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Thoughts for Boards:
Key Issues in Corporate Governance for 2025

As we look ahead to the challenges and opportunities facing boards of directors in this new year, it is illuminating to reflect on how much has changed in corporate governance. Over the last five decades, we have been on the front lines with our clients as the evolution of corporate governance has been propelled by multiple crises and systemic shocks—including the Enron and WorldCom scandals and ensuing Sarbanes-Oxley legislation, which prompted incremental layers of disclosure and regulations, followed by the financial crisis and subsequent Dodd-Frank reforms, and most recently the Covid pandemic, which intensified the spotlight on ESG and stakeholder governance. In the private ordering arena, ISS and shareholder activists were remarkably successful in changing the status quo for once-common governance features like staggered board structures, and we saw the shelving of poison pills—a defense we originated and subsequently defended in *Moran*, *Airgas* and other cases. These trends have, in turn, increased the prevalence and omnipresent threat of proxy fights. And as the corporate governance debates have continued to evolve, we have seen institutional investors become increasingly active participants, with detailed and often diverging policies setting forth their priorities, preferences and perspectives on issues ranging from climate disclosures to DEI to over-boarded directors. The compounding effect is that boards today are expected to navigate a corporate governance landscape that has become much more complex and nuanced, with an expanding set of expectations for their oversight role and responsibilities.

In the midst of all of these considerations, it can be challenging for a board to maintain a steady focus on the core functions needed to preserve, develop and grow a sustainable business—namely, (i) the selection and compensation of management, (ii) overseeing and guiding the company's business strategy, (iii) overseeing risk management, (iv) building credibility with investors and other stakeholders, and (v) the board's self-evaluation of its composition and processes. Many of the issues facing boards today can be organized around one or more of these guideposts. For example, a particular ESG issue may tie into the board's oversight of risk management, the company's business strategy and its communications with stakeholders. Defending against a particular activist attack may require an evaluation of how the activist's proposals contribute to or undermine the company's business strategy, the company's credibility with investors and the board's composition.

Accordingly, set forth below are some considerations for boards to bear in mind as they focus on these core functions:

- **<u>Management Selection and Compensation</u>**
  - The selection and compensation of the company's chief executive officer and other members of senior management is one of the most important functions

of the board. This is particularly true given high levels of CEO turnover in the past year; according to a recent Russell Reynolds report, the number of CEO departures in the S&P 500 increased 21% in 2024 compared to the prior year, and 22% of all CEO departures in 2024 were the result of a planned succession process, the highest level recorded to date. Resultantly, boards are increasing their attention to CEO succession planning. PwC's 2024 Annual Corporate Directors Survey reported that 47% of the directors surveyed believed their boards should spend more time over the next 12 months on CEO succession planning, yet just under 50% of the directors indicated that they were very confident in their board's ability to effectively identify candidates for CEO succession. Indeed, given the dynamic and rapidly evolving business environment, succession planning is often a long-term undertaking that involves careful cultivation of the company's talent pipeline and can be a focal point of activists, who at times bring their own proposed succession candidates to the table. For example, after The Walt Disney Company prevailed in the proxy contest launched by Trian—which was focused in large part on criticizing the short-lived tenure of the company's prior CEO and the boomerang reappointment of Bob Iger to that role—the company announced in October 2024 that a "critical priority" was to name a successor to the CEO by early 2026. In considering board composition, boards should consider the succession planning experience of existing board members and prospective board candidates.

- Executive compensation remains an area of focus for investors and proxy advisory firms. ISS has announced that, beginning with the 2025 proxy season, it will place greater focus on the disclosure and design aspects of performance-vesting equity programs, particularly for companies that exhibit a pay-for-performance misalignment. Glass Lewis, which takes a more holistic approach, emphasized in its 2025 policy update that executive compensation programs are reviewed on a case-by-case basis, and flagged that companies which allow for committee discretion over the treatment of unvested awards in a change of control should provide clear rationales for how such awards are treated in the event of a transaction.

- ESG-related goals may have an appropriate place in executive compensation programs for certain companies, but boards should determine whether such goals promote long-term shareholder value and enhance management incentive arrangements. Determining the nature and usage of ESG-related goals and their impact on compensation outcomes is something that compensation committees should, particularly in light of the shifting political landscape, re-assess on a regular basis as part of their broader annual review and assessment of performance goals.

  For further discussion of compensation matters, see our memo, Compensation Season 2025.

