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Introduction

In this issue of Pegasus, we bring you the legislation on corporate purpose and governance proposed by Senator and former Harvard Law Professor Elizabeth Warren. It is my conjecture that she has proposed this legislation in preparation for seeking the Democratic Party nomination for President of the United States in the 2020 election.

Regardless of her motivations, the contents of the draft legislation are important and thoughtfully crafted by experts in corporate social responsibility and corporate law. I expect this draft legislation to shape discussions and arguments over the legal norms of American capitalism. Some reform of current law is most likely to occur because of Senator Warren’s policy leadership. And what becomes reform of corporate law in the U.S. may well be emulated subsequently by other countries.

First, the major purpose of Senator Warren’s legislation is to prevent, going forward, the view that the sole purpose of a business corporation is to make a profit for the shareholders. Her legislation would require all large American companies ($1 billion or more in gross revenues annually) to obtain a charter from the federal government that requires them to serve the interests of all major stakeholders. This would shift large American corporate entities from pursuing shareholder capitalism to implementing stakeholder capitalism. This objective was set forth in the first of the Caux Round Table for Moral Capitalism’s (CRT) Principles for Business in 1994:

PRINCIPLE 1 - RESPECT STAKEHOLDERS BEYOND SHAREHOLDERS

• A responsible business acknowledges its duty to contribute value to society through the wealth and employment it creates and the products and services it provides to consumers.
• A responsible business maintains its economic health and viability not just for shareholders, but also for other stakeholders.
• A responsible business respects the interests of and acts with honesty and fairness towards its customers, employees, suppliers, competitors and the broader community.

The CRT Principles for Business provide guidance as to what stakeholders may expect from a company. Thus, our Principles could become helpful to courts in interpreting Senator Warren’s legislation, should it ever become law.
Stakeholder MANAGEMENT GUIDELINES

The CRT’s Stakeholder Management Guidelines supplement the CRT Principles for Business with more specific standards for engaging with key stakeholder constituencies.

The key stakeholder constituencies are those who contribute to the success and sustainability of business enterprise. Customers provide cash flow by purchasing good and services; employees produce the goods and services sold; owners and other investors provide funds for the business; suppliers provide vital resources; competitors provide efficient markets; communities provide social capital and operational security for the business; and the environment provides natural resources and other essential conditions.

In turn, key stakeholders are dependent on business for their well-being and prosperity. They are the beneficiaries of ethical business practices.

1. CUSTOMERS

A responsible business treats its customers with respect and dignity. Business, therefore, has a responsibility to:

a. Provide customers with the highest quality products and services consistent with their requirements.

b. Treat customers fairly in all aspects of business transactions, including providing a high level of service and remedies for product or service problems or dissatisfaction.

c. Ensure that the health and safety of customers is protected.

d. Protect customers from harmful environmental impacts of products and services.

e. Respect the human rights, dignity and the culture of customers in the way products and services are offered, marketed and advertised.

2. EMPLOYEES

A responsible business treats every employee with dignity and respects their interests. Business, therefore, has a responsibility to:

a. Provide jobs and compensation that contribute to improved living standards.

b. Provide working conditions that protect each employee's health and safety.

c. Provide working conditions that enhance each employee’s well-being as citizens, family members and capable and caring individuals.
d. Be open and honest with employees in sharing information, limited only by legal and competitive constraints.

e. Listen to employees and act in good faith on employee complaints and issues.

f. Avoid discriminatory practices and provide equal treatment, opportunity and pay in areas such as gender, age, race and religion.

g. Support the employment of differently-abled people in places of work where they can be productive.

h. Encourage and assist all employees in developing relevant skills and knowledge.

i. Be sensitive to the impacts of unemployment and work with governments, employee groups and other agencies in addressing any employee dislocations.

j. Ensure that all executive compensation and incentives further the achievement of long-term wealth creation, reward prudent risk management and discourage excessive risk-taking.

k. Avoid illicit or abusive child labor practices.

