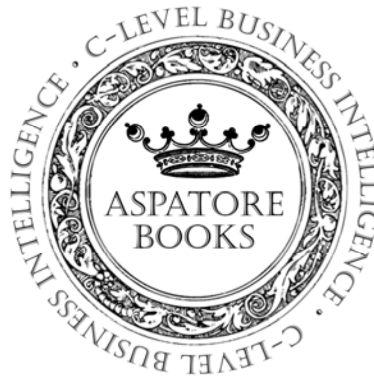
INSIDE THE MINDS

Understanding Corporate Governance Laws & Regulations

Leading Lawyers on Corporate Compliance, Advising Boards of Directors, and Sarbanes-Oxley Requirements



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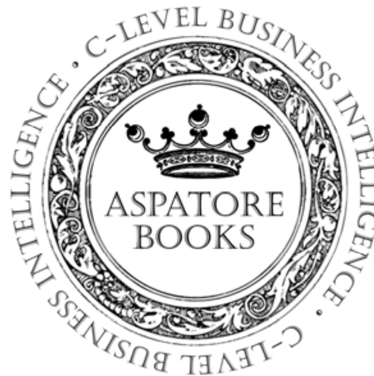
An Overview of Corporate Governance Today

Peter M. Menard

Partner

Sheppard, Mullin, Richter & Hampton LLP



Current Topics in Corporate Governance

In the traditional view of corporations, there are three players: the shareholders, the officers, and the board of directors. The shareholders provide the capital for, and retain the ownership of, the corporation. The officers are entrusted with the day-to-day management of the enterprise for the purpose of maximizing shareholder value. The board is entrusted with setting the goals of the enterprise and overseeing the officers. Corporate governance is a system of checks and balances which seeks to address the principal problem arising from the separation of ownership and control: the potential misappropriation or mismanagement of the shareholders' investment by the officers. The current furor in corporate governance is the result of the recognition, propelled by well-publicized corporate scandals, that external controls are necessary, but not sufficient, to ensure the officers' accountability to the shareholders. The result has been a re-examination of the respective rights and duties of the shareholders, the officers, and the board. Among the most important issues in this ongoing debate are:

- The responsibilities, composition, and structure of the board and its committees;
- The role of the shareholders in the selection of directors and the shaping of corporate policy;
- Corporate disclosure and communication; and
- Risk management.

Board of Directors

The board sets the goals of the enterprise, selects the officers, oversees their performance, and, if necessary, replaces the officers who are charged with achieving the goals of the enterprise. The recent debate on the function of the board has focused on four duties of the board:

- Insulating the shareholders from the self-interest or inadequacy of management and large shareholders;

- Ensuring accurate, complete, timely, and understandable disclosure to the shareholders concerning all material aspects of the company's operations;
- Monitoring management's efforts to identify and address the principal risks to the company achieving its goals; and
- Ensuring compliance with laws.

Traditionally, directors have been selected from a small pool of candidates known to management or by the re-election of existing directors. As a result, boards tend to be homogenous, and directors tend to believe that they owe their positions, and therefore their allegiance, to those who selected them. This haphazard selection process is being replaced by a formal process that emphasizes assessing the experience required by the company's particular circumstances and purposefully selecting directors who can provide the necessary expertise. Board independence, periodic board evaluations, and continuing education, as well as the acceptance of diversity, are critical elements in ensuring proper board composition.

The new focus on board composition emphasizes the value of diversity among the directors. At one recent meeting of a board consisting of a homogenous group of wealthy, white men, one elderly board member declared that he was troubled. He noted that all the directors had similar backgrounds in business or the professions and that all of the directors knew one another, played golf together, and attended the same churches and charitable functions. He questioned how the board could lead the company to be responsive to its diverse customer base without the board reflecting that diversity. He went on to offer to resign from the board if a qualified minority would take his place. Board diversity is not only socially desirable, it simply makes sound business sense.

