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The Board, The General Counsel, and Explaining 'Best Practices'

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The newly updated “Commonsense Principles” of corporate governance offers the general counsel a timely opportunity to engage with the board on the concept—and the application—of “best practices.”

Released on October 18, this “Commonsense Principles 2.0” builds upon the initial 2016 series of recommendations and guidelines addressing the roles and responsibilities of boards, companies and shareholders, proposed by a group of prominent business and financial sector leaders.

“Principles 2.0,” and other similar guidance compilations, are at the root of governance questions the board often tosses to the general counsel. “What’s the best practice on this point?” “Can we commit to following best practices?” “Do we breach our fiduciary duties if we don’t follow best practices?”

But, as well intentioned as those questions may be, answering them can often be a bit tricky. For the concept of “best practice”



is far more nuanced than some directors may think. Given that, the board should not approach the application of best practices without the guidance of the general counsel.

At its essence, “best practice” means a process, method or conceptual approach that reflects an historical record of success, achievement or accomplishment, beyond a level attained by less structured or precise efforts. A “best practice” is indicative of behavior *beyond that required by*

basic, accepted methodologies or minimum legal standards.

In that regard, best practices are more typically regarded as aspirational goals, rather than legal requirements or mandates. In the governance context, they constitute a series of proposals designed to enhance and improve corporate responsibility and boardroom conduct—as the Principles 2.0 seek to achieve.

When advising leadership, the general counsel’s first challenge is to draw the necessary distinction

between “best practice” as an aspirational goal, and compliance with fiduciary duties as a legal obligation. While satisfying established governance best practices may often subsume compliance with fiduciary requirements, compliance with fiduciary duties doesn’t always guarantee satisfaction of particular best practices. The general counsel helps the board understand that distinction when making decisions. Her advice seeks to assure the board that failure to comply with best practices will not, in and of itself, serve as evidence of breach of fiduciary duties or violation of law.

The general counsel’s second challenge is to explain to the board the rationale for pursuing best practices. What is the organizational incentive to apply standards that are above and beyond those required by the law? And that rationale is, quite simply, because they’re an effective antidote to the disease of director liability.

Good faith, the expectation that directors will at all times act with an honesty of purpose, is fundamental to the satisfaction of the director’s basic fiduciary duties. In turn, leading courts view a board’s conscientious pursuit of governance best practices as evidence of its good faith. The general counsel will advise the board on what degree of effort may constitute a “conscientious pursuit.”

And that leads to the third related challenge of the general counsel: identifying the type of fiduciary conduct that can fairly be recognized as “best practice.” Surprising as it may seem, there is no “Office of Best Practices” in the federal hierarchy; no single source, library or collection of officially sanctioned and broadly accepted governance best practices. And, most often, “it’s on” the general counsel to identify them for the board.

Potential resources of best practices include The Conference Board, The Business Roundtable, and the American Bar Association; various academic treatises and restatements; industry guides; stakeholder memoranda; and regulatory guidance from government agencies and self-regulating bodies.

That’s another reason why the release of Principles 2.0 is a notable governance event. The original 2016 version was prepared by a diverse, 12-member coalition of executives of major corporations (including JP Morgan, Berkshire Hathaway, GE, GM and Verizon); asset managers (such as BlackRock, Vanguard Group and State Street); and one shareholder activist (ValueAct Capital Management). Principles 2.0 reflects an expanded consensus with the endorsement of additional business leaders that include the CEOs of AT&T, Bank of America, Coca-

Cola, IBM, Johnson & Johnson, General Motors and DowDuPont.

Because the concept of “best practices” is grounded in fiduciary principles and refined by judicial decisions, the general counsel is particularly well-suited to advise the board on what conduct truly rises to that level, and from what resources that conduct should be identified.

The stated purpose of Principles 2.0 is to provide a basic framework for “sound, long-term oriented governance and, as such, respond to a growing desire across commercial interests for greater clarity in leading boardroom challenges.” At the least, Principles 2.0 helps promote greater boardroom discourse on conduct that may constitute a “best practice.” Whether they serve that purpose for a particular corporate board will depend in large part on the judgment—and guidance—of the general counsel.

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