
Building a Foundation for a Strong Board

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Today's Presenters



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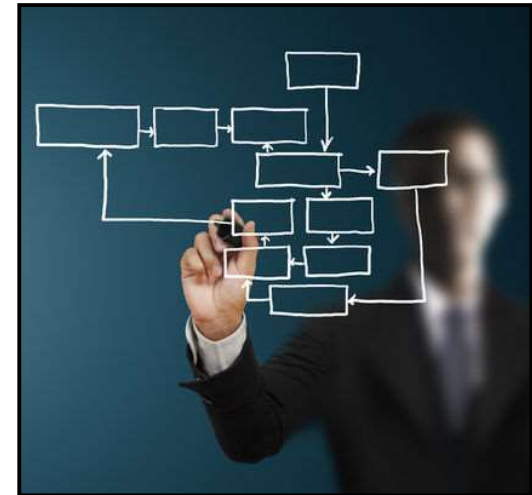
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Topics for Today

- Overview
- Obstacles to good corporate governance
- Discharging fiduciary duties
- Taking the board beyond the “check the box” approach
 - Role of Board and Committees
 - Role of Management
 - Role of In-House Counsel
- Strategies for board improvement
- Preparing to navigate crises
- Preparing for the well-run board meeting
- Current issues facing boards



Overview – Setting Context

- Current Environment and Impact on Boards
- Next Level Goals
 - Engaged directors focusing on strategy and long-term goals
 - Productive working relationships
 - Being prepared to deal with major and minor crises
 - Creating metrics for continuous process improvement
- Common Obstacles
 - Disengaged board
 - Micromanaging board
 - Personnel transitions
 - Ineffective directors
 - Recruitment and onboarding
 - Complications of overlapping entities

- Under Delaware law, the business and affairs of the company are managed by, or under the direction of, a board of directors (DGCL § 141(a))
- Directors owe fiduciary duties to the corporation and its stockholders (*Arnold v. Soc'y for Sav. Bancorp, Inc.*, 678 A.2d 533, 539 (Del. 1996))
- Discharge of Fiduciary Duties
 - Duty of care
 - ❖ *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)
 - Duty of loyalty
 - Business judgment rule
 - ❖ *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)

Board Roles and Responsibilities

- Exercise strategic oversight of company's business
- Manage CEO evaluations, executive compensation and succession planning
- Hold regular, productive meetings
- Conduct self-evaluations and manage accountability of board members



Role of Directors

Key Issues in the Boardroom:

- Risk oversight
- Monitor financial reporting and compliance
- Set the tone for ethical business conduct and corporate culture
- Approve hiring and firing of CEO (and other officers) and consider management succession
- Board composition
- Approve material transactions
- Contribute to the company's economic success
- Shareholder engagement

Role of Committees

- Amount of time directors spend on board work has continued to increase over recent years
- As a consequence, boards look for opportunities to delegate duties to committees (DGCL § 141(c)(2))
- Directors are protected from liability when they reasonably rely in good faith on reports from committees, officers, and other experts when making decisions for the corporation (DGCL § 141(e))

Audit Committee

**Compensation
Committee**

**Nominating and
Governance
Committee**

Interplay of Directors and Management

- Strategic direction vs. day-to-day management
- Keeping board informed
- Drawing on board expertise without crossing the line into managing
- Inherent tension between directors and management
 - Management's balancing act: Provide sufficient information without promoting second-guessing by directors
 - Directors' balancing act: Engage in dialogue without stepping into management's role – challenge management without becoming threatening
 - Confusion about constituent representation

Role of Corporate Secretary

- The corporate secretary is a senior corporate officer with wide-ranging responsibilities who serves as a focal point for communication with the board, senior management and shareholders and who occupies a key role in the administration of critical corporate governance matters
- Core competencies:
 - Understands company's corporate governance framework
 - Has working knowledge of corporate and securities law
 - Is current on corporate governance developments/trends
 - Maintains high standards of integrity and keeps low profile in boardroom
 - Stays attuned to CEO's and directors' objectives
 - Communicates well with management and directors and provides advance notice of issues requiring attention
 - Increasingly called upon to manage shareholder engagement process

Role of In-House Counsel

- Supporting the Board
 - Effectively advise and support the board
 - Manage director expectations through the onboarding process
 - Conduct board evaluations
 - Prepare for well-run board meetings
- Supporting a Constructive Relationship between the Board and Management
 - Provide appropriate direction and oversight
 - Ensure transparency and accountability
 - Allow individuals in each group to exercise rights and discharge obligations
 - Provide effective channel for information disclosure
- Corporation (not any individual stakeholder) is the client

Areas for Board Improvement

- Achieving thoughtful governance practices while maintaining focus on strategic oversight
- Improving management-board relations
- Improving management-shareholder relations
- Preparing for extraordinary situations
- Setting tone through onboarding process

Strategies for Getting There

- Identify and cultivate board leadership
- Develop appropriate term limits for directors and chairs
- Plan for transition away from founder board
- Avoid overlapping responsibilities between committees
- Control onboarding process and annual board education
- Establish process for dealing with ineffective and rogue board members
- Encourage periodic recommitment to rules of engagement

Preparing for and Navigating Crises

- Developing risk management and compliance procedures
 - Full board vs. committee level events
 - Plan for who takes what roles
 - Establish clear lines of communication
- Potential Events
 - PR events
 - Litigation
 - Activist shareholders
 - Data breaches and information leaks
- Advising the board on when to engage independent counsel

Preparing for the Well-Run Board Meeting

1. Prepare pre-meeting checklist
2. Get input from lead independent director on agenda
3. Prepare well-organized notebooks with summaries
4. Prepare comprehensive resolutions for actions taken
5. Send materials to directors at least 1 week in advance
6. Include non-routine topics on agenda
7. Ensure independent director sessions convened with adequate time
8. Prepare outside advisors and consultants
9. Collect and destroy notes taken
10. Prepare minutes promptly



Current Issues Facing Boards – Setting Context

- There has been a paradigm shift in recent years in which the fundamental purpose of the US corporation, to enhance shareholder value, has expanded to add the impact a company has on other stakeholders (e.g., customers, vendors, employees, communities)
- For many shareholders, it is not enough for a company to merely be profitable; it also should demonstrate good corporate citizenship through:
 - Environmental awareness
 - Ethical behavior
 - Sound corporate governance practices
- Large institutional investors (e.g., BlackRock) emphasize the link between corporate purpose and long-term profitability

Current Issues Facing Boards

- Environmental, social and governance (ESG) issues remain a priority
 - Increased pressure for boards to address racism, diversity and inclusion and corporate social responsibility issues
 - Climate change and sustainability
 - Board composition
 - Pay equity
 - Corporate culture (e.g., sexual harassment; workplace misconduct)
 - Supply chain transparency
 - Tax transparency
- Privacy and cybersecurity
- Shareholder activism

SEC Rulemaking Priorities

- Corporate board diversity
- Rule 10b5-1
- Climate change disclosure
- Human capital management disclosure
- Cybersecurity risk governance
- Special purpose acquisition companies (SPACs)
- Rule 14a-8 amendments
- Proxy voting advice

See SEC Agency Rule List – Spring 2021

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