Harvard Law School Forum on Corporate Governance

Under Pressure—Rethinking Board Practices

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Today's corporate boards are facing unprecedented challenges, an evolving and expanding risk profile—and a significantly heavier workload. Demands of board service have risen as director responsibilities must take into account increased regulation, expanding concepts of risk oversight, a highly complex business environment, geopolitical factors, and social dynamics. Even those who adhere to notions of shareholder primacy recognize that topics like DEI and sustainability now fit squarely within the board's purview. Moreover, the 24/7 news cycle and instantaneous social media put corporate leaders in the spotlight full-time, requiring them to respond effectively, and in real time, to developments.

From our seat as legal advisors to boards, we see a higher level of legal risk than ever before. Recent Delaware case law in areas including bylaw provisions, executive pay, the use of special committees, stockholder agreements, and even de-SPAC transactions invite concern and create uncertainty. Further, stockholder plaintiffs have continued to challenge director decision-making through derivative lawsuits, with some alarming and distinctive recent successes.

How can boards deal with these increasing pressures? Many boards have abandoned the traditional quarterly meeting schedule in favor of more frequent meetings and more tightly packed agendas. This may compound the overload. Other boards are considering the level of directors' other commitments as part of the annual nomination process.

While there are no simple solutions, we encourage boards to critically assess their routines and commitments to determine whether changes would make it easier to navigate the workload and make deliberations sharper.

Reimagine Board Meeting Logistics

Of course, modifying board practices may be more difficult than it sounds. First, if the board is generally functioning effectively, there may be resistance to change from both directors and management, and those proposing change may have trouble convincing the rest of the boardroom that change is warranted. Second, the board's programming—including its regular meeting schedule—is generally fixed well in advance, and may be difficult to modify. Nonetheless, we urge boards to consider the following questions:

- **Can the board's "pre-read" materials be improved?** Are executive summaries used to help point directors to the crux of the matters and decisions to be considered at each meeting? Consider forcing each presentation to include three to five bullets of key takeaways. Can board materials be less voluminous without sacrificing the relevancy of the information presented? Consider the use of appendices.
- **If the number of board and committee meetings is increasing, can some meetings be virtual?** In most circumstances, in-person board meetings are critical to effectively facilitate director engagement and discussion. However, there are some circumstances, perhaps routine committee meetings, where virtual meetings may be sufficient and more efficient. Consider the appropriate means of conducting board and committee meetings in light of the agenda items to be addressed and the expected interaction of directors with one another, management, and other meeting attendees.
- **Should meeting agendas be reconfigured?** If meetings tend to run over their allocated time, is too much time spent on routine matters at the outset of the meeting? Consider whether matters with more strategic importance be discussed first. Can management presentations be included in the pre-read materials rather than presented during the meeting?
- **Are board social events used strategically?** Consider whether board dinners and other social events can serve a dual purpose, by encouraging one-on-one director mentoring time or including members of management who are not typically present in the boardroom.

Optimize Committee Work

A significant amount of board work is often accomplished at the committee level. Boards can leverage their committees by ensuring that committees are not duplicating efforts and by minimizing the time that the full board replicates the committees' work. For example, is the budget reviewed at the finance committee, the compensation committee, and the board? Boards should also take a careful look at each committee charter to determine whether there are overlaps or whether some duties should be shifted to other committees.

Consider Additional Board Committees

If the board's standing committees are already overextended, the board may wish to consider whether additional board committees would enhance overall board efficacy and performance. While additional committees may lighten the workload, practical difficulties may prevent their formation, particularly if there are not enough directors with capacity and the relevant skillset to serve them. In many cases, we see use of an ad hoc committee to create an additional workgroup without placing perpetual burdens on the board.

Establish Mentorships

Inexperienced directors may need help acclimating to their role in the boardroom. Pairing a new board member with an experienced director in a board mentorship program, whether formal or informal, can assist in the onboarding process and help the new director learn to navigate boardroom dynamics. Board mentorships can also help the board as a whole, as the new director will have the opportunity to raise questions and discuss issues with another board member outside of the boardroom. Mentorships can help to maximize the meeting time spent on board agenda items and result in more productive meetings. Mentors may be particularly useful for boards that have experienced significant amounts of turnover or have directors who have not had prior public company board experience.

Reconsider Board Resources

Boards should also rethink both the internal and external resources available to them. Directors with knowledge and skills in specialty areas—particularly on climate, technology, and cybersecurity matters—should be engaged in a manner that leverages their skills for the benefit of the whole board. But that doesn't mean that the director supplants management. As a corollary, while boards often depend primarily on the information provided to them by management, it may be prudent to seek input from external advisors and experts as well in order to facilitate decision-making. In fact, state law may, as in Delaware, encourage directors to do so by protecting directors who reasonably rely in good faith on expert advice. Outside experts may be especially useful when the directors are dealing with emerging issues, topics that are new to the board, and specialized matters on which the directors lack expertise.

Rethink Director Commitments

Finally, individual directors must be available, committed, and engaged in order for the board to operate effectively as a whole. A thoughtful and qualitative evaluation of each director's time commitments allows the nominating and governance committee to assess more holistically whether an individual director has the capacity to serve effectively on the particular board or committee at any given time. Likewise, the characteristics and circumstances of the company itself should also be considered. A company in crisis or that operates in a highly regulated industry may demand—and expect—more time from its directors than one engaged in business as usual or one that faces less compliance risk.

Even short of these particular circumstances, there are many other situations that can affect the time commitment expected of directors—a new CEO, the implementation of a new strategy, M&A or capital-raising activity, cyber incidents, developments in AI, ESG issues, activist engagement, and significant board refreshment are common scenarios that can substantially increase the time required for board service. While many of these situations cannot be predicted, the board should take into account any expected circumstances that would necessitate increased board attention and time.

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The intense workloads of boards of directors are unlikely to ease in the coming years. Rethinking board practices and assessing director capacity and opportunities for boards to function more efficiently may help directors fulfill their responsibilities more effectively and optimize the overall performance of the board.

Four Key Takeaways

1. Corporate boards face an evolving and expanding risk profile.
2. There are no easy solutions, but critically assessing and modifying board practices, as appropriate, can help reduce pressure.
3. Boards can look at areas such as board meeting logistics, committees, mentorships, internal and external board resources, and director commitments to help reduce their workloads.
4. The intensity of board workloads is unlikely to ease in the years ahead, and rethinking these practices can help optimize board performance.

Link to the full article can be found here.