2. **SHAREHOLDERS**

A responsible business acts with care and loyalty towards its shareholders and in good faith for the best interests of the corporation. Business, therefore, has a responsibility to:

a. Apply professional and diligent management in order to secure fair, sustainable and competitive returns on shareholder investments.

b. Disclose relevant information to shareholders, subject only to legal requirements and competitive constraints.

c. Conserve, protect and increase shareholder wealth.

d. Respect shareholder views, complaints and formal resolutions.

3. **SUPPLIERS**

A responsible business treats its suppliers and subcontractors with fairness, truthfulness and mutual respect. Business, therefore, has a responsibility to:

a. Pursue fairness and truthfulness in supplier and subcontractor relationships, including pricing, licensing and payment in accordance with agreed terms of trade.

b. Ensure that business supplier and subcontractor activities are free from coercion and threats.
c. Foster long-term stability in the supplier relationships in return for value, quality, competitiveness and reliability.
d. Share information with suppliers and integrate them into business planning.
e. Seek, encourage and prefer suppliers and subcontractors whose employment practices respect human rights and dignity.
f. Seek, encourage and prefer suppliers and subcontractors whose environmental practices meet best practice standards.

2. **COMPETITORS**

A responsible business engages in fair competition, which is a basic requirement for increasing the wealth of nations and ultimately for making possible the just distribution of goods and services. Business, therefore, has a responsibility to:

a. Foster open markets for trade and investment.
b. Promote competitive behavior that is socially and environmentally responsible and demonstrates mutual respect among competitors.
c. Not participate in anti-competitive or collusive arrangements or tolerate questionable payments or favors to secure competitive advantage.
d. Respect both tangible and intellectual property rights.
e. Refuse to acquire commercial information through dishonest or unethical means, such as industrial espionage.

3. **COMMUNITIES**

As a global corporate citizen, a responsible business actively contributes to good public policy and to human rights in the communities in which it operates. Business, therefore, has a responsibility to:

a. Respect human rights and democratic institutions and promote them wherever practicable.
b. Recognize government’s legitimate obligation to society at large and support public policies and practices that promote social capital.
c. Promote harmonious relations between business and other segments of society.
d. Collaborate with community initiatives seeking to raise standards of health, education, workplace safety and economic well-being.
e. Promote sustainable development in order to preserve and enhance the physical environment while conserving the earth’s resources.

f. Support peace, security and the rule of law.

g. Respect social diversity, including local cultures and minority communities.

h. Be a good corporate citizen through ongoing community investment and support for employee participation in community and civic affairs.

The language of Senator Warren’s draft legislation follows the benefit corporation statutes recently enacted in some 30 U.S. states. The CRT took the lead in Minnesota to press for adoption of a benefit corporation statute here.

Richard Broderick, Editor of Pegasus, has excerpted key provisions in the draft legislation for your review. From time to time, we have published in Pegasus the original texts of important reports on business conduct, court opinions and orders of government regulatory bodies. We believe strongly that those who seek to be conversant with the realities of capitalism should be current on the operative language of principled sources of authority rather than rely on reports and commentaries, especially in this new age of social media spin and uninformed pontification.

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The following is a précis of the bill introduced by Elizabeth Warren (D-MA) on August 15, 2018 — S.3348: “The Accountable Capitalism Act.”. The full text is available on her Senate website (https://www.warren.senate.gov/legislation).

In general, the term “large entity” means that “organized under the laws of a State as a corporation, body corporate, body politic, joint stock company or limited liability company; engages in interstate commerce and in a taxable year...has more than $1,000,000,000 in gross receipts.”

The term “officer” means, with respect to a U.S. corporation, the president of the organization, the principal operating officer, accounting officer or controller of the entity, and any vice president in charge of a principal business unit, division, or function of the organization.

