

Putting to Rest the Debate Between Corporate Social Responsibility and Current Corporate Law

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There is an ongoing debate regarding the role of publicly traded for-profit business corporations in addressing the many serious challenges confronting society, including some directly involving nonshareholder corporate stakeholders (such as employees and communities). It has been framed most recently by a statement issued by the Business Roundtable on the purpose of a corporation and a response by the Council of Institutional Investors.¹ As is the nature of many debates, some frame this as an all-or-nothing exercise, with a spotlight on the sharpest point of divergence, and with some calling for federal legislation to address the issue.

Stepping back from an all-or-nothing dichotomy, and regardless of whether one is ideologically for or against publicly traded for-profit business corporations spending corporate funds on societally important objectives, from a legal perspective this debate already has been solved.

Earlier this year, we authored an article titled “[Social Responsibility and Enlightened Shareholder Primacy: Views From The Courtroom and Boardroom](#).”² The bottom line of the article is that the shareholder primacy rule, which governs Delaware corporations (which constitute approximately 60 percent of the Fortune 500 companies), has sufficient room to accommodate socially responsible corporate expenditures — including those aimed at addressing the interests of nonshareholder stakeholders — determined in the lawful exercise of a board’s business judgment. The article highlights the Delaware judicial underpinnings of this “enlightened” shareholder primacy focus, and offers thoughts on how a board of directors can travel the path of social responsibility consistent with serving shareholder interests. In other words, a for-profit Delaware corporation is not precluded from taking social issues into account in the conduct of its business, so long as the corporation’s consideration of those social issues has a sufficient nexus to shareholder welfare and value enhancement or protection.³

We believe that the perspective provided above, based on Delaware’s well-established body of corporation law, has merit from a number of standpoints.

First, and most importantly, it provides the existing legal basis and practical guidance for corporations wishing to take socially responsible positions — including those responding to nonshareholder stakeholder interests — to do so immediately, consistent with the lawful exercise of a board’s business judgment.

Second, it avoids the need to redesign and implement an entirely new doctrine of corporate governance for “garden variety” for-profit business corporations.⁴ And it avoids the time-consuming, heated, public and, for many, unpleasant debate that would almost certainly accompany any such redesign effort.

¹ See, e.g., [Business Roundtable Statement on the Purpose of a Corporation](#) and the [Council of Institutional Investors press release in response](#).

² Harvard Law School Forum on Corporate Governance and Financial Regulation, February 21, 2019. The article originally ran as a Skadden client alert.

³ A number of other state courts are guided by Delaware corporate law if no statute or case law in the relevant jurisdiction otherwise governs the matter at issue.

⁴ Some states — but not Delaware — have “constituency statutes” that generally expressly permit directors to consider the interests of nonshareholder constituencies when making decisions about their companies.

As noted in our article, in 2013, Delaware amended its corporation law, adding provisions permitting the formation of “public benefit corporations.” Delaware General Corporation Law §§361-368. These provisions, among other things, specifically modify the shareholder primacy principle by requiring directors to balance the pecuniary interests of shareholders, the interest of those materially affected by the corporation’s conduct and the public benefits identified by the corporation in its charter.

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Third, it acknowledges our current private enterprise system, implemented in very large measure through publicly traded for-profit business corporations, as flexible and capable of allowing boards of directors, in considering the best interests of shareholders, to be responsive to new and evolving issues facing corporations, including those involving nonshareholder stakeholders as well as more general societal issues and sensitivities regarding them.

To be clear, vis-a-vis any particular proposed action, any number of internal matters will need to be addressed, including gathering information and understanding the relative merits and trade-offs of alternative courses of action and how they may ultimately deliver value for shareholders as well as benefit other stakeholders or more general societal interests. And after a board exercises its business judgment and a particular action plan is approved and made public, any number of interested parties may weigh in, including shareholders, other stakeholders, third-party organizations with views on the issue and politicians. Nevertheless, a properly functioning board gathering the information

and making a decision that is intended to benefit shareholders as well as advance the interests of nonshareholder corporate stakeholders or more general societal interests will have acted in a manner consistent with today's legal framework (at least in Delaware) and should have the protections afforded to directors' decision-making under current Delaware corporate law, including, importantly, the business judgment rule.

The ongoing debate concerning the role of the for-profit public corporation in society does not appear likely to subside in the near-term. Whether companies take into consideration societal interests, including the interests of nonshareholder stakeholders in the corporation, within the context of serving shareholder interests ultimately is a matter of business judgment for boards of directors. The shareholder primacy model is not a barrier to doing so. However, the question will still remain whether for-profit public corporations sufficiently avail themselves of this flexibility to quell critics of the perceived narrow operational focus of the shareholder primacy model, including forestalling efforts by those who call for systemic change.