For Whom is the Corporation Managed?

The Debate over Purpose

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LARRY FINK'S 2018 LETTER TO CEOS

A Sense of Purpose

Dear CEO,

As BlackRock approaches its 30th anniversary this year, I have had the opportunity to reflect on the most pressing issues facing investors today and how BlackRock must adapt to serve our clients more effectively. It is a great privilege and responsibility to manage the assets clients have entrusted to us, most of which are invested for long-term goals such as retirement. As a fiduciary, BlackRock **engages with companies** to drive the sustainable, long-term growth that our clients need to meet their goals.

In 2017, equities enjoyed an extraordinary run – with record highs across a wide range of sectors – and yet popular frustration and apprehension about the future simultaneously reached new heights. We are seeing a paradox of high returns and high anxiety. Since the financial crisis, those with capital have reaped enormous benefits. At the same time, many individuals across the world are facing a combination of low rates, low wage growth, and inadequate retirement systems. Many don't have the financial capacity, the resources, or the tools to save effectively; those who are invested are too often over-allocated to cash. For millions, the prospect of a secure retirement is slipping further and further away – especially among workers with less education, whose job security is increasingly tenuous. I believe these trends are a major source of the anxiety and polarization that we see across the world today.

We also see many governments failing to prepare for the future, on issues ranging from retirement and infrastructure to automation and worker retraining. As a result, society increasingly is turning to the private sector and asking that companies respond to broader societal challenges. Indeed, the public expectations of your company have never been greater. Society is demanding that companies, both public and private, serve a social purpose. To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate.

Without a sense of purpose, no company, either public or private, can achieve its full potential. It will ultimately lose the license to operate from key stakeholders. It will succumb to short-term pressures to distribute earnings, and, in the process, sacrifice investments in employee development, innovation, and capital expenditures that are necessary for long-term growth. It will remain exposed to activist campaigns that articulate a clearer goal, even if that goal serves only the shortest and narrowest of objectives. And ultimately, that company will provide subpar returns to the investors who depend on it to finance their retirement, home purchases, or higher education.

CORPORATE GOVERNANCE

Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'

AUG 19, 2019

Updated Statement Moves Away from Shareholder Primacy, Includes Commitment to All Stakeholders

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WASHINGTON – Business Roundtable today announced the release of a new Statement on the Purpose of a Corporation signed by 181 CEOs who commit to lead their companies for the benefit of all stakeholders – customers, employees, suppliers, communities and shareholders.

Since 1978, Business Roundtable has periodically issued Principles of Corporate Governance. Each version of the document issued since 1997 has endorsed principles of shareholder primacy – that corporations exist principally to serve shareholders. With today's announcement, the new Statement supersedes previous statements and outlines a modern standard for corporate responsibility.

"**The American dream is alive, but fraying**," said Jamie Dimon, Chairman and CEO of JPMorgan Chase & Co. and Chairman of Business Roundtable. "**Major employers are investing in their workers and communities because they know it is the only way to be successful over the long term. These modernized principles reflect the business community's unwavering commitment to continue to push for an economy that serves all Americans.**"

Business Roundtable

Statement on the Purpose of a Corporation

Americans deserve an economy that allows each person to succeed through hard work and creativity and to lead a life of meaning and dignity. We believe the free-market system is the best means of generating good jobs, a strong and sustainable economy, innovation, a healthy environment and economic opportunity for all.

Businesses play a vital role in the economy by creating jobs, fostering innovation and providing essential goods and services. Businesses make and sell consumer products; manufacture equipment and vehicles; support the national defense; grow and produce food; provide health care; generate and deliver energy; and offer financial, communications and other services that underpin economic growth.

While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to <u>all</u> of our stakeholders. We commit to:

- Delivering value to our customers. We will further the tradition of American companies leading the way in meeting or exceeding customer expectations.

- Investing in our employees. This starts with compensating them fairly and providing important benefits. It also includes supporting them through training and education that help develop new skills for a rapidly changing world. We foster diversity and inclusion, dignity and respect.

