated-state-income-tax-revenue-for-affordable-housing; EZRA KLEIN & DEREK THOMPSON, ABUNDANCE (2025) (outlining federal and local government programs that fail to engender broad support by ultimately failing to deliver public good).

happen is the AHFF gets the money back with some return and can deploy that capital wiser than before. Potentially, the AHFF could institute within their investment documents penalties triggered by failing to abide by affordable housing covenants. The point is that even if the money was misallocated to market-rate houses, the AHFF still built more houses. The AHFF will then have to answer why some of the money went to that project. That is the correct level of accountability. These metrics clearly prioritize what is important to Colorado, but do not meddle with how the fund achieves the goals.[309]

C. *Legitimacy: State Funding with Local Doing*

As evidenced by 200 out of 336 eligible jurisdictions opting into the program, Proposition 123 has struck the right balance between state (aggregate) interest and local (implementation) control.[310] The state's role is aggregating capital, spreading investments around to different communities, and structuring the incentives to achieve policy objectives.[311] This permissive structure is then joined with a general opt-in posture on behalf of the local governments and jurisdictions.[312] The state created the sandbox in which the local jurisdictions have the freedom to create solutions suited to the specific realities of each community.[313]

The Proposition 123 approach incorporates democratic legitimacy at several points within the process. This democratic redundancy means the people's voice is not a one-time declaration, but an ongoing conversation. First, Proposition 123 was approved by voters in a state-wide referendum.[314] Second, local communities must then opt into the program, a decision made by elected or appointed officials from the community itself,

309. These metrics resemble, at least in nature, metrics used to determine if a single human being is worth $1 trillion. *See* Tesla Inc., Schedule 14A at 61 (Proxy Statement) (Oct. 17, 2025). Uncomplicated, direct, nowhere to hide for everyone involved.

310. Robert Tann, *Has Proposition 123 — Colorado's Voter-Approved Affordable Housing Fund — Made a Difference in High-Cost Mountain Towns?*, SUMMIT DAILY (Aug. 20, 2024), https://www.summitdaily.com/news/colorado-mountain-town-affordable-housing-fund/.

311. *See supra* Part IV.A-B.

312. *Id.*

313. *See generally* Tann, *supra* note 311 (discussing the program AMI was raised to accommodate the much higher cost of living in rural resort towns).

314. Bedayn, *supra* note 251.

who are therefore more responsive to feedback and dissent.[315] Third, the benchmarking, public commitment to growing affordable units, and potential public input on land use law changes provide additional public input.[316] Finally, each project, even if expedited, will still undergo some level of public scrutiny through the typical entitlement process.[317]

Opponents of Proposition 123 claim the measure probably would not have passed if there had been any sort of organized opposition.[318] There was a reason there was no organized opposition: what constituency would oppose the measure? Proposition 123 dissipated opposition by using funds from a budget surplus. It also undercut opposition by using an opt-in device for local communities. Additionally, all projects are first identified and developed by local communities with their private-sector partners, and then submitted to the fund for financing. There is no central agency foisting housing development, particularly affordable housing, onto communities against their will. It is hard to argue "Not In My Backyard" if the response is, "Okay." What is more democratic than not living with the choices *someone else* makes?

D. *Impact: Just Give People the Money*

Perhaps the most innovative, if nascent, aspect of Proposition 123 is the TEV. The TEV entitles tenants living in projects funded by either the equity or debt AHFF programs to a share in the equity of that project.[319] The share is structured as a waterfall, where the AHFF investment will first earn back its hurdle rate, and any excess profits over the project's expected return flow to the TEV.[320]

The TEV was initially developed by the Colorado Housing Accelerator Initiative (CHAI).[321] Since 2022, CHAI has invested

315. Lifari & Brown, *supra* note 309.
316. *See supra* Part IV.A-C.
317. COLO. REV. STAT. § 29-32-105(2)(a) (2022). The statute does not require the elimination of permitting and zoning law.
318. *See* Bedayn, *supra* note 251.
319. COLO. REV. STAT. § 29-32-104(1)(b)-(c) (2022).
320. *Id.*
321. Roshan Abraham, *Colorado is Pioneering A Way to Let Renters Earn Cash Back For Paying Rent*, NEXT CITY: BACKYARD (June 20, 2024), https://nextcity.org/urbanist-news/colorado-prop-123-tenant-equity-vehicle-renters-earn-cashback-paying-rent. [hereinafter *Renters Earn Cash*].

