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STAKEHOLDERS, SHAREHOLDERS... AND YOUR BOARD

August isn't usually a month for big business news, but here in the U.S., the Business Roundtable grabbed headlines with its statement on corporate stakeholder responsibility. The BRT, America's foremost corporate forum, published a [statement](#) signed by 181 of its member CEOs that seeks to “redefine the purpose of the corporation.” The common view over the past few decades was that a corporation operates for the interest of its shareholders, and boosting investor value is its singular purpose. The new Roundtable shift urges big companies to “lead their companies for the benefit of all Americans.” That is, stakeholders -- employees, customers, suppliers, local communities, as well as the shareholders. Jamie Dimon, chairman of JPMorgan Chase and chair of the Roundtable, wrote “Major employers are investing in their workers and communities because they know it is the only way to be successful over the long term.”

Naturally, this set activists, the business media, law firms and academics abuzzing. Takes on the shift range all over the spectrum. Corporate America needs [to do even more](#); it's a sign of pending socialism; it's bowing to populist pressures; it will [disenfranchise shareholders](#), it changes little... etc. etc.

Here's a take we haven't heard -- what is your board of directors supposed to *do* about this? Corporate boards start out with vague, contradictory duties, and usually too little in the way of time, resources or information to really do their job. Still, our various national legal systems have developed regulation and case law that offer directors some guardrails. They can approach their governance with a pretty good idea of the fiduciary duties, procedures, and conflict safeguards needed to stay out of trouble. While these are defined by court and regulatory decisions, the real enforcers are investors, always ready to sue the board and management if their interests aren't paramount.

Now, looking out for stakeholders will be added to the governance mix. The interests of employees, communities, suppliers and overall society are uncertain, often conflict, and lend themselves to political gaming. These players lack standing to sue the board (at present), while shareholders go to court at the drop of a hat (some of those big investors have already expressed concerns about the BRT change). And, as so often happens, boards are now being handed all these conflicting demands and told to figure it out.

-- **RDW**

5 TIPS FOR BUILDING SPINOFF BOARDS

Corporate spinoffs have long been a popular structural tool, and it's hard to argue with the revenue potential. As of a few months ago, the [Forbes Spinoff Company Index](#) was beating the broader U.S. market by 9 points. Carving out a division of the current company by selling shares or other divestiture can benefit both the parent, investors, and the wider markets by unlocking value. But it also offers a clean-sheet-of-paper opportunity to get corporate governance right -- or wrong if you mishandle the new company's board matters. What are best

practices in crafting the governance of your newly-hatched spinoff?

■ Start early. Finding new directors today is a lengthy process, and assembling enough for a full boardroom roster can take a year. Start identifying and winnowing talent the moment the spinoff plan is announced. But you don't need to bite off the whole process at once says Bonnie Gwin, of Heidrick & Struggles. "Often, companies try to recruit a large number of directors at one time. It's much easier to focus on sequential growth. Identify your top 2 or 3 talent priorities, and bring them on first."

■ Give careful thought to the talent of your launch board. Many companies' board rosters are assembled like newlywed households -- hand me downs, leftovers, and items picked up along the way. Spinoff boards, however, can start with a conscious plan. What specific talents are needed at launch? How should the board's makeup transition over the first year of independence?

■ This step-by-step approach becomes more practical if you focus on board and committee chairs at the start. Assemble a core of board leaders with the talent and priorities needed, and then let *them* drive subsequent recruitment. "Early on, recruit a strong nominating/governance [committee] chair," Gwin advises. This role serves as the new board's talent nexus.

■ Members serving on both the parent and spinoff company board are typical, but this creates conflict and logistical headaches. Stock exchange and regulatory independence requirements for board members should be closely studied. A spinoff director who fails an independence test from the parent opens serious liability issues. Naming top management officers to the new board may be a better approach. "I don't often see dual directors," notes Gwin, but she also finds that some temporary start-up overlap with the parent board (perhaps by expanding that board's membership) can help in building a pool of talent.

■ Spinning off a company demands lots of decisions and paperwork on division of assets, talent, customers, markets, and so on, and one of these decisions will be who has what say in recruiting and structuring the board and committees. Parent company executive leadership? The parent board? What about the CEO of the new spinoff, who'll have to work with this new boardroom team? Typically all these players will have a voice in crafting the new board, but spell this out early on to avoid misunderstandings.

