VOLUME 30 | NUMBER 1 | WINTER 2018

Journal of APPLIED CORPORATE FINANCE

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Columbia Business School

Fiduciary Duties of Corporate Directors in Uncertain Times

by Ira M. Millstein, Ellen J. Odoner, and Aabha Sharma, Weil, Gotshal & Manges*

It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way…[1]

While perhaps not rising to the level of turbulence Dickens described, these are uncertain times for decision-making by boards of directors. The outcome of the US Presidential election, combined with Brexit and other political developments abroad, has called into question—and has begun to upend—trade policy, tax policy, regulatory policy, energy policy, healthcare policy, immigration policy, and other key external policies on which corporate strategies rest. These new political uncertainties exacerbate challenges with which boards have already been grappling, among them oversight in the post-financial crisis environment, cybersecurity, climate change, the lightning impact of social media (even before Presidential tweets), corporate ethics, the conflicting priorities and time horizons of stockholders, and the appropriate role of the corporation in addressing social concerns. And boards are also facing new challenges, such as how to deploy the proceeds of tax reform and how to address demands to stamp out, once and for all, sexual misconduct in the workplace.

Fortunately for directors confronting a complex, unsettled environment as they weigh risks and make decisions concerning corporate strategy and other key issues, bedrock corporate law principles and protections for directors have not changed. It is a "fact of corporate life" that "when faced with difficult or sensitive issues, directors often are subject to suit, irrespective of the decisions they make."[2] Under most circumstances, however, decisions made by informed and financially disinterested and independent directors are protected by the business judgment rule—a "powerful"[3] presumption that directors are "faithful to their fiduciary duties"[4] that is "at the foundation"[5] and "at the core"[6] of corporate law. The business judgment rule presumes that "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company"[7] and, therefore, the courts give great deference to the decision. Other sources of protection for directors are charter provisions exculpating directors from liability for violations of their duty of care; broad charter, bylaw and contractual provisions affording directors indemnification and advancement of litigation expenses; and director and officer (D&O) liability insurance.

The business judgment rule and these additional protections take on special importance at times of elevated risk and uncertainty. By insulating directors from personal liability when they follow an appropriate process (and sometimes even when they do not), the legal framework encourages directors to act proactively and make hard choices.

* The authors express their appreciation to the following colleagues who collaborated with them on prior articles that have contributed to this one: E. Norman Veasey, former Chief Justice of the Delaware Supreme Court, a former senior partner of Weil Gotshal & Manges LLP and now special counsel to the Wilmington law firm of Gordon, Foumaris & Mammarella, P.A.; and Stephen A. Radin and Lyuba A. Goltser, who are partners of, and Andrew E. Blumberg, who is an associate with, Weil Gotshal & Manges LLP. Chief Justice Veasey and Mr. Millstein are co-authors of "Board Excellence and Fiduciary Duties of Corporate Directors" (August 2017) and Ms. Odoner, Mr. Radin, Ms. Goltser and Mr. Blumberg are co-authors of "Fiduciary Duties of Corporate Directors in Uncertain Times" (August 2017), both of which were commissioned by the Millstein Center for Global Markets and Corporate Ownership at Columbia Law School.

1. Charles Dickens, *A Tale of Two Cities* (1859), portraying the turbulence of the late 18th Century.
2. *Smith v. Van Gorkom*, 488 A.2d 858, 881 (Del. 1985).
3. *Rales v. Blasband*, 634 A.2d 927, 933 (Del. 1993).
4. *Beam v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004).
5. *Disney v. Walt Disney Co.*, 2005 WL 1538336, at *4 (Del. Ch. June 20, 2005).
6. *In re CompuCom Sys., Inc. S'holder Litig.*, 2005 WL 2481325, at *5 (Del. Ch. Sept. 29, 2005).
7. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

What Are the Board's Fiduciary Duties and to Whom Are They Owed?

It is a "cardinal precept" of the law that "directors, rather than shareholders, manage the business and affairs of the corporation."[8] In doing so, directors owe the corporation and its stockholders fiduciary duties of care and loyalty[9] and must act "on an informed basis, in good faith and in the honest belief" that their actions are "in the best interests of the company."[10] "In essence, the duty of care consists of an obligation to act on an informed basis; the duty of loyalty requires the board and its directors to maintain, in good faith, the corporation's and its shareholders' best interests over anyone else's interests."[11]

The conduct required to fulfill the fiduciary duties of care and loyalty varies with the context in which the board is making its decision. Some of these contexts are extraordinary "lifecycle" events such as the sale of the corporation, or insolvency. A key duty in the context of ongoing operations is that of "oversight." Often referred to as the "Caremark duty," it requires directors to implement and monitor "information and reporting systems that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance."[12] Directors often face claims of oversight failure when their corporation suffers a large loss as a result of a "corporate trauma" (e.g., the hacking of customers' personal financial data, exposure to unanticipated financial risks, worker safety violations, environmental damage or severe injuries arising out of manufacturing defects), although the standard for imposing liability is extremely high.