- Dealing fairly and ethically with our suppliers. We are dedicated to serving as good partners to the other companies, large and small, that help us meet our missions.

- Supporting the communities in which we work. We respect the people in our communities and protect the environment by embracing sustainable practices across our businesses.

- Generating long-term value for shareholders, who provide the capital that allows companies to invest, grow and innovate. We are committed to transparency and effective engagement with shareholders.

Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country.

The Business Roundtable's 1997 Statement

In The Business Roundtable's view, the paramount duty of management and of boards of directors is to the corporation's stockholders; the interests of other stakeholders are relevant as a derivative of the duty to stockholders. The notion that the board must somehow balance the interests of stockholders against the interests of other stakeholders fundamentally misconstrues the role of directors. It is,

Corporate Governance | Geo-economics | Governance for Sustainability

Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution

A general view shows the mountain resort of Davos, Switzerland, January 25, 2019 Image: REUTERS/Arnd Wiegmann - RC149B671960

02 Dec 2019

Klaus Schwab
Founder and Executive Chairman, World Economic Forum

A. The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders – employees, customers, suppliers, local communities and society at large. The best way to understand and harmonize the divergent interests of all stakeholders is through a shared commitment to policies and decisions that strengthen the long-term prosperity of a company.

Have you read?

Why we need the 'Davos Manifesto' for a better kind of capitalism

i. A company serves its customers by providing a value proposition that best meets their needs. It accepts and supports fair competition and a level playing field. It has zero tolerance for corruption. It keeps the digital ecosystem in which it operates reliable and trustworthy. It

Predictions for 2030: What if we get things right?

PRI | Home

https://www.unpri.org/

PRI | Principles for Responsible Investment

Resources, events, signatories, more...

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LATEST RESOURCES

Responsible investment DDQ for forestry investors

Responsible investment DDQ for farmland investors

ESG integration in Europe, the Middle East, and Africa: Markets, practices and data

The PRI Awards

The PRI L Group

Table C.2: Example sustainability performance data providers and analysis and ratings agencies

SCORE	INDICATORS	DATA	ANALYSIS
The Bloomberg Terminal. Reports ESG data for 9,500 publicly-listed companies in 83 countries, displayed alongside financial data. Assigns to companies absolute and relative scores and indicates performance over time. Data dashboards also include Bloomberg's annual *ESG Disclosure Score* and third-party sustainability ratings.			
Company ESG ratings: n/a *ESG Disclosure Score*: An absolute score between 1 and 100	120 indicators	Self-reported (directly to Bloomberg and via publicly available documents (annual reports, websites, sustainability reports, etc.)); checked and standardized	*Company ESG ratings*: Assesses, among other things: carbon emissions, climate change effect, pollution, waste disposal, political contributions, discrimination, diversity, human rights, executive compensation, shareholders' rights, and independent directors *ESG Disclosure Score*: Assesses disclosure of quantitative and policy-related ESG data
ImpactBase. ImpactBase is a free online database of 425+ impact investing funds and products.			
n/a	34 indicators (14 overview, 15 financial, 5 impact)	Self-reported by fund managers	Does not rate or score funds or products; rather, provides overview, financial, and impact-related information
Institutional Shareholder Services (ISS). Publishes the *Environmental & Social QualityScore (E&S QualityScore)*—a measure of the quality of E&S data disclosure for ~4,700 publicly-traded companies—and the *Governance QualityScore (G QualityScore)*—a measure of the quality of governance practices for 5,600+ publicly-traded and widely-held companies. ISS also provides a suite of other sustainability data and research services through its DataDesk platform; includes collecting and providing data on boards and their directors and company executives and data on specific sectors and issues. Operates ISS Ethix, which provides advice for integrating sustainability factors into investment decision-making.			
E&S QualityScore and G QualityScore: companies are placed into deciles (1–10) that represent a relative score	*E&S QualityScore*: 380 indicators *G QualityScore*: 200 indicators	*E&S QualityScore and G QualityScore*: Collected from company websites, sustainability reports, company policies, etc.; verified	*E&S QualityScore*: Assesses depth and extent of E&S information disclosure as a proxy measure for companies' understanding of their E&S risks and preparedness for addressing them *G QualityScore*: Assesses corporate governance quality across 4 dimensions: board structure, compensation/remuneration, shareholder rights, and audit practices; factors are weighted based on governance practices and voting and regional governance standards
Morningstar. The *Morningstar Sustainability Rating* assesses sustainability performance of ~20,000 mutual funds and ETFs. Higher sustainability ratings oftentimes (but not always) correlate with high star ratings for risk-adjusted returns.			
Rating of 1 to 5 globes, indicates performance relative to industry group ratings	2 (underlying companies' ESG scores and ESG controversies)	*Underlying companies' ESG scores*: assessed by Sustainalytics using 70+ indicators *ESG controversies*: n/a	Fund ratings are calculated first by assigning ESG scores to underlying companies' ESG scores (1 to 100, measures of ESG preparedness, disclosure, and performance relative to peers) then subtracting points for ESG controversies (incidents that negatively impact the environment and society).
MSCI. MSCI generates *ESG Ratings* for 6,500 companies and 590,000+ fixed income securities worldwide. These ratings are one part of MSCI's larger ESG data, research, and analysis services, which also include: company, industry, and thematic reports; portfolio analytics; data feeds; and indexes.			
A relative, industry-specific score from AAA to CCC	96 indicators	Collected from government and non-government organization datasets, company disclosure documents, and media sources; data are verified	Assesses exposure to ESG risks and risk management capabilities

