

*Boardroom Best Practices Panel —
International/Cross-Border
Boardroom Issues*



BOARDROOM BEST PRACTICES – INTERNATIONAL/CROSS-BORDER BOARDROOM ISSUES

INTRODUCTION

“Boardroom Best Practices” was a featured panel discussion at the seventh annual National Directors Institute, hosted by Foley & Lardner LLP on March 6, 2008, in Chicago. The discussion was moderated by Foley Partner Benjamin F. Garmer III. Panelists included Terry D. Growcock, Chairman of The Manitowoc Company, Inc.; Randall J. Hogan, Chairman and CEO of Pentair, Inc.; Robin Johnson, Partner at Eversheds LLP; Cary A. Kochman, Managing Director of UBS Securities LLC; Timothy Sullivan, President, CEO, and Director of Bucyrus International, Inc.; and Dennis Wheeler, Chairman, President, and CEO of Coeur d’Alene Mines Corporation. The panel discussed a variety of issues of principal concern to boards of directors and management regarding international/cross-border corporate governance.

COMPLIANCE WITH FCPA AND OTHER LAWS

In order for management to make the annual-report certifications required by Section 404 of the Sarbanes-Oxley Act, companies must ensure compliance with the Foreign Corrupt Practices Act (FCPA) and other laws. They can do this by fostering and communicating a “winning right” corporate culture that requires all employees to adhere strictly to legal standards. To sustain and effectively communicate these standards, companies need to hire employees with integrity and should never waste an opportunity to reinforce the standards. Companies also should provide annual FCPA and ethics training to all board members and employees. It is particularly important that a company find an “ethics champion” to train and interpret these standards to local employees. Further, a company must maintain consistency and must not waver from these standards, whether it is dealing with a foreign private enterprise or with a foreign government.

GLOBALIZATION OF THE BOARD OF DIRECTORS

As U.S.-based businesses become more global in nature, many companies actively have recruited and retained an international board member who can bring a unique and invaluable perspective to the board. Many organizations also hold board meetings in international locales so the board can gain awareness of the global nature of its company’s business.

FOREIGN SUBSIDIARIES

Given the general desire of U.S.-based companies to closely monitor and control foreign subsidiaries, many such companies have appointed their U.S.-based CEOs and CFOs as board



members and/or officers of their foreign subsidiaries. While there are no widely accepted best practices in this area, companies that have adopted this governance approach should be cautioned that it is not without risk, as such officers could be personally liable for the acts of the foreign subsidiary in certain countries. Indeed, some companies do not appoint U.S.-based persons as board members and/or officers of their foreign subsidiaries, but rather populate such positions with the local chief compliance officer and the local finance manager, who are more familiar with jurisdictional legal issues.

JOINT VENTURES WITH A FOREIGN COUNTERPART

When considering a joint venture with a foreign counterpart, a board should ensure that, with the help of management, it has analyzed three key questions:

WHAT IS THE SCOPE OF THE JOINT VENTURE?

The company should be sure to understand and address joint-venture governance issues, including the identification of who has day-to-day control of the operations. Careful consideration should be given to protecting the company's intellectual property rights and to the joint venture's potential impact on the value of the company. A well-drafted joint-venture contract will help identify and clarify these issues.

WHAT ARE THE ALTERNATIVES TO THE JOINT VENTURE?

Operation of the joint venture may not be clear and simple, given that it is often hard to align the interests of the foreign party. For this reason, some companies view foreign joint ventures as an unsatisfactory way to do business and, if given the option, prefer greenfield investments and acquisitions. If a company has no option, it should be prepared to spend a considerable amount of time and resources on the foreign joint venture.

HOW/WHEN WILL THE COMPANY EXIT FROM THE JOINT VENTURE?

The company should have a clear path to liquidity and value when the joint venture is terminated. Typically, companies have a difficult time unwinding a joint venture because of valuation issues, but a well-drafted joint-venture contract should define these terms upon termination.

RELATIONSHIPS WITH FOREIGN GOVERNMENT OFFICIALS

U.S.-based companies abroad need to be involved in the foreign communities in their region and should engage in constructive dialogue with the local government officials. Due to the complexity of foreign government policies, company executives need to exercise patience and take the time to visit with local mayors and other officials. A local manager should be appointed to oversee and manage these relationships.



FOR MORE INFORMATION

For more information on this session or the seventh annual National Directors Institute, visit Foley.com/ndi or contact the moderators and panelists directly.

Benjamin F. Garmer III
Foley & Lardner LLP

Terry D. Growcock
The Manitowoc Company, Inc.

Randall J. Hogan
Pentair, Inc.

Robin Johnson
Eversheds LLP

Cary A. Kochman
UBS Securities LLC

Timothy Sullivan
Bucyrus International, Inc.

Dennis Wheeler
Coeur d'Alene Mines Corporation