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On Board

The General Counsel's Role in Briefing the Board Postelection

From the Experts

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Following the election, the time is ripe for general counsel to provide important governance support through a series of board briefings on the possible implications to the company of potential policy changes. Not only would such briefings support core fiduciary obligations, they would also be consistent with emerging guidelines that encourage more robust board educational programming.

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The implications for commerce across the broadest possible scale from the recent federal and state elections are obvious to most. The possibility of significant changes in law, regulation and enforcement practices, among other areas, could have substantial impact on whole industry sectors, as well as on individual corporations, their financial structure and their strategic planning. New corporate opportunities could be as plentiful as new enterprise risks. Who really knows at this point?

While much of the current discussion is speculation, corporate leadership should be encouraged to begin briefing the board right now on potential policy implications. The sky is not falling, yet board members intuitively know that transformative change may be in the works. They're reading the papers, watching the news programs and thinking about how the coming change may affect their company. So, there's little upside to waiting until greater clarity is achieved.

It's not a matter of "gun-jumping" or otherwise wasting important slots in the board agenda. If the governing board and key committees are to be active partners to management in evaluating the strategic and tactical implications of election-related policy, the education process should begin sooner rather than later. And it is better for the executive team to approach board leadership with an educational programming proposal than to wait to be asked to prepare one.

This approach is entirely consistent with fiduciary principles governing director attentiveness, diligence and oversight. These principles generally provide that the board has a basic obligation to be sufficiently informed on relevant strategic, political, economic, regulatory and similar developments in order to provide effective oversight and make informed decisions. Indeed, expectations of engagement, diligence and attentiveness are at the core of the duty of care.

These expectations are significantly increased in periods of transformational change such as major economic developments; national or international crises; and fundamental shifts in political power.

An aggressive board education program keyed to election-related changes is also consistent with both of the major corporate governance policy statements released this summer. For example, the Commonsense Governance Principles, prepared by the Dimon/Buffett group, includes a surprising degree of support for continuous director education on industry developments. Indeed, the Commonsense Principles promote the use of outside advisers and experts in making board education presentations—a position that could be controversial with some CEOs who zealously control board access. Another example is the 2016 edition of the Business Roundtable's Principles of Corporate Governance, which encourages board members to take advantage of internal and external education programs, and recommends particularly robust educational efforts for new directors.

Briefing the board on election-related implications could involve two specific components. The first would be a near-term, high-level briefing on the inferences to be drawn from such sources as campaign pledges, position papers, transition team composition and Cabinet member appointments. This briefing would introduce the potential for transformative impact on company operations and strategic planning, and would suggest, using broad strokes, areas of potential impact on the company's business model.

Its goal would be to leave the board more capable of monitoring continuing developments on the evolution of postelection policy. It could also enhance the ability of the board to anticipate possible changes to the company's operational and governance structures, and to engage in related discussion with senior management. One example would be the ability to alert key committees of the need to shift their focus as policy decisions evolve into specific legislative and regulatory proposals. The committees most likely to assume greater and more pressing responsibilities include strategic planning, human resources, executive compensation, enterprise risk/compliance and finance.

The second component would be a more formal education program, extending over a period of time, that would provide targeted board and committee briefings on specific transition developments and legislative and regulatory proposals. Examples might include the appointment of a new SEC chair; specific proposals to modify or repeal Dodd-Frank; major corporate tax initiatives; Affordable Care Act revisions that broadly affect company employees; administrative pronouncements on regulatory enforcement in critical areas; decisions of the Federal Reserve Bank and other major economic trends and developments; and a host of other developments and proposals expected to have a significant impact on the company, its shareholders and other constituents.

The fundamental principle of such an aggressive education program is to support the ability of the board to effectively perform its oversight and decision-making functions. The quality and timeliness of the information provided will be critical to the program's success. It need not involve many hours and reams of paper, but the program's sophistication should be commensurate with the significance that corporate leadership attributes to anticipated policy changes.

While it is the general responsibility of senior management as a whole to keep the board informed on such matters, the general counsel is uniquely well-suited to lead the educational effort, given that most policy changes will be manifested in legislative and regulatory initiatives.

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