Sources: www.bloomberg.com/impact/impact/esg-data/; www.issgovernance.com/; www.msci.com/esg-ratings; www.sustainalytics.com/our-solutions/#esgintegration; Davis Polk (2017). ESG Reports and Ratings: What They Are, Why They Matter?. July 12, 2017; www.investopedia.com/terms/m/morningstar-sustainability-rating.asp; www.impactbase.org.

Note: Table is for illustrative purposes and does not represent an endorsement of these entities.

Figure 1 MSCI ESG Key Issue Hierarchy

3 Pillars	10 Themes	37 ESG Key Issues	
Environment	Climate Change	Carbon Emissions Product Carbon Footprint	Financing Environmental Impact Climate Change Vulnerability
	Natural Resources	Water Stress Biodiversity & Land Use	Raw Material Sourcing
	Pollution & Waste	Toxic Emissions & Waste Packaging Material & Waste	Electronic Waste
	Environmental Opportunities	Opportunities in Clean Tech Opportunities in Green Building	Opp's in Renewable Energy
Social	Human Capital	Labor Management Health & Safety	Human Capital Development Supply Chain Labor Standards
	Product Liability	Product Safety & Quality Chemical Safety Financial Product Safety	Privacy & Data Security Responsible Investment Health & Demographic Risk
	Stakeholder Opposition	Controversial Sourcing	
	Social Opportunities	Access to Communications Access to Finance	Access to Health Care Opp's in Nutrition & Health
Governance	Corporate Governance*	Board* Pay*	Ownership* Accounting*
	Corporate Behavior	Business Ethics Anti-Competitive Practices Tax Transparency	Corruption & Instability Financial System Instability

** Corporate Governance Theme carries weight in the ESG Rating model for all companies. In 2018, we introduce sub-scores for each of the four underlying issues: Board, Pay, Ownership, and Accounting.*

Harvard Law School Forum on
Corporate Governance and Financial Regulation

It's Time to Adopt the New Paradigm

Posted by Martin Lipton, Wachtell, Lipton, Rosen & Katz, on Monday, February 11, 2019

1 Comment Print E-Mail Tweet

Tags: Asset management, Boards of Directors, Corporate culture, Corporate Social Responsibility, Engagement, Long-Term value, Management, Shareholder activism, Shareholder voting, Short-termism, Stakeholders, Stewardship
More from: Amanda Blackett, Karessa Cain, Kathleen Iannone, Martin Lipton, Sabastian Niles, Steven Rosenblum

