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Two Timely Governance Topics for Upcoming Board Meetings

Two important governance issues for agenda consideration relate to the company's possible commitment to principles of stakeholder capitalism, and to consideration of possible governance "lessons learned" from the pandemic.

By Michael W. Peregrine

As the board chair and CEO pursue planning for upcoming board and committee meetings, the chief legal officer may wish to recommend two important governance issues for agenda consideration. As framed by recent developments, these issues relate to the company's possible commitment to principles of stakeholder capitalism, and to consideration of possible governance "lessons learned" from the pandemic.

As evidenced by media coverage, scholarly observations and third-party initiatives, both of these issues are part of current governance discourse, and invoke core fiduciary obligations of officers and directors of corporations across industry sectors and form of organization. They also properly within the scope of the chief legal officer's governance focus, on behalf of the board and executive leadership.

The stakeholder capitalism issue is prompted by the one-year anniversary this August of the release by the Business Roundtable of its controversial "Statement of the Purpose of a Corporation." This anniversary provides a useful opportunity for boards to revisit the validity of the statement and to evaluate the benefit of embracing its themes.

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As most CLOs are generally aware, the Roundtable's statement presented a call for corporations to take actions that also benefit stakeholders, not just shareholders. These include commitments to (i) deliver value to customers; (ii) invest in employees; (iii) deal ethically and fairly with suppliers; (iv) support the communities in which they work; and (v) generate long-term value for shareholders who provide the capital that allows companies to invest, grow and innovate.

The Roundtable's goal was to emphasize the critical linkage between inclusive long-term growth and value creation for all corporate stakeholders, including customers, employees, suppliers, communities and shareholders. The statement reflects the belief among its signing CEOs that "businesses can't flourish over the long term or appropriately reward their shareholders without investing in the stakeholders who make success possible."

One year later, the Roundtable observed that the nation's companies have followed through with continuing their stated commitment to work for the benefit of all corporate stakeholders: "Business Roundtable companies have invested in workers, taken a leading role in fighting the pandemic, and supported the communities where they serve."

Yet since its introduction, the Roundtable's statement has been highly controversial. To some, it has been a welcome extension of the corporate social responsibility movement, and a tacit acceptance of the position that "[P]urpose is not the sole pursuit of profits but the animating force for achieving them." To others, it is perceived as "a mere public-relations move rather than a signal of a significant shift in how business operates."

As a recent article in The Wall Street Journal observed, the viability of "stakeholder capitalism" is not a black-and-white issue for corporate boards, especially given the financial and operational issues presented by the pandemic and its impact on the work-force. For example, many companies have been forced to make difficult decisions concerning stakeholders such as employees and communities, in order to remain financially viable.

But boards should continue to have focused discussions on corporate purpose, for at least three reasons: (i) the increasing efforts of more corporations to adopt specific initiatives designed to benefit a broader class of stakeholders; (ii) the tendency of more boards to adopt CEO evaluation guidelines that measure whether a CEO is successfully balancing the long-term needs of the business against the short-term demands of investors; and (iii) the likelihood that a Biden administration will be supportive of measures that convert the Business Roundtable's central themes of stakeholder capitalism into law and regulation.

The governance "lessons learned" issue is prompted by the release this July of a survey of board nominating governance committee chairs, conducted by the highly regarded SpencerStuart consulting firm. The survey focused on how boards have responded to the COVID-19 crisis and what longer-term governance changes they think may emerge post-pandemic.

Interestingly, SpencerStuart found survey respondents to be "overwhelmingly confident that their board has the skill sets and experience it needs and do not anticipate any change in board structure or refreshment practices in the near future" That is an interesting and somewhat surprising conclusion, especially given general conversation in the governance community to the contrary, and the generational and unanticipated challenges presented to boards by the pandemic.

Most leading statements of governance principles encourage the annual evaluation of the company's governance guidelines against such factors as recent board experience, trends in the law and the evolution of recognized best practices. Through such effort, the expectation is that the company will identify "best practices" that will provide effective solutions-beyond those required by law-to the governance challenges it faces. Indeed, the conscientious pursuit of governance best practices has long been recognized as a leading prophylactic against director liability.

In this context, the results of the SpencerStuart survey are surprising, and merit close evaluation by board governance and nominating committees. Can it be, that despite the unprecedented challenges with which American commerce has been confronted, no governance changes in board composition and structure are necessitated? That the current committee structure worked fine? That there are no board "lessons learned" from this experience?

In many respects, the confidence expressed by the SpencerStuart respondents is laudatory, and may well be the byproduct of assiduous preparation by the nominating/governance committee chairs and their membership. But the risk is that its results will be used by some sedentary, entrenched boards to avoid consideration of needed changes.

That's where the CLO comes in. Not challenging the accuracy and reliability of the SpencerStuart survey itself, but using its results to prompt board-room discussion on its own reaction. How would our chair have answered the questions? What are own "lessons learned"—as to such matters as the role of management-to-board reporting; enterprise risk oversight; the need for new or different expertise on the board; the relationship between board turnover and the achievement of diversity goals? Is our board experience different? That's a discussion every board should have at some time, post-pandemic.

Board meeting agendas are notoriously tight—especially for those held in the fall quarter. There is very little room for the introduction of special concepts and topics. But topics such as the benefits of stakeholder capitalism, and governance "lessons learned," should meet the standard. They are timely, they are in the public milieu, and they are consistent with the law's expectation of director vigilance and awareness. They would fit well within even the most restrictive of board agendas. As the board's governance counsel, the general counsel serves his duties by recommending their inclusion.

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