

## On Board: Positioning the Board Ahead of a #MeToo Spotlight

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*Michael W. Peregrine*

With the #MeToo movement spreading across the nation, boards of directors should anticipate, and take proactive steps to respond to, the possible expansion of this social responsibility movement to their own company's industry sector. And general counsel is the logical corporate officer to team with the board in crafting this critical response.

The interest of the board is grounded primarily in its overarching fiduciary responsibility for the oversight of workforce culture. In addition, the board is responsible for preserving the reputation of the corporation as a critical strategic asset. In that regard, the #MeToo movement is one of those unique issues for



which the board can justify assuming the leadership role on behalf of the organization, working in consultation with general counsel and other senior executives.

The timing of such board action is critical, given the rapid advance of #MeToo concerns through multiple industry sectors, attracting widespread media coverage. The "roll call"

of companies facing such challenges is long and diverse—extending beyond the initial focus on the entertainment and fine arts communities. And, of course, many of the complaints of misconduct are horrific in nature.

Michigan State University is the most recent example of intense media and regulatory focus due to the infamous Nasser matter. Both the U.S. Olympic Committee and USA Gymnastics have suffered collateral damage as well. In addition, a prominent leisure activities company has reportedly lost new business opportunities due to allegations that it was inattentive to an alleged pattern of misconduct by its founder and chairman. Even charities such as The Humane Society and The American Red Cross have recently been criticized for how their board and legal department, respectively, responded to internal investigations of alleged sexual misconduct claims.

It is noteworthy that several of the most recent developments have included explicit suggestions that key elements of leadership (e.g., the board,

senior executives, the office of general counsel) were either inattentive to warning signs of sexual misconduct, or more deliberately “turned a blind eye” to such warning signs. In other situations, the scope and independence of internal review processes have been criticized for failing to protect the interests of victims.

These are serious consequences. And, in virtually each instance, the damage has extended beyond the corporation to its officers, directors and even members of its legal team. (Such observation is in no way intending to diminish the profound harm inflicted upon the victims of misconduct and abuse.)

A proactive board response, in consultation with general counsel, could logically incorporate these components, among others:

- First and foremost, a visible organizational embrace of the underlying social responsibility tenets of the #MeToo movement. This could mean a clear expression from board and executive leadership that they are committed to preventing workplace harassment and abuse at all

organizational levels, and that it is an issue at the absolute top of the board agenda.

- Second, confirmation with general counsel that legally compliant policies regarding sexual harassment are in place and communicated to all organizational constituents (including protections intended to preserve the rights of the accused, as well as those of the victim).

- Third, confirmation of both the effectiveness of employee “hotline” mechanisms, and that complaints processed thereunder, or otherwise, are processed appropriately.

- Fourth, a vertical organizational reporting system that rapidly elevates to the highest appropriate authority levels legitimate concerns regarding workforce conduct.

- Fifth, proper coordination of all corporate executives who would logically be involved in workforce culture matters (such as the general counsel, the chief compliance officer, the senior vice president for human resources and possibly the chief diversity officer).

- Sixth, clarity among officers and directors of their

obligation to share with the full board information of which they become aware that relates to the well-being of the corporation, and the related duties and functions of the board.

- Seventh, education from legal counsel on the types of information coming before the board and its committees that courts have historically interpreted as “red flags,” requiring a board response.

- Eighth, the commission of a confidential internal review of allegations of sexual harassment and similar complaints previously made within the organization, and how they were addressed (particularly if they implicated key organizational leaders), with the full board to review the conclusions and findings of the review.

The board may also refer to publicly available recommendations of outside investigative counsel on how, in individual situations, corporate governance should be reshaped to address workforce culture controversies (e.g., the 2017 Eric Holder report to the Uber board).

The #MeToo movement is the latest and perhaps

most visible public demonstration of the relationship between workforce culture and corporate reputation, and ultimately the long-term sustainability of the organization. The 2017 white paper of The National Association of Corporate Directors, “Culture as a Corporate Asset,” provides a foundational discussion of this critical relationship. And the developments of recent weeks and months provide irrefutable evidence of why board responsibility for workforce culture has so rapidly achieved fiduciary “best practice” status.

Boards across industry sectors have been aptly warned by controversies involving The Weinstein Co., prominent ride sharing and leisure activity companies, Michigan State University, USA Gymnastics and even The Humane Society. This is not an issue on which the board can afford to be perceived as “staying on the sidelines,” deferring to management. It is a time for fiduciary leadership—with respect to the interests of the company, and its workforce.

The core fiduciary message is clear: preventing sexual

harassment in the workforce increasingly requires special board focus given the nature of the potential harm to all involved parties—employees, consumers and corporate stakeholders. And this message applies regardless of whether the entity is publicly held, privately held or a nonprofit.

General counsel has the unique ability to “see the whole field” in terms of legal, business and reputational matters and thus is well positioned to lead the board through this process.

**Michael W. Peregrine**, a partner at McDermott Will & Emery, advises corporations, officers and directors on matters relating to corporate governance, fiduciary duties, and officer-director liability issues. Peregrine thanks his partner, William P. Schuman, for his assistance in the preparation of this article.