over $25 million in loans and equity in 13 projects.[322] CHAI has created or preserved 559 affordable units and ten at market rate.[323] CHAI's TEV works the same as the state TEV, wherein excess equity or debt payments made above expected returns are funneled into payments for the tenants, so long as they make their monthly rent payments on time.[324] In 2024, CHAI provided an average of $249 per renter annually plus a profit share of $47 from 2023 revenue.[325] The CHAI's cash-back to tenants is not restricted and can either accumulate or be used by the tenants at their discretion.[326] CHAI anticipates it will reach 400 participating tenants by the end of 2026 and reliably produce $500 per year in benefits for each participating tenant.[327] Even early in the program, of the 145 eligible residents, 30 had opened checking accounts, and 22 had activated debit cards. At the same time, 45 tenants had enrolled in a credit-building program and made 553 on-time payments.[328]

CHAI leadership claims that cash back is more engaging to tenants than simply lowering rents.[329] This is perhaps best illustrated by the experience of one TEV tenant, who used her accumulated cash back to purchase gas late at night in a rural community.[330] She did not have enough money on her to buy gas, and it was too late to call anyone.[331] She used her TEV cash-back to get home and avoid spending the night in the car with her daughter, who has a rare heart condition.[332]

The state version of TEV appears slightly more restrictive than CHAI's private program. The state TEV restricts the use of the TEV cash toward a down payment on a home or other "related purposes," like increasing personal savings.[333] This restriction was probably either a legal requirement or a demand

322. COLO. HOUS. ACCELERATOR INITIATIVE, 2024 IMPACT REPORT 3 (2024), https://chaifunds.com/wp-content/uploads/2025/02/CHAI-2024-Impact-Report-Final.pdf [hereinafter CHAI REPORT 2024].
323. *Id.*
324. *See Renters Earn Cash*, *supra* note 322.
325. CHAI REPORT 2024, *supra* note 323, at 3.
326. *Id.* at 6.
327. *Id.* at 7.
328. *Id.*
329. *See Renters Earn Cash*, *supra* note 322.
330. *See id.*
331. *See id.*
332. *See id.*
333. COLO. REV. STAT. § 29-32-104(1)(b) (2022).

from state legislators for their vote.[334] Either way, it is a reasonable, if perhaps unfortunate, restriction. Part, if not all, of the impact is the flexibility and sense of agency that receiving even a small amount of cash can give a family. CHAI's TEV does not produce life-changing amounts of money, but, when combined with an affordable apartment, credit-enhancing programming, and a sense of obligation and dignity, it begins to add up.

The only shortcoming with both the state and CHAI TEV design is the lack of either actual or even beneficial ownership. CHAI leadership called the TEV a "proxy for ownership."[335] Adding some ownership aspect, even if attenuated, would close the loop on the use of private ordering for social impact. Leveraging corporate and trust law could empower those participating in the TEV to make material decisions regarding their homes and elevate their rights to the cash generated by the TEV mechanism. Granted, this assessment is made without access to the private documents of CHAI's TEV or the yet-to-be-formulated state TEV. It could be that the state of Colorado is considering implementing something akin to an individual development account,[336] which would provide some ownership structure to the relationship between the tenants and the AHFF's obligation to share excess profits with the TEV.

E. *Scale: Crowding in Private Capital*

CHAI was able to provide both below-market capital to affordable housing projects and cash back to renters because its limited partner investors were willing to accept a below-market return on their capital.[337] 92% of the CHAI's LPs contributed

334. H.B. 23-1304, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023) (the original submission, on Apr. 20, 2023, already possessed this language but the subsequent hearings and amendments do not provide history on this provision).

335. *See Renters Earn Cash*, *supra* note 322.

336. Individual Development Accounts are savings accounts offered to low-income and low-wealth individuals in partnership with a bank and nonprofit. They allow organizations to match the contributions made by the individual into the savings account, which can then be used for specific statutorily defined purposes, such as buying a home or starting a business. They are eligible for Community Reinvestment Act consideration. *See* OFF. COMPTROLLER OF THE CURRENCY, COMMUNITY DEVELOPMENTS FACT SHEET: INDIVIDUAL DEVELOPMENT ACCOUNTS 1 (Jan. 2018), https://www.occ.gov/publications-and-resources/publications/community-affairs/community-developments-fact-sheets/pub-fact-sheet-individual-dev-accounts-jan-2018.pdf.