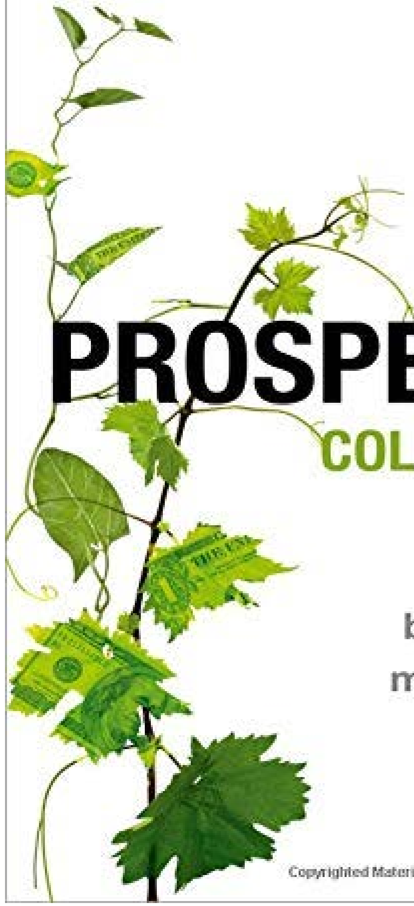
Editor's Note: Martin Lipton is a founding partner of Wachtell, Lipton, Rosen & Katz, specializing in mergers and acquisitions and matters affecting corporate policy and strategy. This post is based on a Wachtell Lipton publication by Mr. Lipton. This post is based on a Wachtell Lipton memorandum by Mr. Lipton, Steven A. Rosenblum, Karessa L. Cain, Sabastian V. Niles, Amanda S. Blackett, and Kathleen C. Iannone.

Capitalism is at an inflection point. For the past 50 years, corporate law and policy has been misguided by Nobel Laureate Milton Friedman's ex-cathedra doctrinal announcement that the sole purpose of business is to maximize profits for shareholders. Corporations have also been faced with technological disruption, globalization and the rise of China, capital markets dominated by short-term trading and focused on quarterly profits, and unrelenting attacks and threats by activist hedge funds. In response to these pressures, corporations focused primarily on increasing shareholder wealth in the short-term, at the expense of employees, customers, suppliers, long-term value and the local and national communities in which they operate. The prioritization of the wealth of shareholders at the expense of employee wages and retirement benefits, with a concomitant loss of the Horatio Alger dream, gave rise to the deepening inequality and populism that today threaten capitalism from both the left and the right.

Action by corporations, asset managers, and investors is imperative. We have developed *The New Paradigm*—a roadmap for an implicit corporate governance and stewardship partnership—based on the idea that corporations and shareholders can forge a meaningful and successful private-sector solution to attacks by short-term financial activists and the short-termism that significantly impedes long-term economic prosperity. *The New Paradigm* is structured to obtain its benefits without the ill-fitting encumbrance of legislation and regulation. It is flexible and self-executing by corporations notifying their investors that they have adopted it and by investors notifying the corporations in which they have invested that they have adopted it. It is not a contract and can be unilaterally modified.

The Changing Landscape

After the 2008 fiscal crisis, the role of the corporation began to receive closer examination. This was fueled by, among other things, recognition of short-termism as a cause of the fiscal crisis, a growing concern about climate change, the failure of wages to keep pace with inflation, and a recognition in academia that Friedman's shareholder primacy, the related Chicago School theories of an efficient market (Eugene Fama), and agency cost (Michael Jensen and Fama) were fueling discontent and systemic imbalance. Within a few years after 2008, many corporations and investors, and most



PROSPERITY

COLIN MAYER

better business makes the greater good

115TH CONGRESS
2D SESSION

S. 3348

To establish the obligations of certain large business entities in the United States, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 15, 2018

Ms. WARREN introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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A BILL

To establish the obligations of certain large business entities in the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Accountable Capitalism Act".

SEC. 2. DEFINITIONS.

In this Act:

(1) DIRECTOR.—The term "Director" means the Director of the Office.

(2) LARGE ENTITY.—

What is going on?

