



## A Brief Response Regarding Stakeholder Governance

Posted by Peter A. Atkins, Marc S. Gerber, and Kenton J. King, Skadden, Arps, Slate, Meagher & Flom LLP, on Tuesday, September 22, 2020

**Editor’s note:** Peter A. Atkins, Marc S. Gerber, and Kenton J. King are partners at Skadden, Arps, Slate, Meagher & Flom LLP. This post is based on a Skadden memorandum by Mr. Atkins, Mr. Gerber, Mr. King, and Edward B. Micheletti. Related research from the Program on Corporate Governance includes [The Illusory Promise of Stakeholder Governance](#) by Lucian A. Bebchuk and Roberto Tallarita (discussed on the Forum [here](#)); [For Whom Corporate Leaders Bargain](#) by Lucian A. Bebchuk, Kobi Kastiel, and Roberto Tallarita (discussed on the Forum [here](#)); and [Toward Fair and Sustainable Capitalism](#) by Leo E. Strine, Jr (discussed on the Forum [here](#)).

The recently published Forum post “[The Friedman Essay and the True Purpose of the Business Corporation](#)” defends a view of stakeholder governance that reflects the following two basic flaws:

1. It misstates to whom the fiduciary duties of directors of Delaware corporations (and of corporations organized in other states that follow Delaware law) are owed and, accordingly, the assured scope of protection of the business judgment rule for directors.
2. It ignores the reality that the interests of nonshareholder stakeholders can be—and increasingly are being—taken into account by corporations governed by Delaware law.

We have addressed each of these points at length in our prior Forum posts on the subject. (See our posts “[Stockholders Versus Stakeholders—Cutting the Gordian Knot](#)” (Aug. 2020); “[An Alternative Paradigm to ‘On the Purpose of the Corporation’](#)” (June 2020); “[Directors’ Fiduciary Duties: Back to Delaware Law Basics](#)” (Feb. 2020); and “[Putting to Rest the Debate Between CSR and Current Corporate Law](#)” (Sept. 2019). Our focus in this and prior posts on stating what Delaware director fiduciary duty law is currently for business corporations, rather than on alternative approaches, is necessary for purposes of advising directors today.) And we have offered in those posts guidance to directors regarding how to navigate legitimate and permissible efforts to consider nonshareholder stakeholder interests. We will not repeat that.

However, because of its central importance to the fiduciary duty and protection of directors, we address the following statement in the post to which we are responding:

I continue to advise corporations and their boards that—**consistent with Delaware law**—they may exercise their business judgment to manage for the benefit of the corporation and all of its stakeholders over the long term. That **it is the corporation, qua corporation, that commands the fiduciary duty of its board of directors**. (Emphasis added.)

This does not correctly describe Delaware law. As former Delaware Supreme Court Chief Justice Leo E. Strine, Jr. has stated.<sup>1</sup>

[A] clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, **directors must make stockholder welfare their sole end**, and that other interests may be taken into consideration only as a means of promoting stockholder welfare. (Emphasis added.)

If a board's decision-making process proceeds on the basis of a misconceived view regarding to whom the directors owe their fiduciary duties, we believe that the Delaware courts may not accord the directors the protection of the business judgment rule, but, rather, may apply the more rigorous entire fairness standard of review.

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<sup>1</sup> Leo E. Strine, Jr., "The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law," 50 *Wake Forest Law Review* 761,768 (2015). See also Robert G. Eccles, Leo E. Strine, Jr. and Timothy Youmans, "Purpose With Meaning: A Practical Way Forward," (posted on the Forum [here](#)). ("In the leading jurisdiction, Delaware, management *may* treat other stakeholders well so long as there are rational relating benefits to stockholders.") (Emphasis in the original.)