337. *See Renters Earn Cash*, *supra* note 322.

their distributions to the TEV.[338] Some of the early supporters of the CHAI were large foundations such as Gary Community Ventures and the Gates Family Foundation.[339] Clearly, CHAI was successful in raising private impact investment sufficient to deliver on its dual mandate of increasing affordable housing and providing financial upside for the people living in the units.

However, even CHAI leadership understood that private impact investment was insufficient to meet the demand for affordable housing and wealth-building in low- to moderate-income communities.[340] They knew that only the state could raise sufficient impact capital to replicate the CHAI and TEV approach at the scale necessary to address the state-wide issue of affordable housing.[341]

Through the AHFF's forgivable loans, concessionary debt, and equity to crowd in commercial capital at the project level, not the fund level.[342] This approach allows the AHFF to make a case-by-case determination of whether the project's terms are sufficient to meet their affordability and other requirements. It also allows AHFF to serve one mandate, sustainably funding affordable housing, instead of two mandates (building affordable housing and delivering financial return to investors) that, at times, can be mutually exclusive. Finally, the size and reliability of the AHFF allow future housing developments to plan with some level of expectation on receipt of the funds. This will lead to increased development planning because the fund can project how much money will be available next year.[343]

The first and most straightforward product is the concessionary debt product. The AHFF loan product comes in four varieties: straight concessionary debt for multifamily developments, LIHTC gap financing, LIHTC pre-development loans,

338. CHAI Report 2024, *supra* note 323, at 3. This phrasing of this sentence leads one to believe that the limited partnership agreement between CHAI and their LPs did not include the right of the manager to retain excess earnings. Instead, it looks as though the manager of the fund was required to make distributions which in turn could be contributed to the TEV vehicle.

339. Colo. Hous. Accelerator Initiative, https://chaifunds.com/ (last visited Mar. 6, 2026).

340. *See Renters Earn Cash*, *supra* note 322.

341. *Id.*

342. *See supra* Part IV A.

343. *See* Affordable Hous. Fin. Fund, Fiscal Year 2026 Funding Plan (2025), https://coloradoaffordablehousingfinancingfund.com/wp-content/uploads/2025/06/Prop123-CO-AHFF-FiscalYear2026FundingPlan.pdf.

and the debt for housing manufacturers.[344] For the concessionary debt and the two LIHTC debt varieties, that rate is set at 2.5%.[345] The multifamily debt takes an additional step by offering up to 90% of the capital based on a loan-to-value (LTV) or loan-to-cost (LTC) calculation, and it does not require a debt service coverage ratio over 1.2.[346] This level of risk is above what a typical commercial lender will take on.[347] When combined with the below-market interest rate, this product can drastically reduce the cost of capital and thus the pressure to generate revenue. Alleviating this pressure should crowd in more commercial capital, either by narrowing the equity requirement to merely 10% of the capital stack or by attracting LIHTC investment.[348] Importantly, either dynamic will assist emerging developers.[349]

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344. *See* Affordable Hous. Fin. Fund, Proposition 123: Concessionary Debt Program Multifamily Finance Guidelines (2024) [hereinafter Multifamily Debt Guidelines], https://coloradoaffordablehousingfinancingfund.com/wp-content/uploads/2024/08/Prop123-CO-AHFF-ConcessionaryDebt-MultifamilyFinanceGuidelines.pdf.

345. *See id.* at 3; *see also* Affordable Hous. Fin. Fund, Proposition 123: Concessionary Debt Program LIHTC Gap Finance Guidelines 3 (2025) [hereinafter LIHTC Gap Guidelines], https://coloradoaffordablehousingfinancingfund.com/wp-content/uploads/2025/04/Prop123-CO-AHFF-ConcessionaryDebt-LIHTC-GapFinanceGuidelines.pdf; Affordable Hous. Fin. Fund, Proposition 123: Concessionary Debt Program LIHTC Predevelopment Finance Guidelines 3 (2024) [hereinafter LIHTC Predevelopment Guidelines], https://coloradoaffordablehousingfinancingfund.com/wp-content/uploads/2024/08/Prop123-CO-AHFF-ConcessionaryDebt-LIHTC-PredevelopmentFinanceGuidelines.pdf.

346. *See* Multifamily Debt Guidelines, *supra* note 345, at 1.