COMPENSATION COMMITTEES - 4 BEST PRACTICES

While the challenges and knowledge required in serving on your board's audit committee are well known, demands on the compensation committee have been catching up, particularly at larger and public companies. Exec pay plans have grown hugely complex, compliance laws much tighter, and investor activists and proxy advisors are watching closely. How should the comp committee manage its newly high-stakes, high-risk paysetting role?

■ Start with the right chair. "[Compensation committee] chairs today really have to know a lot of things," observes Aubrey Bout, managing partner at consultants Pay Governance. Aside from a working knowledge of terms like EVA, LTIPs, SERPs, qualified vs. nonqualified, and of tax law, the chair must also be an able politician and communicator. Ability to engage with the chief executive (while pushing back as needed), work closely with outside pay advisors (*see the next article*), and shape a solid committee work plan are crucial skills. Also, the comp chair is now expected to act at the company's outside spokesman with investors and proxy advisors on why the pay plan is well thought out and boosts performance. "They have to engage with investors, and really understand what the top investors want," says Bout. "It's a hot seat job today."

■ In the U.S., compensation committees are now required by the SEC and listing bodies to spell out far more of their processes and assumptions than a few years ago. Disclosure starts with a narrative description of the scope of the committee's authority; its working processes, how it delegates to comp consultants or others, and details on the work and independence of these consultants. Your Compensation Disclosure and Analysis (CD&A) digs into detail on pay philosophy, performance linkages, and risks. Comp advisors and company compliance staff offer plenty of boilerplate language for this, but leading-edge committees will use disclosure as an opportunity for a top-down rethinking of what and why they pay.

■ Comp committees are naturally fueled by paperwork, reports, tables and numbers, and this tends to corral meetings into a rigid, checklist model. Having too much to do in too little time aggravates this. Pre-meeting preparation is vital, both for preparing info, and for committee member review. "The most effective chairs really set a tone on what they expect of the committee ahead of time," notes Kyle Lamport, a manager with Longnecker & Associates comp consultants. Lamport finds that dashboard displays for data, a growing boardroom power tool, are particularly effective for visualizing comp committee biz. "I see a lot more use of graphs to effectively display material."

■ This effort should do more than just speed through the committee agenda. Freeing up committee time for discussion and debate beyond number crunching makes for better results. David Swinford, CEO of comp consultants Pearl Meyer & Partners, finds compensation committees “are typically unwilling to do something different unless they have a serious problem. They’re always time constrained, and have to deal with so much info that there’s no time for any brainstorming.” As a comp committee chair, how about sitting down with your legal staff and compliance people for a searching review of the committee agenda? What items could be condensed through the use of consent agendas, or presentations trimmed or eliminated? Then, how could your committee best use the freed-up time for discussion of pay trends, investor concerns, or fresh ideas?

COMPENSATION COMMITTEES -- COMP CONSULTANTS SOUND OFF

As you can tell, in developing the above article, I reached out to a number of top comp consultants for ideas. Once I had these pros on the topic of comp committees, though, they offered a number of good tips from *their* side of the table. How can committees make better use of compensation consultants? What best practices have they seen? And how can the board tell if the comp consultant is letting them down?

■ Pick your consultant’s brain for ideas on a better committee. “Senior consultants have been to hundreds, maybe even thousands, of compensation committee meetings. They’ve all seen situations that could be better managed. An experienced consultant can help with that,” says David Swinford. This goes beyond education, trends and numbers (more on that in a moment), but to the basics of how the board operates. Ask your consultant for her thoughts on your committee agendas, meeting priorities, discussion, presentations, etc. After sitting through comp committee meetings for years, you can be sure they can suggest improvements.

■ Tap the consultant for committee education. Consulting firms often provide training or orientation for comp committees, particularly valuable in onboarding new members. “With at least half our clients, there’s some informal education piece to what we do. For newer board members who may not have gone through this already, [compensation] can be overwhelming,” notes Kyle Lamport. Comp consultants may not get rich on this service, but it benefits both them and your company by assuring that members are well briefed on pay matters (and it saves having to explain every detail in the course of meetings).