Perhaps no issue regarding board composition has received more attention than director independence. NYSE, AMEX and NASDAQ listing standards require that a majority of the directors be independent. The listing standards and Section 10A of the Securities Exchange Act of 1934 require that all members of the audit committee be independent. The listing standards further require that the compensation of the CEO and the other executive officers be determined by a majority of the independent directors or a compensation committee composed solely of independent directors

and that director nominees be selected by a majority of the independent directors or a nominations committee composed solely of independent directors. Although the definition of "independent director" includes certain excluded categories (e.g., officers and employees), the determination of independence requires the affirmative finding by the board that the director has no relationship that would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. Among the relationships that should be considered are personal and prior business relationships.

Many commentators believe that separating the role of the CEO and the chairman of the board, or otherwise establishing the position of a lead director, is indispensable for achieving board independence. Some commentators suggest that this separation of duties frees the CEO from the increasingly complex and time-consuming responsibilities of managing the board, thereby enabling him to concentrate on the operations of the enterprise. They suggest that it also enhances the ability of the board to provide an independent check on management and to ensure that the board maintains a longer-term perspective, as opposed to the tendency of management to focus on shorter-term objectives. By contrast, other commentators argue that separating these roles can result in confusion as to who is accountable for the company's performance, the lessening of the responsibility felt by the other directors, a slower response to emergencies, and struggles for power, as well as the added expense of a second full-time position. They further suggest that the independence of the chairman or the lead director is likely to be co-opted by his immersion in a full-time role.

Certainly the separation of roles or the appointment of a lead director is no substitute for a well-constituted board. The role and composition of board committees, particularly the audit, compensation, and nominating committees, has been a particular emphasis of many recent corporate governance initiatives. Listing standards now require that all members of the audit committee comply with a more stringent definition of independence and meet minimum financial literacy requirements. SEC rules require the disclosure of whether there is an "audit committee financial expert" and, if not, why not. The audit committee is charged with selecting, overseeing, and pre-approving the services rendered by the company's accountants.

The recent decision of the influential Court of Appeals for the Second Circuit in AFSCME v. AIG (September 5, 2006), and the subsequent announcement by the SEC of forthcoming rulemaking, have given new impetus to the efforts of large institutional shareholders to obtain the right to present their own slates of director nominees in a company's proxy statement. Shareholder activists anticipate an upsurge in the number of shareholder proxy proposals to amend corporate bylaws to enhance shareholder proxy access.

Shareholders

In the traditional view, a corporation is organized to advance the economic interests of the shareholders. The board seeks to protect the shareholders' capital contributions and to maximize the shareholders' return.

Shareholder primacy has resulted in a corporate governance movement that looks to the most powerful shareholders, the institutional investors, to oversee the performance of the board. The recent decision in AFSCME v. AIG has given new impetus to the campaign of large institutional shareholders to obtain the right to nominate individuals for election to the board. Large shareholders have also been successful in forcing many corporations to adopt a majority vote standard in the election of directors rather than the prevailing plurality vote standard.

Shareholders are also forcing a re-examination of their role in determining corporate policy, primarily through shareholder proposals contained in the annual proxy statement. Examples of recent shareholder proposals include the elimination of classified boards, restrictions on cumulative voting, and poison pills. In addition, shareholder activism has recently resulted in a pending NYSE rule proposal to make director elections a nonroutine matter and thereby to limit the discretion of brokers to vote shares held in street name except at the express direction of the recordholder.

I actively encourage vigorous communication between our corporate clients and their shareholders. For instance, in a quarterly conference call a CEO can indicate that he welcomes shareholder input, or in an annual meeting a chairman can express his openness to shareholder proposals. There is an old adage: "Don't ask a question unless you're prepared for the answer."

However, my experience has shown that it is better to proactively address shareholder concerns than to allow a determined opposition to develop.

