Corporations Must Look to Adopt a New Paradigm

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Late one night during the financial crisis of 2008–2009, when working around the clock was the order of the day in the AIG war room, a team member left the building to grab takeout for dinner. Having forgotten to remove his AIG badge, he was punched by an irate passerby, a man incensed by the unfairness of it all. That financial gulf has only gotten bigger and more lethal in the past decade.

From that day on the two of us, as longtime corporate counselors, wondered, “Did the financial crisis last long enough to teach corporations its critical lessons?” Companies no longer serve just customers and shareholders, but a much broader audience that is as much impacted by the doings of large companies as those that they serve directly. When they sneeze, we all get colds.

A forthcoming article by Harvard Law Professors Lucian Bebchuk and Roberto Tallarita, both experts in corporate governance, spotlights how this country’s contentious debate over social justice and inclusion has cascaded into C-suites and boardrooms. Their essay explores whether publicly held companies should continue basing decisions on the interests of shareholders, or whether there’s been a paradigm shift, meaning that corporate executives should take into greater account the views and aspirations of such stakeholders as customers, employees, and community leaders.

As we can attest, the shareholder vs. stakeholder dynamic is not new and long predates the AIG and Wall Street experience. What *is* new is the urgency of the debate and an abiding belief in many quarters that now – more than ever – corporations must practice what we call “mercantile activism” to address societal ills and enhance their brand while they do it. If all companies are doing is *maximizing* profits for this quarter, what are the *liabilities* they are creating for the next? Even if the perfect storm of the pandemic and its financial devastation could not have been precisely predicted, down markets and their associated unrest could be. Historically, when the federal government becomes inactive in addressing societal problems, Wall Street steps into the void – at least to a degree. J.P. Morgan, Andrew Carnegie and even John D. Rockefeller eventually understood that.

After breaking down the arguments and volunteering some positive perceptions of shareholder capitalism, Professors Bebchuk and Tallarita conclude that the conventional model – shaping corporate actions around the (generally) short-term pecuniary desires of shareholders – is still the smartest path for publicly traded companies to pursue.

While they concede that a substantial number of corporate leaders support “stakeholderism” because it enables them to insulate themselves from short termist hedge fund activists and investors, they argue that stakeholderism “would impose substantial costs on stakeholders and society, as well as on shareholders.” Based on their analysis they counsel, “If stakeholder interests are to be taken seriously, stakeholderism should be rejected.” As if maximizing profits now doesn’t create liabilities later. Sometimes not much later at all.

We’d like to register a partial dissent. In our view, shareholders *are* stakeholders. To be sure, they’re at the top of the list, but their desires should not subsume those of other stakeholders. It’s difficult for many shareholders to see beyond the next quarter and the next stock dividend, which too often hamstrings corporations from recognizing longer-term or strategic imperatives.

Between us, we have advised hundreds of companies over the years, protecting their brand reputation through good times and bad, through tough crises and recoveries. We can distinguish between a “moment” and a “movement.” And we believe that what is happening in America today is a genuine paradigm shift, a movement toward transparency, accountability and inclusion that is not likely to abate until real change occurs. If companies do not substantially invest in diversity, equity and inclusion or sustainability today, will they soon be written off as not relevant going forward?

The world is changing — and we maintain that corporate America must adapt or be left behind.

In our estimation, the shareholder primacy paradigm for corporate governance should be redefined to include other constituencies, not only customers, shareholders and employees, but at least include a critical look at the holes in society and anticipate where investments in constituencies are sound and advisable. Companies don’t need to serve all of society, replacing the declining federal government, but they do need to at least look forward and do the math. Several states have had so-called “other constituencies” statutes on the books for many years, but Delaware (the home of most publicly traded corporations) does not, a reality that needs to change.

Not long ago, both Delaware and California enacted laws allowing for the incorporation of businesses with explicit social or public benefit purposes – an encouraging development that we hope gets emulated elsewhere.

Meanwhile, the Business Law Section of the California Lawyers Association has approved formation of a working group to study stakeholder capitalism. Bebchuk and Tallarita’s article should be required reading, but more compelling to us is the work of the Business Roundtable (BRT) in recent years listening to institutional investors and other thought leaders calling for stakeholder capitalism which the BRT then endorsed.

About the Authors:

Bill Ide, III

A veteran corporate strategist and trusted advisor to public and private companies, nonprofits, and public sector agencies, *clients turn to William "Bill" Ide for counsel on crisis response, corporate stewardship, reputation and risk management strategy and corporate governance.*

With an extensive history of representing boards and senior leadership in crisis and risk situations, Bill's practice focuses on providing independent counsel to clients by investigating facts, providing critical legal guidance and, when appropriate, objective remediation recommendations. A leader in the business and legal communities, Bill previously served as Senior Vice President and General Counsel at Monsanto Company, counsel to the United States Olympic Committee and president of the American Bar Association.

Within the business community, he serves on the boards of MetaJure and Rimidi Diabetes and previously served as a member of the Board of Directors of Albemarle Corporation (NYSE, ALB) where he chaired the Governance Committee and served on the Audit and Compensation Committees. He also served as a member of the Board of Directors of Popeyes Louisiana Kitchen, Inc. (NASDAQ: PLKI), where he chaired the Executive and Governance Committees, while also serving on the Audit Committee.

Committed to thought leadership and education, Bill is co-chair of the Advisory Board to the Conference Board's Governance Center and Program Chair for the Conference Board Chief Legal Officers Council. Bill was a senior fellow and co-founder of Emory University's Directors Institute. He currently serves on the Audit and Governance Committees of the Clark Atlanta University Board of Trustees and is General Counsel and Secretary of the EastWest Institute, where he also is chair of the Executive Committee.

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Richard Levick, Esq. is Chairman & CEO of LEVICK, representing countries and companies in the highest-stakes global communications matters – the Venezuelan crisis; Qatar; the Chinese trade war; the Gulf oil spill; Guantanamo Bay, the Catholic Church and many others.

Mr. Levick was honored multiple times on the prestigious list of "The 100 Most Influential People in the Boardroom" and has been named to multiple professional Halls of Fame for lifetime achievement.

He is the co-author of four books and is a regular commentator on television and in print. Mr. Levick speaks all over the world; at West Point, The Army War College and teaches at Fordham Law School.