HOW BUSINESS DISRUPTION IMPLICATES CORPORATE GOVERNANCE

A business disruption-based governance plan should be focused on governance structure changes designed to support the ability of directors and committee members to maintain an ongoing level of engagement with business disruption issues (and effect proper responses when necessary). The overarching expectation is to position the board to be an informed and attentive partner to executive management as they work collaboratively to identify and respond to business disruption threats.

Designated Responsibility: Formally determine, through thoughtful deliberation, whether fiduciary oversight of business disruption matters should be the responsibility of the board as a whole (as with enterprise management) or delegated to a specific board committee with calendar-specific reporting obligations to the full board (as with strategic planning). The expected “active monitoring” role of governance would be set forth in writing whether by resolution of the full board, or by charter of the particular committee.

Standard of Conduct: Direct the general counsel to periodically advise the board and individual committee members with respect to the scope of their fiduciary obligations relating to business disruption oversight, and legal developments relating thereto. This would include examples of how those obligations can be manifested in terms of director preparation, participation in meetings, engagement with management and advisors, and exercise of constructive skepticism with respect to management proposals.

Board Composition: Direct the board nominating committee to consider the competencies and background best suited to address business disruption-related matters; i.e., is there a need to appoint directors with specific “disruptive-related” competencies (e.g., experience with disruptor companies; with companies that have been effected by disruption; and/or with innovative technologies) or rather those with more diverse perspectives across the spectrum of background and experience?

Intra-Board Coordination: Assure the coordination of strategic planning and enterprise risk management efforts with the evolution of board level oversight of business disruption. Identify the extent to which the duties and responsibilities of the respective oversight tasks are similar, separate and overlap, and refine charter scope and vertical and horizontal reporting relationships accordingly. Avoid the “right hand/left hand” confusion that often arises with committees that possess very broad, all-encompassing portfolios.

Director Refreshment: Revise director refreshment policies and procedures (e.g., term limits; age limits; removal rights; individual and full board evaluation policies, officer rotations) to allow for greater flexibility to add directors and board/committee leaders with necessary expertise and commitment to address business disruption threats. This would encompass, among other policies, those relating to term limits; age limits; removal rights; individual and full board evaluation policies; officer rotations and “fitness to service” requirements.

Talent Development: Regardless of the company’s industry sector, the board committee responsible for CEO search and succession and other executive talent development activities should consider the extent to which senior executive-level searches and retention initiatives should focus on individuals who are innovative thinkers with expertise in new technology, digital engagement, artificial intelligence, genomics, and advanced analytics. The talent development process will seek to project the company as a “career accelerator”; providing its executives with an environment highly conducive to experimentation, innovation, and career mobility, and one that is unencumbered by a corporate or industry tradition of risk-aversion and incrementalism.

Identification of Barriers: Identify potential legal and regulatory barriers at federal and state levels to planned responses to particular business disruption threats (e.g., laws relating to antitrust and competition).

Conflicts of Interest: Adjust the board conflicts of interest policy to anticipate relationships of officers and directors with potential disruptive companies. Prompt greater coordination between committees responsible for director independence/conflicts identification and resolution and those responsible for monitoring the potential for business disruption.

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Decision-Making Process: Review the current board decision making process to identify ways it can be streamlined (from a timing perspective) without jeopardizing the ability to position individual decisions for business judgment rule protection. To what extent can the timing in which major decisions are made be compressed to provide greater organizational agility, without jeopardizing participation by key leaders, limiting access to important advisors and otherwise handicapping the ability of the board (or committees with delegated authority) to make informed decisions?

Board/Management Dynamic: Counsel members of the executive leadership team on the fiduciary expectation of direct board involvement in business disruption planning and strategy. Clarify for all involved parties the appropriate, relevant lines of authority and articulate those areas in which the board has specific responsibility (e.g., as with shared responsibilities for strategic planning).

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