- Political dysfunction is distorting settled arrangements
- The political problem(s):
  - Post 2008 populist shift
    - Feeling “left out”
    - Rising levels of inequality
    - Donald Trump
    - Brexit
  - Legislative deadlock
    - U.S. Congress has ceased to legislate including on
      - Climate change
      - Redistribution
    - And getting worse?
      - Corbyn?
      - Accountable Capitalism Act . . . Or something similar?

The “corporate governance” response . . .

- Redefining corporate “purpose”: Colin Mayer, <u>Prosperity</u>
- A “New Paradigm”
  - Martin Lipton
  - Davos Manifesto
- ESG in boardroom
  - Employee voice
  - Climate change as a board issue
  - Board and workforce diversity

In contrast to . . .

- The traditional US/UK view:
  - Corporate Law is about solving a set of problems
    - Locking in capital for the long term
    - Centralized management
    - Tradeable shares
    - Controlling agency costs
      - Shareholder-manager
      - Controlling Shareholder-Non Controlling Shareholders
      - Shareholder-creditor
  - Other problems have other (regulatory) solutions
    - Environmental regulation
    - Redistribution through the tax system
    - Labor law
  - Managers expected to manage companies subject to these side-constraints

What is going on?

- "For whom is the corporation managed?" is, at least, four different questions:
  - Law: what is the best theory of the "corporation" as an enterprise form?
  - Finance: how to think about the firm?
    - Theoretical
    - Empirical
  - Management: how to build successful companies?
  - Politics:
    - The social responsibilities of large business entities
    - Corporate Governance as substitute for political gridlock and dysfunction

The Legal Debate: What must a theory of the corporate form explain?

- Form has been used since the mid-1800s with more or less the same form:
  - Legal Personality with indefinite life
  - Limited Liability
  - Transferable shares
  - Delegated management with a board structure
  - Investor ownership/shareholder voting
  - Capital Lockin
- Used in variety of contexts
  - Concentrated ownership
  - Dispersed ownership
  - Capital intensive industries
  - Service industries
- Varied uses:
  - Publicly traded firms
  - Closely held firms
  - Wholly owned subsidiaries
  - Special Purpose Vehicles
  - Mutual corporations
- Incredible record of success in generating wealth
- A form that provides firms with the flexibility necessary to solve managers' key challenge: organizing the "inputs" to the firm to work together and compete in competitive markets

Not purely theoretical: The Restatement of the Law of Corporate Governance

- The American Law Institute
  - Restatement projects: Torts, Contracts, Property, Agency, and many more
  - The ALI and corporate law
    - 1930s: early attempt to launch a Restatement of Corporate Law
    - 1978: Principles of Corporate Governance (completed 1994)
- Restatement of Corporate Governance: launched January 2019
- Reporter: me
- Associate Reporters:
  - Jill Fisch (Univ. of Pennsylvania Law School)
  - Marcel Kahan (NYU School of Law)
- The process of a Restatement
  - Drafts
  - Advisers and Members Consultative Group
  - ALI Council
  - ALI membership

A preliminary draft

RESTATEMENT Section 2.01

The objective of a business corporation [§ 1.12] is to promote the value of the corporation for the benefit of its shareholders, within the boundaries set by law. In doing so, a corporation may have regard (among other matters) to—

(a) the likely consequences of any decision in the long term,

(b) the interests of the corporation's employees,

(c) the need to foster the corporation's business relationships with suppliers, customers and others,

(d) the impact of the corporation's operations on the community and the environment,

(e) the desirability of the corporation maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly as between shareholders of the corporation.