■ Expect a good consultant to prod the committee out of its comfort zone. “The committee should want an independent thought partner on compensation, and increasingly a strategic one. The consultants of old would tell you how they don’t make decisions, but now they should have a point of view and be willing to share it. That might step on toes, but the committee should take that advice and make its decisions,” says Aubrey Bout. “My pet peeve is the consultant who tells you to do what everyone else is doing. That’s just commodity advice,” David Swinford observes. “Your pay plan may fly under the [proxy] radar, but not build long-term value. The committee should be taking risks to build better performers.”

■ A good comp consultant will have great communication skills. “All our interaction is communication based, including body language. That’s the key to understand how people are feeling,” according to Lamport. With their wide boardroom background, your consultant can instantly pick up if a pay element being presented is stirring questions or discomfort. Tap them for this pay radar (pay-dar?) Aubrey Bout sees the consultant as “a compensation sounding board, who can tell you how this will land with proxy advisors or investors,” and who can clue your committee in on trends or rising issues when it comes to pay perceptions. This emotional intelligence is valuable internally as well. “We can talk with leaders or other executives who are dissatisfied with pay, sometimes playing the Dutch uncle,” says Dave Swinford.

■ What to beware when it comes to comp consultants? Several mentioned watching out for the consultant who tells the CEO one opinion, and something quite different to the committee. Also, all grumbled about consultants who just can’t be bothered when it comes to availability. “One thing committees should expect from their consultant -- actually show up for meetings!” Swinford says. “Too many try to attend as much as possible by phone, but they’ll miss too many non-verbal signals. A good rule is to attend at least three quarters of committee meetings in person.”

ARE YOU READY FOR THE NEW STOCK HEDGING DISCLOSURE?

When the U.S. Dodd-Frank legislation burst onto the scene a decade ago, American business was still in shock from the 2008 recession, and anticipated quick, radical change as the law’s enabling rules rolled out.

Well, we should have known that nothing happens fast in Washington. It wasn’t until the end of 2018 that the D-F rules on disclosure of employee stock hedging policies (Item 407I) were finally released. These became effective this July, and become law of the land for corporate disclosures starting next proxy season. Yet the long

lag between first mention of hedging disclosure and final implementation in itself has added to confusion on policies. What do your board and its compensation committee need to do now to be in compliance for proxy season 2020?

- First, realize what the new rule *doesn't* require. Nothing in the new Dodd-Frank regulation says that your company needs to set a policy on hedging of company stock by directors, officers and employees. It just says that if you *do* have such a policy, it needs to be disclosed and explained in your proxy filing. But, when the rule was first set out a decade ago, most public companies played it safe and wrote up some sort of a policy.

- Why dig into a policy that's been on file for a decade? Companies have likely "had the same policy in place for a few years now, and they need to reexamine it," says Bruce Newsome, a partner with the law firm Haynes Boone in Texas, and an expert on compensation issues. The new hedging rules are broader than first discussed. Essentially all U.S. public companies are covered under the final rule, including "smaller reporting" and "emerging growth" ones (though the latter two have an extra year to comply). Also, your policy will now need to address everyone, not just top officers and directors. Anyone who receives stock in a parent company or any subsidiaries must be covered.

- What should a hedging policy cover? If you have varying policies in place for differing officer, directors and employee positions, boil them down into an honest summary, and the impact on each. Discuss categories of hedging that are allowed, and those prohibited, if any. If your policy is to have *no* policy, explain why a policy would not be material to your company. (Here are some hedging policy [examples](#)).

- The new rule takes a broad approach to "hedging." Techniques for offsetting a fall in the value of company stock holdings are many, and constantly evolving, so the rule is open ended on definitions. This could mean that sometime down the road, someone will get nailed for not disclosing a tactic not currently thought of as "hedging."

- Public companies were already required to discuss hedging policies in their proxy compensation disclosure and analysis (CD&A)... but don't assume this will fulfill the new rule. First, the CD&A disclosure only covered named executive officers. The Dodd-Frank rule, as noted, includes everybody. Further, CD&A hedging disclosures tended to be vague. If you have a policy that covers everyone, it should be more detailed.

- Get good advice on meeting the new requirement. "Talk with your compensation consultants and other advisors now on your policy, and how broad it needs to be," counsels Newsome. "You don't want to be scrambling with this in early 2020."

