Strong Governance And The Corporate Secretary

by Kristina Veaco

What distinguishes the truly effective corporate board—is it strong leadership, a strong commitment to governance principles or strong governance practices? Among the most important factors to ensure the implementation of sound governance principles and practices is strong legal and organizational board support, provided by an excellent corporate secretary. Directors can overlook the value of this fundamental boardroom best practice, even though it can make all the difference in delivering good governance.

The primary goal of a sound corporate governance program is to help boards of directors meet their fiduciary responsibilities. In doing so, directors are more likely to obtain the protection of the business judgment rule for their actions. Boards must ask themselves serious questions to raise awareness of some of the fundamental corporate governance practices and processes they need to become more effective and efficient. Boards should begin this process by answering a few tactical questions:

☐ Is your board spending more time on compliance and less time on strategy?

☐ Is your board satisfied with the support it receives from the company?

☐ Are you meeting the SEC and stock exchange requirements for effective corporate governance?

☐ Do you have the right directors?

☐ Do you have a strong board evaluation process?

☐ Are your board and committees properly staffed—able to satisfy their fiduciary obligations and to function properly?

☐ Are meetings well planned, well attended and properly documented?

☐ Do you have an effective board orientation and education effort?

☐ Are the right resources in place to interact with your board and implement your governance practices?

☐ Are you confident that you have adequate equity grant practices and governance?

☐ Are investors satisfied with your governance practices?

Today's regulatory environment makes having a sound governance program a corporate imperative. Data suggest that companies with sound governance programs perform better. Sarbanes-Oxley, the SEC and the stock exchanges have each imposed governance requirements on public companies, not to mention the expectations of investors, director and officer liability insurers, and proxy advisory services.

State corporation law also sets forth certain legal requirements for boards of both private and public corporations that are part of a company's governance. Court decisions, such as the 2006 *Disney* case, make clear that certain governance standards must be met in the process. In that case litigation might have been avoided had stronger governance processes existed. Boards need to ensure that their corporate governance practices and processes are in order.

In a time of increased focus on corporate governance, boards need to ensure that fundamental governance practices and processes are in place at their companies.

Most corporate governance failures can be traced to ineffective service provided by board advisors, and inadequate controls on governance processes. This is true for large and small corporations alike. In a climate of increased focus on corporate governance,

Kristina Veaco *is the founder of Veaco Group, a corporate governance advisory firm, with particular focus on the practical implementation of sound governance practices. [www.veacogroup.com]*

boards themselves need to ensure that fundamental governance practices and processes are in place at their companies.

The role of corporate secretary is an increasingly important and visible one as the person in that role is generally responsible for the company's corporate governance. The lawyers and professionals who manage the corporate secretary function effectively combine practical knowledge of the detailed requirements with sound practices and processes to ensure a high standard of governance.

The corporate secretary is responsible for appropriate recordkeeping of board and committee materials, and developing agendas that capture required board action. The corporate secretary compiles materials and resolutions for board consideration and drafts artful minutes that demonstrate the board's diligence in exercising its responsibilities.

Without these fundamental practices in place, the board may have to resort to unanimous written consents because regular meeting agendas have not captured required actions. Meeting minutes may be poorly drafted. In such situations, the board could face challenges to its decisions in the event of legal or regulatory proceedings, or audits where board meeting minutes and records will come under very close scrutiny.

Corporate secretaries at well-run companies provide assurance that the board is getting what it needs, with appropriate recordkeeping and procedures.

In the commentary that followed the *Disney* decision, it has been noted that the governance processes in place when that case first arose in the mid-1990s would never be tolerated today by the courts in the post-Sarbanes-Oxley environment.

The corporate secretaries at well-run public companies keep their boards organized and operating efficiently by using a standard set of procedures and practices. These provide a framework for the board to meet various legal and regulatory requirements. Ultimately, the goal is to provide assurance for the board that it is getting what it needs, that appropriate records are being kept, procedures are followed and policies are in place.

Here are procedures and practices an effective corporate secretary should provide to your board:

☐ *Develop annual agendas.* The organization of the board and its processes are critical to the smooth functioning of the board. Before the beginning of each fiscal year, the corporate secretary should develop draft agendas for each of the board and committee meetings.

These draft agendas should reflect historical agenda items as appropriate, committee charter requirements, other required matters such as officer elections, director nominations, Section 16 designations, approval of the 10-K, benefit plan matters, regular financial reports, regular reports of the general counsel, and corporate strategy presentations. Any corporate governance or other matters set forth in the corporate governance guidelines are likewise needed. Refer to the company's corporate approvals process for additional matters requiring board or committee approval.

The draft agendas should be reviewed with senior management, including the general counsel, before going to the chairman of the board, presiding/lead director and committee chairs as appropriate. Once through that process, the annual agendas can be submitted to the board and committees for their approvals.

Prior to each meeting the agendas are again reviewed and modified or supplemented as necessary, with input from the chairman, lead/presiding director and committee chairs. This process allows the board to focus on the most pressing matters, and yet not overlook required items.

These agendas may be also used as part of the board/committee evaluation process, as an objective measure of the board's performance. If, at the end of the year, the board attended to matters identified as important at the beginning of the year, it can be said to have substantially met those particular objectives.

☐ *Develop a two-year meeting schedule.* The corporate secretary should, on an ongoing basis, plan out a schedule of meetings for the board and each of its committees that extends at least two years.

When deciding on this schedule, consideration is given to the company's particular cycles and scheduled events. These include earnings releases, quarterly and annual SEC filings schedules, the timing of the annual budget review and other recurring matters requiring board or committee approval. Stagger committee meetings so that directors on more than one committee are able to attend all of their meetings.