Directors owe their fiduciary duties to *all* stockholders—even where appointed to the board by a particular stockholder.[13] But this creates a challenge for boards because most corporations have a multi-faceted stockholder base with a wide range of priorities and views on strategies, time horizons for maximizing returns and how their corporation should address environmental, social and governance issues. Moreover, the stockholder base may hold various types of equity in addition to traditional common stock. So in today's world, how does a director think about the interests of *all* stockholders?

The Delaware Court of Chancery has answered the question this way: the board owes fiduciary duties to "the stockholders in the aggregate in their capacity as residual claimants, which means the undifferentiated equity as a collective, without regard to any special rights."[14] This principle applies, for example, to board decision-making with regard to proposed transactions with a controlling shareholder or other related party. It also applies to board decision-making regarding activist shareholder proposals for a change in strategic direction, such as a sale or break-up of the company or a change in capital allocation policy to emphasize buybacks or dividends over reinvestment.

Corporations have many constituencies in addition to their stockholders: employees, customers, suppliers, the local communities in which they operate and the wider, sometimes even global, communities affected by their operations. In Delaware, the home of more than 50% of all US publicly traded corporations, however, "stockholders' best interest must always, within legal limits, be the end. Other constituencies may be considered only instrumentally to advance that end."[15] Thus, for example, the legal basis for board decisions to engage in corporate philanthropy or to increase wages is not the benefit that the local school district or the corporation's workforce will receive but rather that these actions will increase the value of the corporation for the stockholders by enhancing the pool from which the corporation can draw a well-educated workforce and enhancing the corporation's ability to attract and retain that workforce.

In contrast with Delaware, many other states have adopted statutes that allow, and in a few cases even require, a board to consider the interests of non-stockholder constituencies, especially in the context of a potential change in control.[16] Delaware has recently experimented with a new type of for-profit corporation—a public benefit corporation ("PBC")—"to produce a public benefit or public benefits and to operate in a responsible and sustainable manner."[17] The statute expressly requires the directors of a PBC to balance three sets of competing interests: the pecuniary interests of stockholders, the best interests of those materially affected by the corporation's conduct, and the public benefits identified in the corporation's charter.[18] As of this writing, there are few examples of PBCs—it remains to be seen how prevalent they become, and how directors of PBCs reconcile the three sets of competing interests in practice.

What Time Horizon Should the Board Use for its Decisions?

Corporate strategy is at the center of the board's responsibilities. This includes striking the right balance between actions intended to enhance stockholder value in the short-term and actions intended to enhance growth and profitability

8. *Aronson*, 473 A.2d at 811 (citing 8 Del. C. § 141(a)).
9. *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).
10. *Aronson*, 473 A.2d at 812.
11. *Shoen v. SAC Holding Corp.*, 137 P.3d 1171, 1178 (Nev. 2006).
12. *In re Caremark Intern. Inc. Deriv. Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996)
13. *In re Nine Sys. Corp. S'holder Litig.*, 2014 WL 4383127, at *36 (Del. Ch. Sept. 4, 2014) (emphasis in original).
14. *Hsu, 2017 WL 1437308, at *17 (quoting In re Trados Inc. S'holder Litig., 73 A.3d 17, 36-37 (Del. Ch. 2013)).*
15. *Hsu*, 2017 WL 1437308, at *17 No. 14 (quoting Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 Wake Forest L. Rev. 135, 147 No. 34 (2012).
16. *See* 1 James D. Cox & Thomas Lee Hazen, *Treatise on the Law of Corporations* § 4:10 (3d ed. 2016).
17. 8 Del. C. § 362(a).
18. 8 Del. C. § 365(a).

over a longer time horizon, and the appropriate allocation of corporate resources between these potentially competing objectives. The Delaware Supreme Court stated in 1989 that Delaware law authorizes a board "to set a corporate course of action, including time frame, designed to enhance corporate profitability." Thus, in the view of the court, "the question of 'long-term' versus 'short-term' values is largely irrelevant because directors, generally, are obliged to chart a course for a corporation which is in its best interests without regard to a fixed investment horizon."[19]

