

## The CLO's New Role in Advising on Corporate Purpose

By Michael W. Peregrine

The Business Roundtable's controversial new Statement on the Purpose of a Corporation (statement) provides a new opportunity for positive chief legal officer (CLO) engagement with the governing board.

As many corporate counsel are aware, the statement is a call for corporations to adopt corporate purposes to more fully incorporate a stakeholder, as opposed to shareholder, orientation. These purposes include commitments to "deliver value to customers," "invest in employees," "deal ethically and fairly with suppliers," "support the communities in which [they] work," and "generate long-term value for shareholders, who provide the capital that allows companies to invest, grow and innovate." In that regard, the statement seeks to redefine corporate purpose away from concepts of shareholder primacy towards promotion of "An economy that serves all Americans."

Since its release on Aug. 19, the statement has prompted substantial conversation and debate concerning corporate purpose,



and the corporation's commitment to corporate social responsibility. It is also encouraging more CEOs to refocus corporate strategies to address leading social issues of the day.

But with this attention comes important questions concerning the statement's impact on individual corporations, and on the fiduciary obligations of their board of directors. These are questions that should be the subject of focused board conversation. Given the statement's relationship to corporate law and governance, that conversation

can be best led by the CLO. Topics to be addressed might include:

**Why We Care:** Corporate leadership should give close consideration to the statement for two fundamental reasons: FIRST, it speaks to the connection between financial performance and social purpose, and SECOND, it goes to the core of a director's fiduciary duty—to what, or whom, is that duty owed? Those are issues of basic significance to all officers and directors.

**What It Isn't:** Most importantly, corporate leadership

should understand that the statement is not law. Neither does it carry the force of law, nor presage any legislative proposal that is currently under legislative consideration. Furthermore—as several leading legal observers have noted—Delaware law has never promoted the doctrine of shareholder primacy nor has it prevented directors from addressing the interests of other corporate stakeholders.

**What It May Be:** The Business Roundtable suggests that the statement reflects “best practice.” There is not, of course, any central authority that formally confers such a designation. But, in this case, we have a leadership initiative—the statement—endorsed by approximately 180 CEOs of leading American corporations. That’s getting pretty close to the definition of “best practice.” And given judicial deference to that status (i.e., “the best prophylactic against director liability”), it might be best to consider the statement as such.

**What’s Prompting It:** In order for corporate leadership to fully grasp the implications of the statement, it must understand the rationale for its development. Fundamentally, the statement represents the latest application of the corporate social responsibility movement, and an endorsement of sorts of the public advocacy of Blackrock CEO Laurence Fink, that “Purpose is not the sole pursuit of profits

but the animating force for achieving them.” It also reflects a concern that “the American Dream is alive, but fraying” due to growing economic inequity.

**What to Do About It:** The Business Roundtable doesn’t offer a roadmap for boards as they consider the company’s commitment to corporate social responsibility in general, and to implementing the Statement in particular. That is a question to be resolved by the board in the informed exercise of its business judgment. As the estimable Martin Lipton has noted, the board will be called upon to exercise a “balancing act” of sorts between important considerations of shareholder value, on the one hand, and the interests of other corporate stakeholders (and how serving a social purpose is linked to positive financial performance) on the other hand.

**What’s Coming:** To some, the statement is less a noble pronouncement of corporate responsibility, and more of an effort to self-regulate in anticipation of a less favorable political climate for business following the 2020 elections. Whatever the case, any boardroom discussion of corporate social responsibility may benefit from an awareness of the related views of the progressive presidential candidates.

Prominent among these is Sen. Elizabeth Warren’s “Accountable Capitalism Act,” which would require large corporations to

obtain a federal charter. Directors of chartered companies would be required to consider not just the interests of shareholders, but also those of employees, customers and the communities in which those corporations operate.

These and other elements of useful boardroom conversation fit well within the scope of the CLO’s roles as both technical legal adviser and, as “wise counselor” to board and management. Indeed, the CLO is likely already incorporating moral and ethical considerations as part of his/her client advice (as the professional rules contemplate). These capabilities uniquely qualify the CLO as a primary adviser to both the board and the executive leadership team on matters of corporate social responsibility, especially in the aftermath of the statement.

**Michael W. Peregrine**, a partner at the law firm of McDermott Will & Emery, advises corporations, officers, and directors on matters relating to corporate governance, fiduciary duties, and officer and director liability issues. His views do not necessarily reflect the views of the firm or its clients