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Practical cross-border insights into corporate governance law

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2022 – The Expanding Spotlight on Boards of Directors

Wachtell, Lipton, Rosen & Katz



Sebastian V. Niles

The ever-evolving challenges facing corporate boards of directors worldwide prompt periodic updates to a snapshot of what is often expected from the board of directors of a public company – not just the legal rules, or the principles published by institutional investors and various corporate and investor associations, but also the aspirational “best practices” that have come to have equivalent influence on board and company behavior.

The war in Ukraine and broader geopolitical implications, inflation and interest rate dynamics, supply chain interdependencies, the coronavirus pandemic and ongoing efforts to return to a “new normal”, heightened competition in the battle for talent and workers, as well as other trends and technologies, which have been accelerating the pace of disruption, are raising a host of challenges that companies must successfully navigate. As boards of directors seek to provide effective oversight and guidance, their mandate is being further shaped by the wide embrace of ESG and sustainability issues as core matters for corporate and investor concern, stakeholder governance as a means of creating and protecting value, and a renewed focus on sustainable long-term investment strategies. In this environment, directors need to grapple with the practical implications of this new paradigm, such as adjusting existing board functioning to reflect stakeholder governance, defining corporate “purpose”, integrating ESG considerations into business strategy, delivering sustainable value to all stakeholders and dealing with competitive threats. Directors are also facing questions about what, if any, modifications should be made to communications and engagement efforts with shareholders and other stakeholders. In addition, recent events have heightened the emphasis on effective and adaptive crisis management and shone a light on the role of all market participants in combating social and racial inequality.

The legal rules as to directors’ duties have not necessarily changed across jurisdictions. What have changed considerably, however, are the expectations of investors and other stakeholders for (1) greater transparency, (2) deeper board engagement and oversight, (3) greater opportunity to engage with directors, and (4) responsible investor stewardship to further long-term, sustainable value creation.

Boards should:

- maintain a working partnership with the CEO and management and serve as a resource for management in charting the appropriate course for the corporation;
- set the “tone at the top” to create a corporate culture that not only gives priority to ethical standards, professionalism, integrity and compliance in setting and implementing both operating and strategic goals, but is also a reflection of, and a foundation for, the corporation’s purpose;
- choose the CEO, monitor the CEO’s and management’s performance and develop and keep current a succession plan that takes into account the objectives and challenges that the corporation faces;
- oversee corporate strategy (including purpose, culture and vision) and the communication of that strategy to investors, recognizing that investors want to be assured about not just current risks and problems, but also threats to long-term strategy from global, political, climate, social, economic and technological developments;
- oversee and understand the corporation’s risk profile, as well as its management of short-, medium- and long-term risks, including climate-related risks, and how risk is taken into account in the corporation’s business decision-making and strategic planning, and recognize that they have a duty to respond to red flags warning of imminent risks, if and when they arise;
- determine the appropriate level of executive compensation and incentive structures with the basic objective of having and retaining the best management available, and with awareness of the potential impact of compensation structures on business priorities and risk-taking, taking into account ESG goals and current stakeholder, proxy advisor and public and political views on compensation;
- be prepared to deal with crises, including macro events such as a continued breakdown in international relations, unstable and volatile political situations, the coronavirus pandemic, a natural disaster such as an earthquake or hurricane, a liquidity squeeze or a long-term recession, including understanding the ways such events affect tariffs, taxes, the global financial system, supply chains and immigration (human capital);
- be prepared to take an active role in matters where the CEO may have a real or perceived conflict, including in the context of takeovers and attacks by activist hedge funds focused on the CEO;
- oversee management’s development of analyses and metrics to understand the impact of ESG and stakeholder interests on the value and strategy of the corporation, and oversee the integration and balancing of these interests to promote the long-term success of the corporation, keeping in mind that in performing this oversight function of balancing and allocating among all the stakeholder interests, directors are fully protected by the business judgment rule;
- recognize that investors (including activists) and certain proxy advisors are monitoring the board’s oversight and responsiveness to ESG governance, and are comparing the corporation’s performance on ESG to that of its peers;

- receive updates from management or advisors, as appropriate, on changes to regulatory guidance, disclosure requirements and other changes in law that may affect the management of the corporation, including with respect to climate change, diversity, and other ESG topics;
- have a lead independent director or a non-executive chair of the board with clearly defined duties and responsibilities who can facilitate the functioning of the board, serve as a liaison between the independent directors and management, and assist management in engaging with investors, other stakeholders, their advisors such as S&P, ISS and SASB and with regulators;
- together with the lead independent director or the non-executive chair, determine the agendas for board and committee meetings and work with management to ensure that appropriate information and sufficient time are available for full consideration of all matters;
- recognize that shareholder engagement has become a central component of corporate governance, and participate, as appropriate, in proactive outreach efforts to communicate with and listen to shareholders and other stakeholders;
- work with management to anticipate possible takeover attempts and activist attacks and keep response playbooks up-to-date in order to be able to address these attempts or attacks more effectively, if they should occur; in this regard, it may be prudent to meet at least annually with the team of the corporation's executives and outside advisors that will advise the corporation in the event of a takeover proposal or an activist attack;
- be open to management inviting a stakeholder or even an activist, under appropriate circumstances, to meet with the board to present the stakeholder's or activist's opinion of the strategy and management of the corporation;
- evaluate the performance of individual directors, the board and board committees on a regular basis and consider the optimal board and committee composition and structure, including board refreshment, expertise and skill sets, independence and diversity;
- review corporate governance guidelines, committee charters and workloads and tailor them to promote effective board and committee functioning; and
- determine that appropriate records of the foregoing are timely created and maintained.

Corporations should seek to:

- have a sufficient number of directors to staff the requisite standing and special committees to meet investor and other stakeholder expectations for experience, expertise, diversity and periodic refreshment;
- consider whether the corporation would benefit from the addition of management or board committees focused on finance, risk management, compliance and ESG and stakeholder governance;
- compensate directors commensurately with the time and effort that they are required to devote and the responsibility that they assume, taking into account the possible impact on the objective of long-term growth in value;
- have directors who have knowledge of, and experience with, the corporation's businesses and the key developments and drivers that impact those businesses, even if this results in the board having more than one director who is not "independent";
- have directors who are able to devote sufficient time to preparing for and attending board and committee meetings and engaging with investors and other stakeholders;
- have directors who recognize that institutional investors and other third-party ESG activists will monitor the composition of the board of directors for expertise on particular aspects of ESG (including climate change and diversity) and for presence on the board of known opponents of an ESG issue;
- provide directors with all the data that is necessary for making sound decisions regarding performance, strategy, compensation, climate change, diversity, other ESG issues, financial stability and stakeholder allocation;
- provide directors with relevant reporting on material decisions or industry trends such as the use of artificial intelligence and cryptocurrency, as well as corporate cybersecurity defense and readiness;
- remain apprised of developments in the market for D&O insurance, including whether jurisdiction-specific legal developments allow for the use of captive insurance companies to self-insure D&O risk;
- provide directors with regular tutorials by internal and external experts as part of expanded director education, and to provide directors with the information and expertise they need to respond to disruption, evaluate current strategy, strategize beyond the horizon and integrate and balance the interests of stakeholders; and
- maintain a collegial relationship among and between the corporation's senior executives and the members of the board that facilitates frank and vigorous discussion and enhances the board's role as strategic partner, evaluator and monitor.



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