Stockholders Versus Stakeholders — Cutting the Gordian Knot

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Directors of most for-profit U.S. corporations have long considered the corporation's relationships with customers, employees, suppliers and the communities in which they operate — sometimes referred to as "stakeholders"[1] — in the course of overseeing the building, operating and growing of the corporations' businesses. In more recent years, the concepts of "stakeholders" and "stakeholder interests" have greatly expanded, with the interests generally falling under the umbrella of environmental, social and governance (ESG) matters.[2] Now current and ongoing events, including the COVID-19 pandemic and the increased attention to systemic racism following the killing of George Floyd, add new and increasing complexity for boards of directors as they consider stakeholder interests in the context of navigating their businesses through economic headwinds. Calls from some quarters for boards to focus on these stakeholder interests, while distinguishing them from stockholder interests, have sown confusion and misunderstanding. This article, through stating a series of guiding principles, attempts to "cut through it all" like the Gordian Knot, bring clarity to the discussion and provide real-world guidance for director decision-making.

Principle 1: Directors' statutory mandate and fiduciary duties contemplate consideration of long-term value. Directors who serve on boards of for-profit Delaware corporations have broad authorization to exercise their business judgment, consistent with their fiduciary duties to stockholders, with a long-term view of enhancing and protecting corporate value for the benefit of stockholders.[3]

Principle 2: Stakeholders interests may support long-term value. If a rational nexus exists between specific stakeholder interests and a long-term view of enhancing and protecting the economic value of a corporation, then directors of that corporation may consider such interests when determining what is in the best interests of the company and its stockholders.

Principle 3: Many proponents of stakeholder interests believe they support long-term value. Many (perhaps most) who urge directors of U.S. for-profit corporations to take into consideration "stakeholder interests" acknowledge — in fact, desire — that, in doing so, directors will be acting in furtherance of the protection and enhancement of

[1] Early use of the term "stakeholder" primarily referenced specified non-stockholder constituencies (named in anti-takeover "constituency statutes" adopted by over 30 states starting in the early 1980s) that a board was permitted to consider as potentially having identifiable interests in a corporation — such as employees, customers, suppliers and local communities in which the corporation operated, and sometimes state and national economies. Today, many believe that for-profit corporations have a broad social responsibility (not just a responsibility to stockholders) and that society in general, and supporters of any social responsibility issue in particular, have a stake in the corporation meeting its social responsibility vis-à-vis that issue.

[2] ESG topics include, among other topics: (i) racial, gender and LGBTQ diversity and equity; (ii) human capital management (including worker health protection and care, job position and pay equity, job safety and workforce retirement planning); (iii) executive compensation; (iv) human rights; (v) the opioid crisis; (vi) gun control; (vii) drug pricing; (viii) political contributions; (ix) lobbying; (x) environmental concerns, including climate change, sustainability and energy-related matters; and (xi) a range of corporate governance-related issues.

[3] In Delaware (and other states that follow its jurisprudence), there are a few context-specific exceptions, such as in connection with the "sale of control" of a company where directors will need to exercise their fiduciary duties to seek the best price then reasonably available. *See, e.g., Lyondell v. Ryan*, 930 A.2d 235 (Del. 2009).

the corporation's long-term viability, sustainability and, ultimately, value. The Business Roundtable and BlackRock are two prominent examples.[4]

Principle 4: Stakeholder interests that support long-term value align with stockholder interests. In many cases, stakeholder interests will be aligned with the interests of stockholders in support of long-term value creation. Presenting the two as in conflict often would be a false dichotomy.

- In short, any stakeholder interest (including any policy, program or effect), the support or implementation of which would, in the informed, independent, disinterested and good faith judgment of a corporation's board of directors, increase or preserve the value of the corporation over the long term should be considered a stockholder-aligned interest, unless the board is not permitted in the circumstances to take a long-term view or otherwise does not believe doing so would be in the best interests of stockholders.