- **Overseeing the Business Strategy**

    - While on-the-ground implementation of the company's business strategy is the responsibility of the company's CEO and management team, the board is responsible for overseeing and guiding this strategy and ensuring that the board has confidence in the business plan and management's ability to execute. Directors can be an invaluable resource and sounding board to help guide the management team in this regard. Given rapidly changing business conditions and significant "known unknowns," it is imperative for boards to optimize their effectiveness in this role. For example, the past two years have seen a dramatic increase in AI applications, with a recent survey indicating that 72% of companies have adopted AI in some form, which has had cascading effects on adjacent industries such as energy, semiconductors and data centers. The regulatory climate also remains in a state of flux, with increased judicial and executive branch scrutiny of federal regulations and a potentially more volatile geopolitical environment. For further discussion of regulatory enforcement priorities under the new administration, see our memo, White-Collar and Regulatory Enforcement: What Mattered in 2024 and What to Expect in 2025.

    - In this environment, there will inevitably be competing considerations and trade-offs that boards must weigh in charting the best path forward—between stakeholders and across varying time horizons. The reconsideration of shareholder primacy over the course of the past decade has underscored the importance of broadening the lens to cultivate a holistic, well-rounded perspective on the company's business risks and opportunities as set forth in the New Paradigm, which we developed and was issued by the International Business Council of the World Economic Forum in 2016. In this regard, boards are uniquely positioned to help management "see the forest for the trees" and resist detrimental pressures for short-term gains at the expense of longer-term sustainability.

    - In addition, boards are increasingly tasked with helping companies navigate politically charged or polarizing issues—such as DEI and ESG. In this environment, boards should consider if, when and how their companies should engage on divisive topics, taking into account shifting stakeholder sentiments and potential risks to reputational capital that can come both from engaging and not engaging on certain issues. Now as much as ever, it is important that boards work with management to set the "tone at the top" and create a corporate culture that gives priority to ethical standards, professionalism and integrity and that reinforces the nexus between "values" and "value."

- **Overseeing Risk Management**

    - Businesses today face an increasingly complex array of risks that are testing the resilience of corporate values, strategies, operations and enterprise risk management, and many, if not most, of these risks are likely to persist and even intensify going forward. According to the World Economic Forum's Global Risks Report 2025, the majority of business leaders polled anticipate some instability and a moderate risk of global catastrophes in the short term, while another 31% expect even more turbulent conditions over the next two years, with even higher expectations of instability and turbulence in the long term.

- One area of risk management that has been a focal point for many years is cybersecurity. The SEC's cybersecurity disclosure rules require companies to disclose specifically how cybersecurity risk management fits into their overall risk management framework. The SEC announced several enforcement actions in 2024 against tech companies for making materially misleading disclosures regarding cybersecurity risks—although two Republican SEC commissioners issued strong dissenting statements to these actions. It is possible that, under the new administration, the SEC will take a different approach to cyber-related enforcement actions. AI-related risk disclosures should be specific and balanced, and identify the material legal, operational and competitive risks associated with AI usage, particularly in light of the SEC's stated focus on "AI washing." A recurring theme in recent SEC comments on AI disclosure has been requests for increased specificity about how AI is intended to be used, sometimes including requests for what "artificial intelligence" means in the specific business context of the disclosing company, as well as details on attendant risks.

- In overseeing risk management, the board should work to understand the corporation's risk profile and its management of short-, medium- and long-term risks, as well as how these risks are being taken into account in business decision-making and strategic planning. It is worth noting, however, that boards cannot and should not be involved in day-to-day risk management, which is squarely within the purview of the management team. In practice, however, this delineation between an oversight role and a management role can raise questions about the level of detail and frequency of briefings, tutorials and other information provided to the board, as well as the extent to which the board should be following up on red or yellow flags. For further discussion, see our memo, Risk Management and the Board of Directors.

- **Building Credibility with Stakeholders**

  - Boards should continue to be proactive in response to the threat of shareholder activism. In recent years, directors have taken a more active role in shareholder engagement and communications. For example, individual directors, particularly lead independent directors and chairs of boards or of standing committees, are increasingly expected to join and be active participants in meetings with investors both in peacetime and during an active proxy fight. During these engagement sessions, directors are expected to demonstrate a strong understanding of the business and investor priorities, and to demonstrate independence from management. By staying abreast of current activism trends and stakeholder sentiment, boards can encourage management to proactively address issues that are attracting attention from investors and other constituencies.