Charter Requirement:

In General – the charter of a large entity will state that is a U.S corporation whose purpose is a create a public benefit as identified in the corporate charter and in addition to such purposes, if any, outlined in the state where the corporation is formed.
Standard of Conduct for Directors and Officers:

1 Consideration of Interests – In discharging the duties of their respective position, the leaders of the corporation shall manage or direct the business and affairs of the U.S. Corporation in a manner that (i.) seeks to create a general public benefit; and (ii.) balances the pecuniary interests of shareholders with the best interest of those materially affected by conduct of the corporation including shareholders, employees of the corporation, suppliers, interests of customers and subsidiaries, the community where the corporation is headquartered, the local and global environment, benefits that may accrue to corporation from the long-term plans for the organization and the possibility that those interests might best be served by the continued independence of the corporation.

Standing – A proceeding to enforce the requirements of this section may be commenced or maintained only –

A) directly by the corporation to which the proceeding applies; or

B) Derivately under the laws of state in which the corporation is organized by a person or group that owns not less than 2 percent of the total number of share or 5 percent of the outstanding equity interests of an entity in which the corporation is a subsidiary at the time of this act.

Applicability of other Laws –

The law of the state in which the corporation is organized and of federal law; if any of the corporation’s structure or function is at odds with federal law, federal law takes automatic preference.
Board Representation –

No more than one year after the enactment of this law the Securities and Exchange Commission in consultation with the National Labor Relations Board will issue rules that ensure that director elections at U.S. corporations are fair and democratic.

In general, no less than 2/5 of directors of corporation shall be elected by the employees of corporations. If the representation falls short of this goal for at least 180 consecutive days, the U.S. Secretary of Labor can levy a penalty of not less than $50,000 but not more than $100,000 for each day of non-compliance. After six month, if the infraction has not been corrected the Secretary can revoke the corporate charter.

In addition to these prohibitions, the law, if passed, would prevent any official from selling, transferring, pledging, etc., the security for five years except in connection with very clearly defined conditions, such as the sale of corporation itself or a will or similar mechanisms. Anyone deviating from these provisions could be subject a civil penalty not less than the fair market value of the subject securities on the date the security changed hands and up three times their market value.

Political Spending

A U.S corporation may not make a political expenditure in support of or opposition to any candidate for federal, state, or local office unless at least 75 percent of shareholders and 75 of the corporate directors approve the expenditure before the money is donated and after to shareholders and directors have been fully apprised of the spending. At which point a shareholder can bring a suit in district court objecting to the expenditure. If the corporation repeatedly violates this requirement, its charter can be revoked.
Outro

Asked for his philosophy for doing business, the railroad magnate James J. Hill replied that it was quite simple. Everything that wasn’t nailed down was his. And anything that he could pry up obviously wasn’t nailed down.

This was back in the days before the creation of public relations firms and communication specialists hired to craft statements upholding a company’s firm commitment to community values, etc. (one could argue that outspoken statements like Hill’s triggered an understanding of the need for more felicitous and agreeable language). It’s difficult to imagine a present-day business executive making a public statement like Hill’s – and keeping his or her employment.

In the potentially groundbreaking legislation she introduced last summer Sen. Elizabeth Warren directly addresses the shareholder above all mentality that led directly to the excesses and abuses at the root of the 2008 Economic Breakdown.

It takes as its point of departure the nearly buried reality that major corporations do not simply come to life on their own but are incorporated under state law and that those laws can be altered, improved, or reformulated to ensure behavior more likely to assist the community, the world environment, worker welfare – you name it. In other words, it is possible, perhaps even likely, that in the not too distant future Congress can pass new statutes creating a capitalist system incorporating many of the principles of good business practice developed over the past three decades by the Caux Round Table. If nothing else, her legislation would put a severe dent in the Rent Seeking that played such a role (and continues to do so) in the devastating collapse just 10 years ago this fall.

We can always hope.

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