Principle 5: Boards should exercise oversight with respect to stockholder-aligned interests. U.S. corporate boards that have not already done so would be well served to address the subject of stockholder-aligned interests, including those, if any, on which they should focus (see Principle 6 below), how they should design their ongoing oversight function and how they should communicate the operation of the board's oversight role. To be clear, given the plethora of stockholder-aligned interests and other needs and initiatives of the company, directors should have considerable discretion in narrowing their focus regarding which, if any, of such interests to assess and pursue.

- As part of their oversight, in conjunction with selecting a particular stockholder-aligned interest to pursue, boards should consider how the corporation's efforts will be measured, what goals will be set consistent with the corporation's overall business strategy and what information the board needs to exercise its oversight role.
- Boards and compensation committees in particular should assess whether these stockholder-aligned interests and related goals are relevant for executive compensation purposes and, if so, how to address this.
- Directors should develop a thorough understanding of how differing stockholder-aligned interests may impact the corporation differently and focus on where stockholder-aligned interests might be in conflict, with board involvement being necessary or helpful to resolve conflicts or otherwise prioritize among competing stockholder-aligned interests.
- Directors should consider how best to communicate the corporation's approach and progress to investors and other stakeholders.

Principle 6: Directors should focus on the relevance of stockholder-aligned interests. Director oversight should focus at the outset on whether, why and how any generally identified stockholder-aligned interest under consideration is relevant to that particular corporation. Each interest will not have the same relevance for every corporation. The directors of each company will need to determine, among other things, whether and how the interests on which they focus relate to their company's business strategy, risk and risk mitigation profiles, reputational objectives and concerns, reactions of company constituencies, and fundamentally the prospect of benefitting the company's long-term value proposition.

Principle 7: Boards should carefully manage processes relating to stockholder-aligned interests. The processes for considering, pursuing, monitoring and communicating about stockholder-aligned interests need to be carefully managed — including because they likely will be scrutinized by various other parties, possibly including stockholders, proponents or opponents of particular interests and other constituencies, presenting the risk of litigation challenging the board's action or the corporation's disclosures and of other forms of negative reaction from stockholders, interested constituencies, governance commentators and competitors.

- Input from and engagement with investors, other stakeholders and outside experts on the perceived benefits and risks associated with particular stockholder-aligned interests may be appropriate.

[4] **The Business Roundtable:** The Business Roundtable's notable Statement on the Purpose of a Corporation adopted in August 2019 (and signed by the CEOs of 181 companies) makes clear that the vision of enhancing the long-term value of the corporation needs to extend to consideration of the interests of corporate stakeholders in addition to those of stockholders. Nevertheless, the statement still contains an express commitment "to … [g]enerating long-term value for shareholders." As stated by one CEO signatory (Tricia Griffith, President and CEO of Progressive Corporation): "CEOs work to generate profits and return value to shareholders, but the best run companies do more. They put the customer first and invest in their employees and communities. In the end, it's the most promising way to build long-term value."

BlackRock: In his 2019 letter to CEOs, Larry Fink, CEO of BlackRock, stated: "[W]e advocate for practices that we believe will drive sustainable, long-term growth and profitability." In BlackRock Investment Stewardship Global Corporate Governance & Engagement Principles, issued in January 2020, BlackRock stated: "Our fiduciary duty to clients is to protect and enhance their economic interest in the companies in which we invest on their behalf. … Our consideration of these [environmental and social] factors is consistent with protecting the long-term economic interest of our clients' assets."

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Principle 8: Pursuit of stockholder-aligned interests is subject to business constraints. Boards (and other supporters of particular stockholder-aligned interests) will need to accept that even regarding such interests that the board considers important for long-term value enhancement and protection of the corporation, the scope, scale and cost of the steps to be taken will be constrained by business considerations that vary from company to company and by the overarching mandate that the long-term benefit to the company and its stockholders is being achieved.

Principle 9: Business judgment rule protection for directors is achievable. The approach outlined above, taken in good faith by an informed, disinterested and independent board would in our view support the application of the business judgment rule to a Delaware corporation's board's decision to pursue stockholder-aligned interests.