Disclosure and Communications

Recent SEC rules have significantly expanded the number, and improved the quality, of corporate disclosures and communications. The SEC's goal is to ensure accurate, complete, timely, and understandable disclosure of material corporate developments. Regulation FD ("Fair Disclosure"), promulgated in 2000, seeks to limit selective disclosure by requiring that when a company spokesman discloses material, nonpublic information to certain market participants, such as analysts, the company must also promptly disclose that information publicly. Similarly, Rule 10b5-1, adopted in 2000, makes it unlawful to purchase or sell a security while in possession of material, nonpublic information about the security or the issuer in breach of a duty of trust or confidence owed to the issuer, its shareholders, or the source of such information. In 2004, the SEC significantly expanded the number of events required to be disclosed on a Current Report on Form 8-K and significantly shortened the time in which such reports, as well as insider trading reports on Form 4, must be filed. Finally, in 2006, the SEC adopted a comprehensive revision to its rules concerning the disclosure of executive compensation.

The Sarbanes-Oxley Act of 2002, which was a result of the scandals involving Enron and other prominent companies, has had a major effect on corporate governance, including in the arena of corporate disclosure. Among other things, this legislation requires CEOs and CFOs to certify in the company's SEC reports that they have evaluated the company's disclosure controls and procedures and have presented in the report their conclusions as to the effectiveness of such controls and procedures in providing reasonable assurance that material information relating to the company required to be disclosed in the report is made known to them to allow timely disclosure. The requirement of individual certifications has led to a higher awareness by CEOs and CFOs of the importance of their personal involvement in the disclosure process and, accordingly, the development of processes and procedures to ensure that material developments are in fact brought to their attention and evaluated for disclosure. This certification requirement has led to the creation of

disclosure committees consisting of key employees from throughout the company that meet at least once a quarter to review the accuracy, completeness, timeliness, and understandability of the company's disclosure of material developments.

Risk Management

One of the hottest buzzwords in corporate governance today is "enterprise risk management" or ERM. Although largely submerged in a sea of consultant jargon, ERM is simply the process of identifying, assessing, managing, and disclosing risks. ERM focuses not only on financial and insurable risks but also on the full spectrum of risks facing the enterprise, including: financing, investing, and reporting risks, legal and regulatory risks, information system risks, operational/supply chain and process risks, market and industry risks, and reputation and political risks. ERM does not seek to eliminate all risks but rather to manage them to ensure that the enterprise's stakeholders realize rewards commensurate with the risks that are taken.

Five years ago, most boards knew very little about ERM. Today, however, many boards have established an ERM committee. The development of an ERM plan consists of several stages. The company should identify the key characteristics of the enterprise that its stakeholders value and then identify the principal risks related to each of these elements. Next, each risk should be evaluated with respect to the likelihood that it will occur and the impact it would have on the enterprise if it were to occur. This prioritizes the enterprise's response. The enterprise can then determine the appropriate method for managing each risk, such as avoiding the risk by outsourcing the business function or insuring against the risk. The enterprise should monitor risks by defining specific performance measures. The enterprise should develop clear areas of responsibility and lines of reporting for each risk. Finally, the risks, the methods adopted to manage each risk and the effectiveness of such risk management should be communicated to the stakeholders. Effective communication can lessen or even eliminate the negative consequences should a risk become a reality.

Take, for instance, a hypothetical retailer of sporting goods. The ERM committee for this enterprise might consider the risk of selling toy guns.

The committee might implement a policy that any toy gun sold should be brightly colored orange or yellow to avoid confusion as to whether the gun is real. Proper risk assessment would reconcile the liability and social consequences of inaction with the potential economic consequences of implementing a policy limiting the types of guns the company can sell.

The Role of Corporate Counsel

The value of most lawyers is not necessarily in specialized knowledge but in our analytical ability. Lawyers are very good at identifying the key issue, stating it simply, listening to the debate, and summarizing fairly the points made by each side. We thus focus the board's debate.

Lawyers play a critical role as gatekeepers, including a responsibility for providing the board with adequate information concerning important legal issues facing the enterprise. This duty is reflected in Section 307 of Sarbanes-Oxley, which requires company counsel to “report up” a material violation of federal or state securities law or a material breach of fiduciary duty.