347. *See Multifamily Earnings Highlights*, Fannie Mae, https://multifamily.fanniemae.com/doing-business-us/financial-information/multifamily-earnings-highlights-year-end-2024. (last visited Nov. 21, 2024) (discussing that the debt financing for multifamily development was 63% of the total LTV and debt service coverage ratio was 2.0, which means the net operating income must be double what the debt payment).

348. Urban Land Institute, Financing Equitable Development: A Survey of Sources and Approaches 2 (2023) https://knowledge.uli.org/-/media/files/research-reports/2023/2023-financing-equitable-development—a-survey-of-sources-and-approaches.pdf.

349. Brett Theodos, Jorge González-Hermoso & Noah McDaniel, The Urban Inst., The Challenges Facing Small or Emerging Multifamily Housing Developers and Strategies to Overcome Them 3 (2025) [hereinafter Challenges Facing Developers], https://www.urban.org/sites/default/files/2025-09/The_Challenges_Facing_Small_or_Emerging_Multifamily_Housing_Developers_and_Strategies_to_Overcome_Them.pdf (discussing how barriers to finance both formal and informal prevent developers from growing from emerging to established, especially developers from communities traditionally excluded from wealth building and development).

AHFF's affordability requirements, on their face, are not more onerous than what these projects would already be required to achieve. For instance, AHFF concedes to any senior lender's affordability requirements.[350] Presumably, the AHFF is not going to accept a subordinate debt position that would not allow it to extract its base level of affordability. On the other hand, AHFF would likely be more than willing to take a subordinated debt position if the senior debt already requires greater affordability than AHFF requires. Moreover, the baseline affordability for projects financed by the debt is an average of 60% AMI for the restricted units, and must be kept affordable for 30 years as per the Regulatory Agreement.[351] This is roughly the same requirement that the LIHTC program already requires for projects that receive tax-credit financing.[352]

A less obvious benefit of the land bank forgivable loan is that it enables affordable housing developers to quickly acquire land they would not be able to acquire without this product. Land acquisition (sometimes called site control) can be particularly difficult for affordable housing developers because it almost always requires upfront capital to move quickly.[353] Large, market-rate developers have the liquidity and wherewithal to make large capital outlays and acquire parcels at full price before smaller or affordable developers can do so.[354] The asymmetry of cash between market-rate developers and smaller developers is more pronounced by how land is valued. Even if speed were not an issue, the price of land is often determined not just by comparables, like a home, but by what can be built on the land and how much revenue that development can generate.[355] This means a for-profit developer is willing to pay more for the parcel because they will make more money on the

350. *See* MULTIFAMILY DEBT GUIDELINES, *supra* note 345, at 4.

351. *Id.* at 2. The project can have 25% of the units that are not "affordable" but those units cannot be financed by the AHFF. This is always a legal fiction. Money is fungible.

352. Maxwell Jaffe & Dustin Ingram, *Chicago Fed. Letter No. 514: Expirations and Early Exits of LIHTC Units: Implications for the Affordable Housing Stock*, FED. RSRV. BANK OF CHICAGO 2 (Oct. 2025), https://www.chicagofed.org/publications/chicago-fed-letter/2025/514.

353. CHALLENGES FACING DEVELOPERS, *supra* note 350, at 3.

354. *Id.*

355. David Garcia, *Making it Pencil: The Math Behind Housing Development*, TERNER CTR. FOR HOUS. INNOVATION U.C. BERKELEY 5 (Aug. 2019) https://ternercenter.berkeley.edu/wp-content/uploads/pdfs/Making_It_Pencil_The_Math_Behind_Housing_Development.pdf.

project through higher housing costs. Whereas the affordable housing developer simply cannot pay the same price for the parcel because they would be forced to either lose money on the development or make the housing more expensive.[356] Another benefit of promoting site control is the ability to attract debt financing, as there is now collateral under control.[357] Finally, this product introduces another aspect that expedites affordable housing development, and that is the deferred interest in the event the parcel is not developed for affordable housing, essentially acting as an option. All of these benefits level the playing field for smaller, affordable housing developers who are more cash-constrained than the for-profit competitors.