Key elements

- Ultimate beneficiaries: shareholders
- Within boundaries of the law
- Huge flexibility during “normal” midstream management
- Limitations at end game and other boundary cases

Why I think Draft 2.01 restates the law, at least in Delaware: “shareholder primacy”

- The Delaware GCL scheme. Under the DGCL:
  - Only shareholders get to vote on:
    - § 109 (Bylaws)
    - § 211, 215 (directors)
    - § 242 (charter amendments)
    - § 251 (mergers)
    - § 271 (Sale of all or substantially all the assets)
    - § 275 (dissolution)
  - Only shareholders get to sue: § 327
  - Under § 281, shareholders are the residual beneficiaries (“Any remaining assets shall be distributed to the stockholders of the dissolved corporation”)
  - Public Benefit Corporation Sections: §§ 361-368

Why I think Draft 2.01 restates the law, at least in Delaware: “shareholder primacy”

- The cases: when interests of shareholders and other stakeholders diverge
  - The decisive Delaware statement: Revlon (but also Macmillan, Paramount v. QVC, Barkan, etc.)
  - The “wholly owned subsidiary” cases: “in a parent and wholly-owned subsidiary context, directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders.”
    - Anadarko Petro. Corp., 545 A.2d 1171, 1174 (Del. 1988).
    - Trenwick American Litigation Trust v. Ernst & Young, LLP, 906 A.2d 168, 200-202 (Del. Ch. 2006)
    - Quadrant Structured Prods. Co. v. Vertin, 103 A.3d 155, 184 (Del. Ch. 2014)
  - The bondholder/preferred/common stock cases
    - Katz v. Oak Industries, 508 A.2d 873 (Del. Ch. 1986)
    - Jedwab v. MGM Grand Hotels, Inc., 509 A.2d 584 (Del. Ch. 1986)
    - HB Korenvaes Inv., L.P. v. Marriott Corp., 1993 Del. Ch. LEXIS 90
    - Equity-Linked Investors L.P. v. Adams, 705 A.2d 1040 (Del. Ch. 1997)
    - In re Trados Inc. S’holder Litig., 2009 Del. Ch. LEXIS 128
    - LC Capital Master Fund, Ltd. V. James, 990 A.2d 435 (Del. Ch. 2010)

Why I think Draft 2.01 restates the law, at least in Delaware: “shareholder primacy”

- Legislative reform efforts: Constituency statutes (32 states have some form)
  - Example: 15 Pa. Cons. Statutes § 1715. Exercise of powers generally.

    (a) General rule.--In discharging the duties of their respective positions, the board of directors, committees of the board and individual directors of a business corporation may, in considering the best interests of the corporation, consider to the extent they deem appropriate:

      (1) The effects of any action upon any or all groups affected by such action, including shareholders, employees, suppliers, customers and creditors of the corporation, and upon communities in which offices or other establishments of the corporation are located.

      (2) The short-term and long-term interests of the corporation, including benefits that may accrue to the corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the corporation.

      (3) The resources, intent and conduct (past, stated and potential) of any person seeking to acquire control of the corporation.

      (4) All other pertinent factors.

    (b) Consideration of interests and factors.--The board of directors, committees of the board and individual directors shall not be required, in considering the best interests of the corporation or the effects of any action, to regard any corporate interest or the interests of any particular group affected by such action as a dominant or controlling interest or factor. The consideration of interests and factors in the manner described in this subsection and in subsection (a) shall not constitute a violation of section 1712 (relating to standard of care and justifiable reliance).

Why I think Draft 2.01 restates the law, at least in Delaware: "shareholder primacy"

- Legislative reform efforts: Public Benefit Corporations

Del GCL § 362 Public benefit corporation defined; contents of certificate of incorporation.

(a) A "public benefit corporation" is a for-profit corporation organized under and subject to the requirements of this chapter that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation. In the certificate of incorporation, a public benefit corporation shall:

(1) Identify within its statement of business or purpose pursuant to § 102(a)(3) of this title one or more specific public benefits to be promoted by the corporation; and

(2) State within its heading that it is a public benefit corporation.

(b) "Public benefit" means a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature. "Public benefit provisions" means the provisions of a certificate of incorporation contemplated by this subchapter.

Why I think Draft 2.01 restates the law, at least in Delaware: “shareholder primacy”

Del. GCL § 365 Duties of directors.

(a) The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation’s conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.