More recently, the Court of Chancery has stated that directors owe fiduciary duties to "short-term as well as long-term holders,"[20] but also that the "corporation, by default, has a perpetual existence," and "[e]quity capital, by default, is permanent capital." Under this view, directors "owe a duty to shareholders as a class to manage the corporation . . . in a way intended to maximize the long run interests of shareholders."[21]

Maximizing long-term value does not always mean the same thing as acting to ensure the corporation's perpetual existence. A director "might readily determine that a near-term sale or other shorter-horizon initiative, such as declaring a dividend, is value-maximizing even when judged against the long-term," "[a] trade bidder with access to synergies… may offer a price for a corporation beyond what its standalone value could support," and directors might for other reasons "conclude that continuing to manage the corporation for the long-term would be value destroying because of external market forces or other factors."[22] When "considering whether to pursue a strategic alternative that would end or fundamentally alter the stockholders' ongoing investment," directors must "seek an alternative that would yield value 'exceeding what the corporation otherwise would generate for stockholders over the long-term.'"[23] While the scenarios may change, the fundamental requirement for directors does not: "strive to maximize value for the benefit of the residual claimants."[24]

Who are the Right Directors for Uncertain Times?

The law positions directors "at the epicenter of all corporate affairs, entrusted as the corporation's ultimate authority."[25] In light of the responsibilities that flow from this position, it is essential that corporations have the "right" directors in the boardroom. There is growing support among institutional investors, pension funds and proxy advisory firms for board refreshment practices that promote increased diversity among directors. For example, some of the largest institutional investors, including State Street and Blackrock, have put companies "on notice" that if they fail to take action to increase the number of women on their boards, they will use their proxy voting power to effect change. Michelle Edkins, Managing Director and Global Head of BlackRock's Investment Stewardship Team, recently stated with respect to companies that have not made much progress on board diversity, particularly gender diversity, if "we have engaged in prior years, we will be voting against the reelection of members of the governance committee unless there's a very credible explanation for lack of progress." Moreover, in September 2017 the New York City Comptroller's Office publicly announced the launch of the next phase of its Boardroom Accountability Project, in which the Comptroller is calling on the boards of 151 companies to disclose the race and gender of their directors, along with board members' skills, in a standardized "matrix" format. Proxy advisory firms ISS and Glass Lewis also emphasized the importance of gender diversity ahead of the 2018 proxy season. Specifically, ISS took the position that boards "should be sufficiently diverse to ensure consideration of a wide range of perspectives" and that it would highlight boards with no gender diversity. Similarly, Glass Lewis noted that it would consider diversity a factor when evaluating board composition in 2018. Starting in 2019, Glass Lewis will recommend voting against nominating committee chairs of boards with no female directors.

We agree that it is imperative to increase diversity in the boardroom. However, amidst diversity, we believe that there are certain characteristics that should be common to all directors in these times of uncertainty. We call this suite of characteristics the "Activist Director." Who is he or she? The "Activist Director" accepts responsibility for partnering with management on strategy but asks the tough questions based on his or her expertise, the time he or she has devoted to understanding the corporation's operations and the competitive environment and possibilities for "disruption," and his or her knowledge of what customers and suppliers expect. The Activist Director recognizes the strategic value of the corporation's reputation and puts management's feet to the fire about the corporation's ethical culture. Finally, the Activist Director embraces meaningful engagement with stockholders, including the clear articulation of strategy called for by BlackRock, Vanguard and other significant asset managers, and is open-minded when considering ideas presented by stockholders—even those labelled with the polarizing term "activist."

Nominating and corporate governance committees are entrusted with the job of identifying and interviewing candidates to serve as directors and then recommending the best candidates for nomination. They frequently work with outside search firms to develop the picture of the directors they are looking for and charge the search firms with assembling an initial slate of "potentials." We recommend that nominating

19. *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989).
20. *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 129 (Del. Ch. 2011).
21. *TW Servs., Inc. v. SWT Acq. Corp.*, 1989 WL 20290, at *7 (Del. Ch. Mar. 2, 1989) (quoted in *Rural Metro*, 88 A.3d at 80 No. 4 and *Trados*, 73 A.3d at 37 No. 5).
22. *Hsu*, 2017 WL 1347308, at *19.
23. *Rural Metro*, 88 A.3d at 80-81 (quoting *Trados*, 73 A.3d at 37).
24. *Hsu*, 2017 WL 1347308, at *20.
25. Ira M. Millstein, *The Activist Director: Lessons from the Boardroom and the Future of the Corporation* (Columbia University Press, 2016).