Attorney codes of ethics generally permit a lawyer to render advice based not only on the law but also on other considerations, including moral, economic, social, and political factors. Conscientious corporate counsel will not limit himself to providing a technical analysis of narrowly defined legal issues presented by management but will be proactive in advising the board as to the broad consequences of corporate action.

Corporate counsel can also keep a company focused on the future by remaining informed, not only about new statutes and regulations but also about innovations made by other companies, evolving best practices, and the current thinking of academia. In addition to the perspective afforded by representing multiple companies, corporate counsel has the luxury of a multitude of resources, including newsletters, blogs, academic papers, continuing education classes, and speeches by the SEC, the Public Company Accounting Oversight Board (PCAOB), and other governmental agencies and self-regulating organizations (SROs). Consequently, corporate counsel provides an invaluable resource for educating the board as to the evolving "best practices" in corporate governance.

Financial Implications for Clients

The impact of Sarbanes-Oxley on legal fees has not been as significant as once feared. Law firms have been able to moderate fees by developing corporate policies applicable to many clients. The real financial impact has come from increased accounting fees. As a result of Sarbanes-Oxley, accountants have had to abandon their valuable consulting practices. Previously, auditing was often used as a loss leader to attract valuable consulting assignments. Accounting firms have been forced to increase what they charge for auditing services to cover the shortfall resulting from the loss of consulting engagements. Furthermore, with the PCAOB auditing the auditors, accounting firms are spending large amounts of their clients' money preparing their work papers to withstand this scrutiny. As a result, accounting fees have risen dramatically following the adoption of Sarbanes-Oxley.

Section 404 of Sarbanes-Oxley (Management Assessment of Internal Controls) has proven to be the most expensive provision of the statute to implement. It requires management to attest to the adequacy of the company's internal controls and the company's independent registered public accounting firm to audit management's attestation. The SEC initially estimated it would only cost about $60,000 per company to implement, but Section 404 probably costs closer to $3 million per company, or about fifty times the SEC's original estimate. Notwithstanding the cost, Sarbanes-Oxley in general, and Section 404 in particular, has resulted in significant improvements in infrastructure.

Strategies for Corporate Governance

When proposing a change in business practices, corporate counsel must demonstrate two things: first, that the change is the right thing to do and, second, that the cost is justified.

Businessmen are no less inclined to do what is right than the rest of us. Although Sarbanes-Oxley engendered great concern about its cost, virtually all of my clients recognized that the changes in business practices mandated by the statute were beneficial. I find that if corporate counsel explains to the board and management why a change is the right thing to do for the

company, its stakeholders, and the public generally and that the cost is outweighed by the benefit, they will implement the change. It is counsel's role to monitor best practices, to present them to the company, and to assess their benefits and costs.

Corporate Governance Laws

Primary Sources of Corporate Governance Laws

There are four principal sources of law that have most affected the corporate governance practices of our public company clients. The first is Sarbanes-Oxley itself and the rules adopted by the SEC to implement this landmark legislation. Sarbanes-Oxley attempts to provide a comprehensive solution to the numerous allegations of corporate wrongdoing arising from the failure of Enron and other prominent companies. As such, it does not have a single theme. However, among its most important tenets is the independence of the auditors and the audit committee.

The second is the change in the listing standards of the exchanges, many of which were required by Sarbanes-Oxley. One interesting development in this regard is that NASDAQ has increased its policing of its listing standards. For example, it has reviewed a number of 10-Ks and challenged the issuers' determinations that their directors are independent. In addition, NASDAQ has recently received from the SEC the power to issue letters of reprimand which must be publicly disclosed through both a press release and a Current Report on Form 8-K. In the past, it could only threaten to de-list a company. The NYSE also has the power to issue letters of reprimand.

The third source of law is the PCAOB. As a new regulatory agency, it is eager to prove its value. Its primary effect to date has been to make the auditors more cautious.