(b) A director of a public benefit corporation shall not, by virtue of the public benefit provisions or § 362(a) of this title, have any duty to any person on account of any interest of such person in the public benefit or public benefits identified in the certificate of incorporation or on account of any interest materially affected by the corporation’s conduct and, with respect to a decision implicating the balance requirement in subsection (a) of this section, will be deemed to satisfy such director’s fiduciary duties to stockholders and the corporation if such director’s decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve.

(c) The certificate of incorporation of a public benefit corporation may include a provision that any disinterested failure to satisfy this section shall not, for the purposes of § 102(b)(7) or § 145 of this title, constitute an act or omission not in good faith, or a breach of the duty of loyalty.

RESTATEMENT Section 2.01

The objective of a business corporation [§ 1.12] is to promote the value of the corporation for the benefit of its shareholders, within the boundaries set by law. In doing so, a corporation may have regard (among other matters) to—

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Hard Questions

- May v. Must?
    - “May” better captures Delaware law:
        - Wholly owned subsidiaries
        - Mutual companies
        - Public companies
    - “Must” is dangerous because it implies enforcement
        - By whom? By the relevant stakeholder?
    - “Should, when appropriate . . .”?
- Corporate charitable giving
    - Clearly ok if rationally tied to shareholder value
    - Must it be tied to shareholder value?
- Ethical considerations
    - Clearly ok if rationally tied to shareholder value
    - Must boards go through that exercise?

Hard Questions

- “Within the boundaries of the law”: the Duty of Legality
  - Easy cases: bribery; pollution
  - But what about
    - UPS drivers double parking to deliver packages?
    - Boards taking on legal and regulatory risk?
    - Uber expanding into NYC?
      - Elizabeth Pollman & Jordan Barry, Regulatory Entrepreneurship, 90 S. CAL. L. REV. 383 (2017)
  - How to capture this?
    - PCG (1994): “To the same degree as a natural person”?
      - But there are lots of laws that only apply to corporations
    - Alternative language?

What is going on?

- “For whom is the corporation managed?” is, at least, four different questions:
  - Law: what is the best theory of the “corporation” as an enterprise form?
  - Finance: how to think about the firm?
    - Theoretical
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  - Politics:
    - The social responsibilities of large business entities
    - Corporate Governance as substitute for political gridlock and dysfunction

The Other Debates: Finance

- Should the BRT statement change how Finance economists model the firm?
  - No.
  - Governance structure creates a power structure that privileges shareholder interests.
  - “Shareholder primacy” still remains a good first order approximation with the normal caveats
    - Firm is solvent
    - No controlling shareholder
    - Minimal regulation
  - But if the law changes? If Senator Warren’s Accountable Capitalism Act becomes law?

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The Other Debates: Management

- Should the BRT statement change how managers manage the firm?
  - No: "shareholder primacy" was NEVER a (sensible) management theory or strategy
    - "It is a dumb idea . . . The idea that shareholder value is a strategy is insane. It is the product of your combined efforts – from the management to the employees". Jack Welch Interview, Financial Times (March 12, 2009).
  - But this can be forgotten:
    - Joseph L. Bower & Lynne Paine, THE ERROR AT THE HEART OF CORPORATE LEADERSHIP (Harvard Business Review May/June 2017)
      - "A widespread belief holds that 'maximizing shareholder value' is the number one responsibility of boards and managers. But that's confused as a matter of corporate law and a poor guide for managerial behavior—and it has a huge accountability problem baked into it."
- What is the link between the LEGAL theory of the corporation and management ideology?
  - Law has an expressive dimension. E.g., Revlon
  - But structures of power and market forces are very strong

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The Other Debates: Politics

- Political dysfunction undermines traditional approach, and undermines political legitimacy of large corporations.
- Is “shareholder primacy” politically sustainable?
  - The Populist turn
  - The current debate as a political response
  - The BRT Statement did not emerge in a vacuum
- And did not go without response:
  - Elizabeth Warren’s letter to Jamie Dimon

Elizabeth Warren’s Letter to Jamie Dimon

ELIZABETH WARREN
MASSACHUSETTS

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October 3, 2019

Jamie Dimon
Chairman and Chief Executive Officer
JPMorgan Chase & Co.
270 Park Avenue
New York, NY 10017

