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A Framework for Management and Board of Directors
Consideration of ESG and Stakeholder Governance

As directors and shareholders become increasingly attuned to ESG considerations and stakeholder-oriented governance, they have sought guidance about how to incorporate these imperatives into the board's decision-making process—particularly regarding decisions that entail trade-offs or an allocation of resources between and among stakeholders and ESG objectives. Our answer to this question is rooted in the classic bedrock of board functioning: directors must exercise their business judgment. This is not only the practical answer—it is the essential animating principle of Delaware law.

Recently, many who continue to advocate for shareholder primacy, and therefore reject stakeholder governance, have sought to portray stakeholder interests in a zero-sum competition, arguing that it is impossible to properly exercise business judgment to reconcile such diverging interests. In their view, stakeholder governance is not only a radical departure from Delaware corporate law but also corrosive of the very essence of capitalism.

Of course, there may be tensions among differing interests involved in many significant business decisions, and the trade-offs inherent in such decisions may entail risks to the corporation. Yet, the balancing exercise that a board must undertake in connection with those decisions is hardly a novel endeavor. Those who argue that the corporation's stock price and shareholder returns should be the ultimate guidepost ignore that balancing interests and risks is the core of business judgment and improperly discount opportunities and potential value drivers that other stakeholders may bring to the table. They also ignore the risks inherent in the shareholder primacy model—such as damage to reputation, loss of valued employees, injury from defective products and loss of market share from failure to invest in R&D and capex. The myopic focus on shareholder primacy can have a distorting effect that impedes the board's ability to give weight to the broader panoply of opportunities and risks facing the corporation.

For their part, shareholders have also been seeking to better understand how ESG considerations should be incorporated into their perspective on valuation and how stakeholder governance impacts their role and functioning. How do the stewardship principles of shareholders relate to the stakeholder and ESG principles of the corporation? This question can be answered by government fiat, such as the

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Accountable Capitalism Act proposed by Senator Elizabeth Warren, or by engagement between the corporation and its shareholders. Faced with these stark alternatives, an ever-growing number of the major asset managers and asset owners have endorsed stakeholder and ESG governance.

Corporations that adopt stakeholder and ESG principles, with the implicit agreement of their shareholders achieved through active communication and engagement, will be best positioned to achieve sustainable growth over the long term. The objective is not to maximize the near-term stock price of the corporation; instead, as we have elsewhere [noted](#), the purpose of the corporation is to achieve and conduct a lawful, ethical, profitable and sustainable business in order to create value over the long term. This does not just permit but rather *requires* consideration of all the stakeholders that are critical to the corporation's success (shareholders, employees, customers, suppliers, creditors and communities). The task of identifying stakeholders, and mediating amongst them, properly rests with boards of directors acting on their informed business judgment. Shareholders are essential partners in the corporation's pursuit of this mission, and regular engagement between investors and directors is another necessary element of effective stakeholder-oriented governance.

Corporate action and decision-making, taken against the backdrop of this view of corporate purpose, will be fully protected by the business judgment rule, so long as it reflects the decisions of unconflicted directors acting upon careful deliberation. While the investigation, information, issues and the stakes are different, the process is not different from that which, for the past 35 years, has been routinely followed by corporate management and boards of directors in considering major investments, the appetite for risk and its management, the ethical "tone at the top," changes in business strategy, or a merger or sale of the corporation: careful consideration and documentation of management's recommendation and the advice and opinion of expert consultants.

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