The fourth source is state law. In California in particular, we have an activist legislature. One recently introduced piece of legislation would require a majority vote standard in an uncontested board election, rather than the traditional plurality vote requirement. There is also legislation pending which would limit political contributions by corporations. These statutes in

theory are only applicable to corporations incorporated under the laws of California. However, the argument is increasingly being heard in the California legislature and courts that California law should govern the affairs of any company with sufficient ties to California. Prevailing corporate law holds that the internal affairs of a corporation are governed by the state of incorporation. A change in the internal affairs doctrine could have a seismic effect on corporate law.

Also not to be overlooked are the various corporate governance rating agencies, such as Institutional Shareholder Services, and the concerted action of large institutional shareholders. By influencing the vote of institutional shareholders and spotlighting a company's corporate governance practices, the rating agencies have some impact on the corporate governance policies of those companies in which the board and management do not have substantial shareholdings.

Advice to Clients

Be Proactive

The most important thing that a board or management team can do is to ask periodically for advice on corporate governance and to be open to change. Just asking what other companies are doing and how developing best practices apply to their company is invaluable. In my experience, when the board does this, it sees that others have blazed the way for them. They can take whichever good ideas apply to their business. The role of the board and management today is a proactive one, as opposed to the past, when corporate governance was only thought about when a new statute or rule was adopted.

Corporate Governance Checkup

At the fourth anniversary of the adoption of Sarbanes-Oxley, it is appropriate for the board to commission an assessment of the policies and procedures implemented in response to that act and to consider the best practices that have developed beyond the strict requirements of the act. Many policies and procedures adopted in the flurry of activity immediately following the implementation of Sarbanes-Oxley, although technically

compliant, would benefit from a re-examination in light of the company's own experience and the experience of other public companies. In addition, the following initiatives, although not required by the act, should be considered by each board:

- Assess the specific experience and skills required to be included on the board to assist management in implementing the company's strategy, and implement a formal search for directors with that experience and those skills;
- Affirmatively seek over time to diversify the board;
- Scrutinize all current and former relationships among directors and between each director and the company or any related party to ensure the independence of all directors;
- Honestly and rigorously assess annually the effectiveness of the board, each board committee, and each individual director;
- Implement a program for board orientation and a rigorous requirement for on-going board education;
- Annually establish specific performance requirements for each executive officer, and assess the effectiveness of each executive officer against these performance criteria;
- Focus on long-term corporate strategy, including management succession, rather than short-term historical financial performance;
- Ensure that executive compensation is based upon specific performance criteria established at the beginning of the year and directly related to the company's business strategy;
- Maintain internal pay equity;
- Ensure that all board and committee material is provided at least one week before the board or committee meeting to ensure adequate consideration by each director;
- Require that each significant board decision is considered at more than one meeting;
- Annually assess each related party transaction;
- Review each SEC report, conference call script and press release to ensure that the disclosure not only meets the

technical requirements of the SEC's rules but is accurate, complete, timely, and understandable;

- Implement an ERM program;
- Periodically interview key employees and solicit their views on improving the management of the company, the performance of the board, and the company's public disclosure;
- Ensure that management understands that information presented to the board should consider all competing factors and not be "spun;"
- Strive to ensure that management is focused on the fundamentals of the business and not just short-term objectives;
- Ensure that the board's core values include going beyond what is merely required to include best practices;
- Encourage the open and honest input from employees, outside counsel, auditors, shareholders, vendors, and other stakeholders without fear of reprisal;
- Establish an annual calendar of meeting dates, recurring board actions, and insider trading blackout or window periods; and
- Annually assess the effectiveness of all compliance policies and programs, including policies regarding insider trading, corporate communications, foreign corrupt practices, and confidentiality and ethics, whistle-blower, and ERM programs.

Question Assumptions

The discussion above is based upon the traditional American view of corporations. However, it contains many assumptions that merit closer inspection by boards and management, a few of which are summarized below. An understanding of these assumptions may suggest that the board's proper role extends beyond maximizing shareholder returns.