- ESG topics remain highly politicized, as anti-ESG activists continue to apply pressure on businesses in a variety of ways, including shareholder proposals, public letters, lawsuits and congressional subpoenas, a trend likely to continue under the new administration. Activists, including those who may not even be shareholders, have successfully used social media campaigns to pressure companies to walk back stated DEI initiatives, as seen when an X (formerly Twitter) campaign spearheaded by Robby Starbuck successfully called for a boycott of Tractor Supply Co. until it removed DEI and ESG programs. Yet, at the same time, the pressure is not "off" boards when it comes to governance—index funds and other investors continue to focus on certain ESG topics, particularly governance, through the lens of risk management and financial resilience, and the ESG enforcement and litigation landscape remains active, including greenwashing litigation and climate-related litigation being brought against fossil fuel companies. In considering ESG-related policies, directors should encourage management to ensure that any ESG-related policies can be demonstrably linked to performance and value creation such that they will withstand potential criticism, and the board should monitor stakeholder sentiment and work with management to proactively engage with stakeholders on these topics as appropriate.

- More broadly, management, with oversight, direction and sometimes direct participation from the board, should engage with stakeholders in order to gain a full understanding of their expectations and values, which can then allow management and the board to anticipate the short- and long-term impacts of decisions. The board can help shepherd the company's voice to ensure stakeholder confidence, even in issues that can be polarizing or divisive, by ensuring that the company's engagement with stakeholders aligns with the company's culture and stated "tone at the top" and is consistent with its purpose. Investor stewardship teams are continuing to focus their engagement efforts on companies' governance policies, board composition, and compensation practices and how they tie to strategic and risk management priorities. Boards should continue to seek out these engagement opportunities, especially in situations where such practices might benefit from additional context or explanation, as well as when a company has been in the public spotlight for its handling of a particular issue.

- **Board Composition and Self-Evaluation**

  - As the range of issues that boards are expected to oversee has expanded—to include topics such as cybersecurity risk management, the impact of artificial intelligence on business strategies, geopolitical scenario planning, and climate-related disclosures—the need for board members with diverse areas of expertise and perspectives has never been greater. At the same time, however, there continues to be a prevailing focus on recruiting directors with seasoned business acumen and well-rounded, core skills rather than candidates with specialized expertise in a few areas. So, for example, PwC's 2024 Annual Corporate Directors Survey reported that only 13% of the directors surveyed indicated that their boards added a director with cybersecurity expertise in the past year. Structuring an effective board is a balancing act, and, while there is a desire to show subject matter expertise in various categories among members of the board, often depicted via a skills matrix in the proxy statement, the composition of the board should be grounded in a long-term view of the company's strategic goals, and the skills and expertise needed to guide management toward the achievement of those goals.

  - The expansion of board responsibilities has sharpened the focus of institutional investors and activists on directors' bandwidth. Over-boarding concerns have been a driver for many recommendations or votes against directors in recent years, with many institutional investors having adopted diverging over-boarding policies. For example, in the case of a director who is also serving as the CEO of a public company, ISS's policy is to recommend against the election of the director if he or she serves on more than three public company boards (including their own company), whereas State Street Global Advisors, BlackRock and Vanguard have adopted a more restrictive policy that caps this at two public company boards. As focus has shifted away from board diversity requirements and mandatory retirement policies, director commitment policies are being touted as a way to promote board refreshment. However, such policies come with trade-offs, as a director with a particularly valuable skillset may serve on multiple boards, and service on other boards could be additive in terms of the experience and leadership skills that they are able to bring to bear. In considering their own composition, boards should seek to ensure that their directors have the requisite time and bandwidth to fully commit to their board duties, while also seeking to find qualified directors who have relevant experience and skillsets. Boards should also confirm that their policies clearly require a director to notify the chair of the board or its nominating and governance committee before such director accepts an additional director position or agrees to serve as a nominee in an activism campaign at another company.

- In addition, the SEC's adoption of the universal proxy card rule has prompted heightened scrutiny of individual director qualifications, as dissident stockholders and proxy advisors seek to identify the most vulnerable targets for board refreshment. Although the universal proxy card has made it easier for activist investors to nominate a slate of candidates, it has not necessarily made it easier for them to obtain a decisive victory in a proxy contest. In some cases, for example, the mix-and-match dynamic has diluted the impact of an activist's slate—as illustrated in Ancora's campaign at Norfolk Southern. Ancora nominated seven directors for 13 board seats; ISS recommended in favor of five of Ancora's nominees and Glass Lewis recommended in favor of six, with an overlap of four activist nominees being recommended by both proxy advisors, and with each of Ancora's seven nominees being recommended by at least one of ISS and Glass Lewis. The net result was that Norfolk Southern's shareholders elected only three of Ancora's seven nominees.

In sum, despite the continuously proliferating governance best practices, disclosure requirements and stakeholder expectations for boards, their effective leadership and oversight continues to be anchored by a few core principles. As boards work with management to navigate complexity, volatility and uncertainty, it will be important to maintain a clear-headed focus on these basic building blocks of effective board oversight.

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