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CORPORATE GOVERNANCE

Boards, Sexual Harassment, and Gender Diversity

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In light of recent events, corporate directors may consider adding an item to the agenda for their next board meeting: the issue of potential sexual misconduct at the company. A recent study indicates that the topic would be new for most public company boards, notwithstanding the fact that it relates to key elements of board-level governance: company culture, tone-at-the-top, risk management, and crisis management. Sexual misconduct in the workplace can take a devastating human toll. Moreover, the issue implicates gender equality and gender diversity concerns more broadly, and boards that include a meaningful proportion of female directors should be better positioned to address sexual harassment and gender equality issues.

Risk Assessment and Action Plan

“Sexual harassment is becoming a serious investment risk,” announced *Barron’s* in November 2017. Yet most boards of directors still underestimate the downside risk from sexual misconduct allegations at their companies. A 2017 survey of 400 private and public company directors by Boardlist and Qualtrics revealed that “the vast majority of

boards (77 percent) had not discussed accusations of sexually inappropriate behavior and/or sexism in the workplace. Nearly all (88 percent) had not implemented a plan of action as a result of recent revelations in the media or re-evaluated the company's risks regarding sexual harassment or sexist behavior at the workplace (83 percent)." The relatively small survey was undertaken before the shocking Harvey Weinstein allegations, but the results remain telling. Sexual harassment can take many forms and is not restricted to a single gender.

Many boards believe that, in the absence of specific complaints, and in the absence of public allegations against firms in their industry, their company does not have a problem. However, the growing societal awareness of misconduct—and of the potential power of misconduct allegations—is creating an environment in which more complaints are made and rise to the level of boardroom notice. Advance preparation is essential for a prompt and effective response.

Boards must take seriously the risks of sexual harassment claims relating to their corporate environment and their personnel. The damage can be seen in headlines almost daily: first and foremost, injured/impacted employees; in addition, negative publicity, the loss of high-profile employees, reputational damage, the inability to attract top talent, the possibility of false accusations, the defections of clients and customers, an immediate impact on the company's stock price, and of course, the cost and disruption of defending burdensome lawsuits. While sexual misconduct allegations are not necessarily a "risk factor" for a company with no reason to believe that any such claims are forthcoming, boards that have not discussed the issue in that context should consider doing so. At a minimum, boards should seek to understand the risks relating to this issue and the company's history, if any, with respect to such claims.

From an oversight perspective, sexual harassment in the workplace is a management and governance issue like many others. The board should review the company's policies and procedures regarding sexual harassment or assault allegations. In addition, the board may want to be briefed on the company's employee training and protocols for preventing, reporting, and addressing sexual misconduct. The board should consider its oversight role in the process and be briefed on the factors used by management in determining which claims are reported to the board (or the relevant board committee). The board may want to hear from counsel as to litigation risk, disclosure requirements, and the importance of maintaining attorney-client privilege in this context. The board could discuss relevant aspects of risk management, particularly with respect to any situations that involve senior leadership, repeat offenders, or a pattern of complaints. Ideally, the board and management should consider the necessity of developing a crisis response plan that includes participation from human resources, public relations, and legal counsel. With a team and plan in place, the company should be better able to respond to a situation quickly and in a coordinated fashion.

Gender Diversity and Sexual Harassment

The steady increase in women directors on public company boards is a positive development for many reasons. In the context of sexual harassment allegations, gender

diversity can be invaluable. The perspective and insight of female directors in board meetings adds immeasurably to substantive discussions and enhances the legitimacy—both actual and perceived—of board decisions. Companies with all-male governance at the board and senior executive level are frequently subject to negative publicity for their lack of gender diversity, particularly when allegations of sexual misconduct or gender discrimination come to the fore.

The leadership of women in senior management positions as well as on the board is essential to the establishment of a corporate culture in which sexual misconduct is taboo. Corporate culture (and the related tone-at-the-top) is created in large part by example and perception, and the influence of women leaders promotes an environment in which gender equality is presumed, harassment is unacceptable, and fair treatment is expected. That said, it is important to note that a diverse team cannot be successfully created through a superficial compilation of representatives from various identity groups. Not only does this approach devalue the talents of those who are thereby reduced to one or more identifiers, but it limits their ability to contribute meaningfully in areas beyond a narrowly defined category. No worthwhile director, executive, or employee would take pride in being hired solely for the sake of diversity, and a team assembled in such an artificial manner would neither reap the benefits nor possess the legitimacy that it seeks. Indeed, in a healthy, productive corporate culture, all employees feel valued for their work and talents, not on account of their gender or other identity characteristics.

Going forward, each board should regularly consider taking a hard look at its company culture. Directors should consider the actions necessary to become confident that their culture is one in which misconduct will not be tolerated and any sexual harassment allegations will be addressed promptly and fairly. By being proactive, they can better ensure that, should a serious allegation arise, management and the board are ready to act swiftly to protect employees, curtail ongoing misconduct, and minimize harm to the company, its shareholders, and other stakeholders.

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