This "option approach" is an interesting and, more importantly, simple enforcement approach. From a regulatory perspective, it allows necessary, but highly contingent activities to move forward without clogging the process with ex ante compliance. Instead of requiring the project to undergo an arduous approval process before the project begins, the option prices in the undesired contingency and impose a financial punishment ex post. This allows the project to get underway much more quickly without forgoing the protection or oversight responsibilities, and in the end, the worst-case scenario is that the AHFF has more funding than it did before. This posture would not be appropriate in every regulatory space, but in the "building stuff" domains, this could unlock an immense level of human activity without abdicating the state's police power.

The concern with the option approach is that during the 10-year period, the owner uses the land for purposes not aligned with affordable housing (for example, for use as a parking lot), the owner stands to make way more than the cost of the loan upon maturity. At that point, the borrower would be more than willing to hand over the loan or even the land, and the land would then have to be expensively repurposed. This risk that land will be misappropriated and borrowers will receive a windfall at the taxpayers' expense can be ameliorated if the

356. CHALLENGES FACING DEVELOPERS, *supra* note 350.

357. *Id.* at 3.

"Lenders don't lend 100 percent. They want you to have some skin in the game, so depending on the project type, you're responsible for bringing 20 to 30 to 40 percent to the table. That's the thing. We just don't have that access. We can get it. It's going to take us a while, but by the time we get it, we missed an opportunity." *Id.*

deferred interest is large enough to deter that kind of behavior. Currently, the deferred interest is set at 2%,[358] well below even U.S. Treasury rates.[359] If the option approach is to work more fully, that deferred interest rate should be set much higher.[360]

The equity product is two different products, one for purely affordable developments and another for mixed-income developments.[361]

With the equity investment product for 100% affordable projects, the AHFF may supply program equity up to the entire balance of the project's equity requirement after the developer's contribution.[362] Repayment of the program investment is permitted at a "capital event" (e.g., refinance or sale) beginning in the third year after construction completion.[363] AHFF assumes full repayment at that time of underwriting the investment, but if full payment is not feasible, partial repayment may occur and any unpaid balance may be assumed by a subsequent purchaser.[364] In that event, AHFF may condition the assumption on an extension of the affordability term after evaluating the property's capital needs at disposition.[365] Projects must satisfy a minimum debt-coverage ratio of 1.10 over must-pay debt.[366] These terms are subsidies intended to make capital "easier" to manage. But none of these terms directly address the cost of capital, which directly affects how much revenue a project must generate.

358. *Land Banking*, COLO. OFF. OF ECON. DEV. & INT'L TRADE, https://coloradoaffordablehousingfinancingfund.com/land-banking/ (last visited Mar. 7 2026).

359. *Daily Treasury Rates*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/resource-center/data-chart-center/interest-rates/TextView?type=daily_treasury_yield_curve&field_tdr_date_value=2026 (last visited Mar. 7, 2026).

360. The "administrator" of the program has the statutory authority to set the interest rate. The worry is that one developer takes advantage of the program and the entire process is thrown into question. Really, they should just keep turning up the interest rate until it really hurts to not do the affordable housing development.

361. *See* EQUITY PROGRAM GUIDELINES, *supra* note 304.

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.* Must-pay is a term of art and includes debt, taxes, and other fees. It does not include developer fees or preferred dividends. This debt is often called senior debt, but AHFF uses the term "must-pay."

The problem is that the AHFF does not expressly state what its cost of capital is in the program materials. Instead, the AHFF constructs a "shared fate" waterfall. AHFF participates in pari passu (Latin for on the same foot, or "you get one, I get one") in net receipt of operating cash flow and capital-event proceeds in proportion to its equity share, which if the private investors want to make a distribution from the project, they must provide the same distribution to AHFF.[367] The developer may earn a fee up to 7%, payable at different milestones, closing, construction completion, and at conversion.[368] AHFF caps the developers' internal rate of return (IRR) on equity at 10% by year thirty.[369] If the property meets or exceeds its underwritten IRR at a capital event, the sponsor may elect to receive a promoted structure entitling it to 15% of remaining profit after the developer's IRR hurdle is cleared.[370]

This is where things become less clear. Normally, the promote for the sponsor/developer is triggered when the LP receives a return exceeding the LP's hurdle rate.[371] However, it is difficult to tell when the promote is triggered because the AHFF, or the LP in the structure, does not specify the required IRR, other than stating that it will be below prevailing market rates.[372] The AHFF caps the developer return, yet it is a soft cap. The developer still receives a fee (cash flow based on the equity percentage) and a 15% promote at the time of sale, which, if the property has a healthy cash flow, could be substantial.[373] Despite the ambiguity, the equity seems to be generating a healthy appetite for the equity product.[374]