Adequate time should be allocated to the meeting schedules for the board and committees to fulfill their obligations. Audit committee meetings tend to demand more time than some other committees, but attention should be given to the matters being presented and the appropriate amount of time to allocate to each.

Compensation committees have been called the "new audit committees" because of the SEC's executive compensation disclosure requirements which may require more meeting time than in the past. This also translates into the need for carefully crafted minutes and meeting materials that will serve as support for such disclosure.

The work of the nominating and governance committees has also been in the spotlight lately, driven by moves towards majority voting, the focus on the composition of the board and the SEC's enhanced disclosure of director qualifications. The nominating committee should have a fully developed meeting schedule as well.

At least once each year, the board should meet for an annual strategy session to fully delve into the company's financials, its short and long-term strategic plans and director education, among other governance concerns. This session is often held offsite, and can last for two or more days.

Senior management must be disciplined in the amount, timeliness and relevance of material prepared for the board.

☐ *Development and distribution of board materials.* Essential to the proper functioning of the board is the quality of materials it receives in advance of meetings, and how long the members have to review those materials. Senior management must be disciplined in its development of board information and ensure that the board is presented with an appropriate amount of relevant background for each matter on which action is required.

For significant matters, the underlying documentation should address, among other things, the financial implications, risks and uncertainties, and alternative strategies, along with an executive summary. Draft resolutions should be included in the materials. Agendas should catalog which items are included in the distribution. As for "housekeeping" or routine matters, these may be combined into "consent" items, so long as sufficient background is provided to the board in advance.

Secure electronic delivery of board materials can be an efficient way to deliver materials. However, attention must be given to the individual work styles of each director. Regardless of the delivery method, materials should be sent out no later than one week prior to regularly scheduled meetings.

Occasionally, transactions or other matters requiring board action arise quite suddenly or are so fast moving that directors will often have less than a week with the materials. In such cases, it is essential to have advance communication with the directors to let them know the proposed timing so that they can set aside time on their calendars. In such cases, secure electronic delivery can speed the process considerably.

Finally, board and committee materials must be properly stored and maintained as part of the record of the meeting. Company practices and laws vary as to how long such records are kept. For board records, however, forever, is not too long.

Board minutes should be drafted with the business judgment rule in mind—but should not be a transcript of what each director said.

☐ *Minutes matter.* Minute taking is no longer considered to be just a ministerial function. Skilled professionals should be taking board and committee minutes, which should be complete and contain sufficient detail. Minutes need to be drafted with consideration for the elements of the business judgment rule: that the directors acted on an informed basis, in good faith and not in their personal self interest.

The level of detail required on a particular topic in the minutes will depend on the nature of that topic. Minutes should reflect who was present at the meeting, and make clear reference to materials provided to the directors (both in advance of and during the meeting). They should note if the topic was discussed and, if required, include any resolutions adopted.

Minutes should not reflect what each director said, but rather note alternatives presented, that questions were raised on particular topics, and that discussions occurred. In one *Disney* proceeding, the minutes were incomplete and inconsistent, and it was suggested that the drafter did not understand their purpose (and may not have been at the meetings). Had the minutes been adequately drafted, that case might have been dismissed years earlier.

Once drafted and reviewed internally, minutes should be promptly distributed to the directors for their review before memories fade. In some cases, subject matter experts such as tax or benefits lawyers should be part of the review process. Directors can formally approve minutes at the next scheduled meeting. Following the board's approval of minutes, any notes or drafts should be destroyed.

☐ *Director education.* Time should be set aside on meeting schedules for some director education to keep the board abreast of current trends in the business, for important legal developments, and as a refresher as to their ongoing obligations. Additionally, outside educational opportunities should be made available to the directors at the company's expense.

☐ *Director orientation.* As they join the board, new directors should be educated about the company through presentations by senior management. Topics include the overall business of the company, the financials, current strategic efforts, risk management, legal and regulatory matters, human resources and executive pay and the company's corporate governance practices and initiatives.

☐ *Board evaluations.* The board and its committees should regularly evaluate their own performance. Both objective and subjective criteria may be used. The corporate secretary can facilitate this evaluation process, which may take various forms.

Evaluation questions and processes should be tailored to the particular company and its board. Frequently, outside governance consultants are brought in by the board to conduct the evaluation. In some companies individual director evaluations are included as part of the process. The nature of the evaluations will vary from company to company, but in all cases should be handled with discretion.

☐ *Succession planning.* One of the board's most important responsibilities is that of hiring the right CEO for the company and making sure there is a plan in place for executive succession. Regular performance evaluations and a deliberate succession planning strategy are imperative, and, again, can be facilitated by the corporate secretary.

In conclusion, having a sound corporate governance program in place is a corporate imperative in today's regulatory climate, both from an internal as well as external perspective. The practices above are just some of the fundamental processes that directors should expect from their companies, and which are in use by corporate secretaries for the most progressive boards.

Directors need to know that they are getting what they need to make their decisions, that minutes are being drafted to reflect their deliberations, and that appropriate records of those meetings are being kept. For their part, outside regulators expect their requirements to be met. Finally, with a strong governance program in place the company's reputation with investors, D&O insurers and proxy advisory services will be enhanced. It stands to reason that companies with sound governance programs should perform better. ■

Reprinted by THE CORPORATE BOARD
4440 Hagadorn Road
Okemos, MI 48864-2414, (517) 336-1700
www.corporateboard.com