In the U.S., most boards and corporate counsel take it for granted that a business enterprise is simply the marriage of capital and management, whose purpose is to maximize shareholder value. In many other countries, however, a corporation is also required to be socially accountable, and management and the board must reconcile the interests of various

stakeholders, only one of which is the shareholders. Management must be a market-oriented, but socially responsible, protector of shareholder interests.

Although it is often said that the board is the agent of the shareholders, the board actually is an independent institution that owes the shareholders certain fiduciary duties. In true agency theory, the agent is required to follow the dictates of his principal. The powers of the shareholders under corporate law, however, are limited to specific rights, such as electing and removing directors and approving or disapproving fundamental corporate changes. Most corporation codes expressly provide that the business and affairs of the corporation shall be managed by or under the direction of the board. Furthermore, the business judgment rule provides broad protection against the decisions of the board being challenged in the courts. Accordingly, the board has a significant field for independent action.

Corporate actions affect many constituencies other than the shareholders, including creditors, employees, vendors, customers, and the communities in which the corporation does business. As a result, in many states both case law and statutes provide that the board may consider the effect of its decisions on constituencies other than the shareholders. The prevailing view is that the board's ability to consider the interests of other constituencies is limited to circumstances in which such consideration is rationally related to maximizing long-term shareholder value or, conversely, to maximize long-term shareholder value, a company must effectively manage its relationships with all constituencies. In an era of global businesses with annual revenues larger than many countries, it may be naive to believe that a board charged primarily with maximizing long-term shareholder value will adequately address the social impact of its decisions. However, consideration of the commonweal is not only a moral obligation, but is legally permissible, at least to the extent that it is rationally related to advancing the company's business.

The triumph of shareholder primacy has resulted in a corporate governance movement that looks to the most powerful shareholders, the institutional investors, to oversee the performance of the board. However, the shareholders do not constitute a single block with common interests. There are mutual funds, hedge funds, private equity groups, day-traders, arbitrageurs, long-term investors, and others with differing agendas.

Institutional shareholders themselves have issues concerning conflicts of interests, short-term investment horizons, and their own lapses in corporate governance which suggest that unfettered control by shareholders would be as problematic as the situation it is meant to replace, imperial management and a disengaged board.

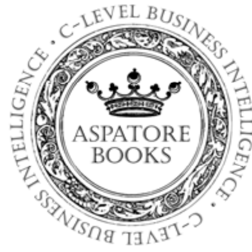
Each of these considerations suggests that the scope of the board's proper role may extend beyond maximizing shareholder returns and include ensuring social accountability.

Peter M. Menard is a senior partner in the Corporate Practice Group and chairman of the firm's Public Company Team.

Mr. Menard's principal areas of practice are corporate governance, securities law compliance, and corporate transactions. He is a frequent commentator on issues of corporate governance, including the Sarbanes-Oxley Act of 2002 and emerging SEC regulations. Mr. Menard's securities practice includes periodic SEC filings; board and committee representation; securities exchange listing rules; public offerings; venture capital financings; proxy contests; tender offers; exchange offers; going private transactions; and SEC and exchange enforcement actions. His corporate practice includes acquisitions; leveraged buyouts; facilities construction and management agreements; and technology development, research, license, and materials transfer agreements.

Mr. Menard's clients range from start-up companies to large, publicly traded corporations with international operations primarily in the retailing, manufacturing, financial institutions, and consumer products industries.

Mr. Menard is a member of the State Bar of California. He is a director of the Foundation for the Junior Blind. Mr. Menard has spoken extensively in the areas of corporate governance, raising capital, compliance with federal and state securities laws, accounting issues, and establishing effective investor relations programs.



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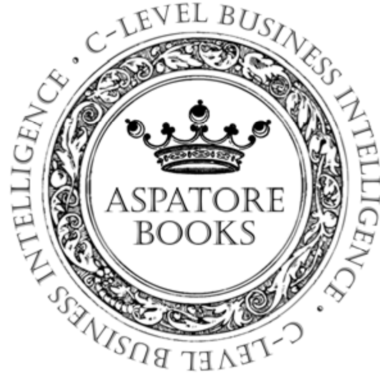
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