Recruiting Activist Directors: Recommendations for Directors and their Counselors

The following are examples of questions that boards should ask potential candidates—and potential candidates should ask themselves—to better understand their values, interests, skills, experiences, and availability. The questions should be adapted, of course, to the experience of the candidate and the needs of the corporation.[26]

Doing the Right Thing

• Have you ever had to defend a decision you made as a director or otherwise in your career even though other influential people were opposed to your decision?

• There are times when members of management, shareholders, or proxy advisors may try to exert pressure on directors for a certain outcome. Have you encountered such a situation? How did you react?

• Have you ever served on a board where certain board members were not, in your opinion, doing what was in the best interests of the corporation as a whole? What did you do?

• Tell me about a time when you strongly disagreed with someone and how it resolved.

• How would you handle a situation where there is pressure to achieve short-term quarterly results at the risk of jeopardizing long-term performance? Have you come across this situation before?

• Have you ever introduced a new idea or policy to the boards you serve on? Did you meet any resistance when trying to implement the new idea or policy? How did you cope with it?

• People make mistakes and sometimes do things that turn out differently than hoped for. Has this happened to you? What happened?

• While serving on boards, what steps do you go through to ensure that your decisions are in the best interests of the corporation?

• What types of decisions do you find the most difficult to make as a director and why?

• When have you gone above and beyond to get a job done?

• Have you ever found yourself in an ethical dilemma as a board member or otherwise in your career? What did you do?

Director Interest

• Why are you interested in the company's industry and, specifically, the company's business?

• Why would service on this particular board be meaningful and fun?

Time and Commitment

• How much time do you typically spend on other boards?

• How much time each month can you commit to this board?

• What are some examples of you having to set priorities and multitask?

• Have you had scheduling conflicts in the past with your full-time job and the boards you serve on? How do you resolve these conflicts?

• What other obligations do you have?

and corporate governance committees and their search firms use the characteristics of the Activist Director as prominent features of that picture and focus their interviews and other due diligence on testing those characteristics.

(Text continues on page 22.)

26. For additional questions, see Ira M. Millstein, *The Activist Director: Lessons from the Boardroom and the Future of the Corporation* (Columbia University Press, 2016).

What to Do in Uncertain Times: Recommendations for Directors and their Counselors

Directors should expect uncertainty to be a fact of corporate life for the foreseeable future. In light of this, we offer the following recommendations for directors and their counselors.

To lay the foundation for board decisions that will be entitled to the protection of the business judgment rule or, where applicable, withstand more stringent standards of review:

• In approaching decision-making on all but a limited number of issues, recognize that the business judgment rule, augmented by exculpatory and indemnification provisions and D&O insurance, affords powerful protection against personal liability as long as decisions are made following an appropriate process—regardless of outcome.

• At the outset, identify and disclose any actual or potential self-interest or lack of independence with respect to the matter in question so that a thoughtful determination can be made by the board about which directors should participate in the decision-making and which, if any, should recuse themselves from discussions and/or a vote.

• Identify and obtain the information that will be relevant to the decision. Consider the need for expert advice.

• Ensure that the minutes carefully document independence determinations, the process by which the decision was reached, the time spent, the information considered, the risks and benefits weighed and the ultimate basis for the decision.

• If stockholder approval will be sought or a discussion of the transaction is otherwise to be sent to stockholders, ensure that these matters are also described in the proxy or information statement.

To help the company avoid both the underlying calamity and the impact on stockholder value that come from corporate trauma:

• Probe how risk is incorporated into corporate strategy and be vigilant about potential harm to the company's reputation.

• Ensure the board's agenda provides ample time, on a regular basis, for oversight of the framework, processes and resources (both internal and external) that management is using to identify, evaluate and mitigate risk. Oversight should include how well risk management efforts are keeping pace with changes in the company's operations and in the political, business and regulatory environment.

• As part of setting the appropriate tone at the top, emphasize—throughout the organization—the importance of upholding ethical values and adhering to risk management and compliance initiatives. Promote a culture that fosters speaking up and healthy debate so that concerns can be surfaced and addressed before they escalate into trauma. Keep a watchful eye on the culture by monitoring the types and frequency of concerns coming through the organization's hotline and other internal reporting mechanisms, and management's analysis and response.

• Study special committee reports and other analyses to see what has gone wrong at other companies, including ethical failures and compensation structures that may have encouraged excessive risk-taking rather than sustainable growth. Seek to understand how, with twenty-twenty hindsight, these traumas might have been avoided or, at least, identified at an earlier stage. Work with senior management to take advantage of lessons learned.