Dear Mr. Dimon:

I write in regard to the Business Roundtable’s (BRT) new *Statement on the Purpose of a Corporation* issued on August 19, 2019.[1] This new statement marked a potentially significant change. It reversed the Business Roundtable’s troubling position, held since 1997, that “corporations exist principally to serve shareholders,”[2] [3] instead acknowledging that “each of [y]our stakeholders is essential” and committing to “deliver value to all of them, for the future success of our companies, our communities and our country.”[4] You signed the pledge to follow these principles on behalf of JPMorgan Chase. I write for information about the tangible actions you intend to take to implement the principles, including whether, to make good on your commitment, you will implement the steps laid out in the *Accountable Capitalism Act* I plan to reintroduce in the coming weeks.

For most of our country’s history, as corporations succeeded, corporate profits and wages for working families all rose together. In the early 1980s, less than half of the corporate profits from America’s biggest companies went to shareholders, but now, as a result of decisions to boost share prices at the expense of workers, consumers, and other stakeholders, more than 90 percent of profits go to shareholders, representing a shift of trillions of dollars.[5] [6] In 2015 alone, American companies paid about $1 trillion back to investors in the form of buybacks and dividends, even as wages and other investments stayed flat or decreased.[7] While corporate profits

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[1] Business Roundtable, “Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans,” August 19, 2019, https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.
[2] *Id.*
[3] Business Roundtable, “Statement on Corporate Governance,” September 1997, http://www.ralphgomory.com/wp-content/uploads/2018/05/Business-Roundtable-1997.pdf.
[4] Business Roundtable, “Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans,” August 19, 2019, https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.
[5] Brookings Institute, “Stock buybacks: From retain-and-reinvest to downsize-and-distribute,” William Lazonick, April 2015, https://www.brookings.edu/wp-content/uploads/2016/06/lazonick.pdf.
[6] The Hill, “Congress can turn the Republican tax cuts into new middle-class jobs,” Opinion, William Lazonick, February 7, 2018, https://thehill.com/opinion/finance/372760-congress-can-turn-the-republican-tax-cuts-into-new-middle-class-jobs.
[7] “Makers and Takers”, Rana Foroohar, Crown Business, New York, 2017, p. 71

Is the “corporate governance” response good politics?

- Milton Friedman, The Social Responsibility of Business is to Increase its Profits, NY Times Magazine, September 13, 1970
  - Whether blameworthy or not, the use of the cloak of social responsibility, and the nonsense spoken in its name by influential and prestigious businessmen, does clearly harm the foundations of a free society. I have been impressed time and again by the schizophrenic character of many businessmen. They are capable of being extremely far-sighted and clear-headed in matters that are internal to their businesses. They are incredibly short-sighted and muddle-headed in matters that are outside their businesses but affect the possible survival of business in general. This short-sightedness is strikingly exemplified in the calls from many businessmen for wage and price guidelines or controls or income policies. There is nothing that could do more in a brief period to destroy a market system and replace it by a centrally controlled system than effective governmental control of prices and wages.

The politics of corporate purpose

- The Friedman claim:
  - departing from “shareholder primacy” is bad *politics*.
  - A modern thought experiment: President Eliz. Warren in August 2021
  - What arguments will be left?

Preliminary appraisal

- The problem: you cannot count on the legislature to perform traditional functions . . .
- And populism is plausibly a threat
- Will changing corporate law/governance head off that threat?
  - If so, many would say that the changes would be acceptable
  - But unlikely and . . .

A Dangerous Temptation

- Law has an expressive dimension
- Very tempting to use corporate LAW to improve the management of corporations in a way that makes them more legitimate politically.
- But corporate law, when it works well, does a FEW things WELL:
  - Defines the enterprise form (and a menu of other enterprise forms: general partnerships, limited partnerships, LLCs, LLPs, etc), providing options for organizing economic activity
  - Controls agency costs
- The corporate form as a vehicle for wealth creation has been wildly successful
- The risk of tampering with it: if you ask corporate law to do too much, it will end up not doing anything at all.~