NDI Executive Exchange

Public Company Corporate Governance Hot Topics

1. **Business Roundtable's new Statement on the Purpose of a Corporation is more evolutionary than revolutionary.**

   In August 2019, the Business Roundtable released a new Statement on the Purpose of a Corporation signed by 181 CEOs who committed to lead their companies for the benefit of all stakeholders – customers, employees, suppliers, communities and shareholders. Although the new statement received a lot of attention in the press, panelists agreed that if companies weren't already considering all stakeholders then they likely weren't maximizing shareholder value in the first place. Accordingly, the panelists agreed that the new purpose won't generally change how companies conduct business and the statement appeared to be driven political forces, as opposed to substantive, new issues. However, panelists noted that you can't separate business from politics and that political forces are likely to have a large impact on business in the coming years.

2. **Changes coming to Delaware corporate law?**

   One panelist noted that there is a real possibility that former Delaware Supreme Court Justice Leo Strine, who retired on October 30, 2019, is going to run for Governor of Delaware. Justice Strine believes that boards can balance profit and social purpose and has advocated for adding an extra "E" to ESG (environmental, social and governance) initiatives for "employees." If Strine is elected, he may change Delaware corporate law, which may have a significant impact on all of the companies currently registered in Delaware.

3. **Competition for talent is the driving force behind changes in company policy**

   The intense competition for a talented and diverse workforce is now one of the driving forces behind company policies. In order to attract and retain deep talent pools, companies are being forced to change their policies and in the panelists' view, companies that aren't open minded to the diversity issues will be at a significant competitive disadvantage.

4. **What happens when a constituency of shareholders conflicts with other constituents?**

   Panelists were asked how their boards' handle situations where one constituency of shareholders conflicts other constituents. As an initial matter, panelists all agreed that the response depends on how many shareholders a company has and that large, diversified companies are in the best position to address all shareholder concerns. However, panelists agreed that regardless of the number of shareholders a company has, companies and boards should be meeting with their major investors on a regular basis so the investors aren't the ones reaching out to the company and that these routine discussions generally can preempt situations where there is a material conflict between different groups of shareholders.

5. Should companies buy back shares or use it for other purposes?

Despite recent political commentary to the contrary, panelists all agreed that a board should buy back shares if that is the best way to deliver long-term shareholder value. The panelists also agreed that the decision to buy back shares should be analyzed against all other alternatives. One panelist noted that dividends is likely a better way to return capital to shareholders if a company's shares are trading at a premium or near fair value, notwithstanding the fact that a stock repurchase program may be in place.

6. Risk management at board level after the *Marchand* decision.

On June 18, 2019, in *Marchand v. Barnhill*, the Delaware Supreme Court, in an opinion written by Chief Justice Leo E. Strine, on behalf of a unanimous court, issued a decision reversing the Court of Chancery's dismissal of a stockholder derivative suit alleging that the board failed to provide adequate oversight of a key risk area and thus breached its duty of loyalty. The case arose out of a listeria outbreak in ice cream made by Blue Bell Creameries USA Inc. that sickened many consumers, caused three deaths and resulted in a total product recall. As a result, the Court determined that the board failed to provide oversight because the Blue Bell board allegedly failed to implement any system to monitor Blue Bell's food safety performance or compliance.

The panelists unanimously agreed with the courts conclusion. Panelists stated that boards must form a committee to focus on risks and that boards must do more than rely on management to outline risks. Monoline businesses and businesses operating in high-risk areas will likely have to bring in third parties to consult on risk. The risks should be reviewed at every board meeting and entered into the board minutes without exception. In closing, panelists noted that the *Marchand* case had horrible facts and that bad facts can lead to bad law so boards need to pay very close attention to how they are addressing risk.

7. Should cyber-risk be part of the board's risk committee or should a separate cyber committee be formed?

Panelists agreed that cyber should likely have its own committee given the technical expertise required to analyze cyber risks. Panelists noted that despite hiring experts and making substantial investments in cybersecurity protection, criminals will always be one step ahead of industry best practices so implementation of the cyber programs is essential. Equifax was cited as an example. Equifax had cyber experts on its board and a dedicated internal cyber team, but the cyber breach was a result of the board's failure to insure that their cyber plan was fully implemented.

8. Data privacy will become a bigger risk than cyber.

Panelists noted that, with the proliferation in data collection and digitization in nearly every industry, data privacy will likely become a bigger risk than cybersecurity. Panelists noted that companies are now able to track everything about a person and hold extremely private, personal information. The misuse of this personal information can result in more personal and financial harm than cyberattacks. Boards not only have an obligation to make sure that the data is safely stored, but also that the data isn't used for nefarious purposes.

9. Gender initiatives.

There have been several initiatives related to increasing the number of board positions held by women in recent years. Panelists and women attendees noted that it in their view the initiatives are unnecessary given the number of imminently qualified women available to and who are currently serving on boards. One panelist noted that a female director on his board thought the California gender law was insulting to women, as it insinuated that women couldn't be represented on boards based on their own merits. All panelists think there should be a greater focus on diversifying boards generally, which should include a focus on increasing minority representation as well as gender diversity.

10. Unprecedented number of issues are in the forefront of politics.

Politicians have historically not scrutinized longstanding business practices (e.g., stock buy-backs), especially when the practices have been proven empirically to deliver long term shareholder value. Panelists agreed that this appears to be changing and that anything from employee compensation to the private equity industry is in the purview of politicians and can be ripe for change. Given the polarity in politics, panelists agreed that boards need to be thinking of action plans in the event that even a few of the more extreme policies come to fruition, as the number of potential issues on the table has never been larger.