• Regularly reassess and look for ways to strengthen the board's own risk management oversight activities. Ensure the allocation of responsibility among the board and board committees covers the waterfront of risks. Focus on the quality of risk management oversight as part of board and board committee self-evaluations. Consider the need for competencies in critical company-specific risk areas as part of the process of refreshing the composition of the board.

• Most important, don't hesitate to ask the tough questions or request more information of management or your fellow board members.

What Does This Mean for Directors?

The law, principally through the business judgment rule, gives directors the flexibility to make the decisions, to take the prudent risks, and to pursue the critical innovation and growth that ultimately mark the success of a corporation. The law does not distinguish between directors making decisions that will promote the short-term versus long-term results of the corporation. Rather, the key is whether independent, disinterested directors have followed the requisite informed process when making decisions.

It is also true that, beyond the courts of justice, the courts of public opinion and the markets influence decision-making in the boardroom. Admittedly, there is always risk in investing in the long-term performance of the corporation, especially when this means forgoing immediate profits or boosting share price. The alternative risk is the risk of focusing only on short-term results and foregoing innovation and growth to the point where a corporation may become uncompetitive and cease to be sustainable in the future. Directors are in the difficult position of evaluating which risk is greater and must ask themselves what the right thing to do for their companies may be—not what is easiest in the short-term.

This is the critical point. Directors should have confidence knowing that they are empowered to make decisions that are in the long-term interests of the corporation. In other words, the law liberates directors from succumbing to short-term pressures. This may mean missing a quarter to invest in innovation. It will certainly mean taking calculated business risks. And it will mean pushing back firmly against short-termism from the markets when the board believes its long-term strategy is the right one for the corporation. But it may well also mean that a sale of the company generates more value for shareholders than remaining independent, or that a hedge fund does have the right strategy that the board and management missed. The point is that the only people in a position to make those distinctions are the directors.

They—the directors—are the "ultimate authority."

IRA M. MILLSTEIN is a senior partner at the law firm Weil, Gotshal & Manges LLP, where he practices in the areas of government regulation and antitrust law and counsels boards on issues of corporate governance. Mr. Millstein is a frequent lecturer and an Adjunct Professor of Law and Founding Chair of The Millstein Center for Global Markets and Corporate Ownership at Columbia Law School and an Adjunct Professor at Columbia Business School.

ELLEN J. ODONER heads Weil's Public Company Advisory Group, which advises U.S. and foreign public companies on corporate governance, securities regulation and compliance. Among her areas of focus, Ms. Odoner represents boards of directors, audit committees and other committees of independent directors of public companies as well as the governance bodies of significant not-for-profit institutions in complex transactions, investigations and other contexts involving the exercise of fiduciary duties.

AABHA SHARMA is a senior associate in Weil's Public Company Advisory Group. Ms. Sharma has experience advising public and private companies, boards of directors, special committees, executives and private equity sponsors on a full range of corporate governance and compliance matters.

Journal of Applied Corporate Finance (ISSN 1078-1196 [print], ISSN 1745-6622 [online]) is published quarterly by Wiley Subscription Services, Inc., a Wiley Company, 111 River St., Hoboken, NJ 07030-5774 USA.

Postmaster: Send all address changes to JOURNAL OF APPLIED CORPORATE FINANCE, John Wiley & Sons Inc., C/O The Sheridan Press, PO Box 465, Hanover, PA 17331 USA.

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Journal of Applied Corporate Finance is published in four issues per year. Institutional subscription prices for 2018 are:
Print & Online: US$757 (US), US$904 (Rest of World), €588 (Europe), £463 (UK). Commercial subscription prices for 2018 are: Print & Online: US$1007 (US), US$1202 (Rest of World), €782 (Europe), £615 (UK). Individual subscription prices for 2018 are: Print & Online: US$129 (US), £73 (Rest of World), €107 (Europe), £73 (UK). Student subscription prices for 2018 are: Print & Online: US$47 (US), £26 (Rest of World), €40 (Europe), £26 (UK). Prices are exclusive of tax. Asia-Pacific GST, Canadian GST/HST and European VAT will be applied at the appropriate rates. For more information on current tax rates, please go to www.wileyonlinelibrary.com/tax-vat. The price includes online access to the current and all online back files to January 1st 2014, where available. For other pricing options, including access information and terms and conditions, please visit www.wileyonlinelibrary.com/access.

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