In the mixed-income product, AHFF likewise may provide program equity for the entirety of the post-sponsor equity need, with full repayment permitted at a capital event beginning in year three post-completion.[375] As with the fully affordable product, partial repayment and assumption by a buyer are

367. *Id.*
368. *Id.* It is assumed that it is 7% of total development costs, usually minus the cost of land, which here might have been $0 anyway.
369. *Id.* at 3.
370. *Id.*
371. Nathaniel M. Marrs & Alan Van Dyke, *Real Estate Joint Venture Waterfalls and Clawbacks: Variations and Complications*, 32 REAL EST. J. 206, 207 (2016).
372. EQUITY PROGRAM GUIDELINES, *supra* note 304, at 1.
373. *Id.* at 1, 3.
374. AHFF 23–24 Report, *supra* note 242, at 2, 9.
375. EQUITY PROGRAM GUIDELINES, *supra* note 304, at 2.

permissible, and AHFF may require an extended affordability term upon assumption based on then-current capital-needs analysis.[376] Given the more market-driven objectives of the project, the minimum debt-coverage ratio is higher, at 1.20 on all must-pay obligations, and the developer fee is capped at 4%, payable at closing, completion, and conversion.[377] The program equity again participates pari passu in cash flow and capital events.[378] Developer equity may be structured with a preferred return of up to 15% during the first five years; however, where the holding period exceeds five years, the preferred return must average 12% or less over the entire operating period.[379] As in the affordable product, if the property meets or outperforms its underwritten IRR at a capital event, the developer may opt into a promote of 15% of remaining profits after clearing the developer's IRR hurdle.[380]

Generally, the mixed income product uses the same mechanism as that of the fully affordable mechanism. It increases the debt coverage ratio from 1.1 to 1.2 and, while that is a material change, it is probably still below market.[381] Moreover, the guidelines make it clear that the cost of AHFF's capital (whatever that might be) will still be below market, but higher than that of the purely affordable product. Again, this is to be expected. Yet the mixed-income product does shift some of the risk back to the developer through a lower fee not to exceed 4%.[382] The AHFF then allows the developer to recoup some of that risk capital by taking a preferred dividend, which then decreases after five years.[383] This decrease occurs because, after five years, the property is far less risky and the developer has likely recovered most of the risk capital.[384] Again, the AHFF caps the IRR for the developer, albeit at a higher 12% IRR, but that is probably necessary to induce for-profit developers to participate in the program.[385] This subsidy feels as though it is intended to attract developers that are already

376. *Id.* at 3.
377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.*
381. *Id.*
382. *Id.*
383. *Id.*
384. *Id.*
385. *Id.*

planning to build a market-rate development, but need additional equity to secure senior debt and begin the project. The developer is then willing to accept a lower IRR and make some units affordable because, without the AHFF equity, the project will not proceed at all.

V.
Conclusion

This Article began by asking how impact investing and social entrepreneurship can be sustained amid political, economic, and institutional uncertainty. Durability is unlikely to come from retreat, insulation, or a narrowing of ambition. Instead, recent public–private deals demonstrate investment terms can influence firm behavior and advance public objectives. U.S. Steel, MP Materials, and Intel show that social entrepreneurship can operate within conventional capital markets and corporate forms, even as they expose the limits of ad hoc design and centralized control.

The cases examined here illustrate recurring challenges: unclear alignment between stated public purposes and governance rights, weak mechanisms for local accountability, and uncertainty about the disposition of financial returns generated by public risk-taking. These shortcomings do not undermine the legitimacy of impact-oriented investment, but they do highlight the need for clearer frameworks that link subsidy, control, and benefit in a more transparent and durable way. Absent such development, the field risks being defined by episodic interventions rather than coherent, repeatable structures.

The Community Carried Interest is offered as one such framework. By reallocating a portion of residual returns to affected communities, the CCI treats social impact as a question of ownership and economic alignment rather than compliance or discretion. The experience of Colorado's Proposition 123 suggests that this approach can function at scale while remaining compatible with commercial capital. In that sense, the current moment is not a threat to impact investing or social entrepreneurship, but an opportunity to refine their legal and financial architecture—to sustain the field by further developing it, rather than retreating from it. We must not concede.