[BI ONLINE FINDS - 9/19](#)

- While my 2018 book [Board Seeker](#) continues to offer valuable tips for those pursuing your first board seat, the topic is always open for other sources of board wannabe advice. Networking group *Women in the Boardroom* is a great resource for ideas, and that includes a recent blog post on how to [ace your board interviews](#).

- The folks at BoardEffect offer a solid board portal platform, but I also find them to be a thought leader on helpful tools and tips for overall board operations. Their latest is several one-page tipsheets for taking better board meeting minutes. Stop at this [Diligent](#) link for a free download.

- *Get On Board Australia* offers some great advice and resources for board seekers, and one recent item I discovered is of particular value. The title says it all -- "[Five Common Mistakes Made by Board Members](#)." Check it out... and admit that you've committed at least one of these over the years.

[Q&A: Can We "Furlough" a Board Member?](#)

Q: One of the independent directors on the board of our real estate firm has been asked to take a temporary role with a major non-governmental organization in our country. This is quite a responsible, needed position and could last for 6 months or possibly longer. We much value the contribution of this member, but government conflict rules require that he not have a private sector role during this term, and he'll be quite busy anyway. We don't want to lose his skills and contacts, however. Is it possible to arrange some sort of board "leave of absence?"

A: In most jurisdictions, yes, but first check with company counsel on your regulator's rules and stock exchange requirements. Assuming there is no outside prohibition, turn next to your own board bylaws to assure the groundwork is in place. The board's nominating and governance committee should serve as the gatekeeper here. Add to your board bylaws (and specifically, the committee's charter) authority to place a director on leave

of absence. Since this is a bit irregular in the course of fiduciary duty, it might be wise to lay out some acceptable reasons for furloughing a director, such as health, inability to perform duties, government service, or an investigation.

State also that the nominating and governance committee will have sole discretion on approving the leave. You may or may not give final approval to the full board (assuming your NomGov committee is fully independent, such approval shouldn't be required). Your bylaw statement should also grant the committee power to extend a leave. I found a sample "[board leave of absence](#)" clause online. Note the legal approach -- the *board* is in charge here, not so much granting the director leave as determining he or she will be unable to fulfill required duties.

So much for the ground rules. In writing a committee resolution authorizing this specific furlough, it's wise to include a term for the leave (in your case 6 months), with the caveat that the committee may grant an extension. Beyond these legalities, assure that board operations will continue to be both effective and legally compliant. During the term of the leave, there will be a hole in your board's makeup and legal status. Losing this independent member, even temporarily, could leave various board committees (maybe even the board itself) below quorum or independence requirements, which is obviously trouble.

"BOARD SEEKER" PAPERBACK AND AUDIOBOOK

My new book, *Board Seeker: Your Guidebook and Career Map into the Corporate Boardroom*, was published last year by [Business Expert Press](#), and is proving a strong seller. Over the past few years, we've developed a lot of great information to help the executive "board wannabe" turn hopes for a board seat into reality. Now, I've collected and expanded on these insights to develop a road map for your board search. The link above has more detail. Also, check out my [video](#) introduction, or follow up at [Amazon](#).

The *audiobook* edition of *Board Seeker* is also available through Amazon Audible. Stop in at the [Audible order page](#) for 5 hours of board-wannabe wisdom, read by Yours Truly.

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Ralph Ward's upcoming Boardroom Masterclass and speaking engagements:



Our July four-day Boardroom Masterclass for the [Quest Institute](#) in South Africa (*left*) was a big success! Look for future Quest engagements. Also, join us in November at the [Marcus Evans Corporate Governance Conference](#) in Dubai.

Visit the [speaker](#) page on the *Boardroom INSIDER* site for links to keynote speech videos, and also my listing on the [eSpeakers](#) site.

Boardroom webinars through [GRCEducators](#) and [AudioSolutionz](#) - check their websites for details and to register.

RALPH WARD'S BOARDROOM INSIDER is published monthly for directors, CEOs, those who work with corporate and nonprofit boards (corporate secretaries, corporate counsel, support staff, and consultants), and those who are board prospects.

Ralph Ward is author of the books *BOARD SEEKER*, *BOARDROOM Q&A*, *THE NEW BOARDROOM LEADERS*, *SAVING THE CORPORATE BOARD*, *IMPROVING THE CORPORATE BOARD* and *21st CENTURY CORPORATE BOARD*, and a speaker on corporate board issues. Keep up with us on Twitter at [@boardroominside](#).

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