Why a Company Should Consider Using an Executive Committee of Its Board of Directors

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IN BRIEF

In companies of all sizes, the fact that board meetings occur only on a periodic basis can make it challenging for boards to meet their obligations.
The creation of an "executive committee" can improve the flow of information that assists a company's management and board in governing effectively.
An enhanced ability to monitor and consult can aid a company's CEO, board of directors, and general counsel/chief legal officer in carrying out effective corporate governance.

The role of a public corporation's in-house general counsel/chief legal officer has always been a difficult balancing act. The general counsel must be an expert advisor to the company's CEO and board of directors. He or she must fulfill significant legal obligations to the company's owners and creditors. An effective general counsel also must function as a knowledgeable business partner in senior management. The complex responsibilities of the position have been written about extensively in numerous professional publications and have been amplified by laws passed, regulations issued, and court cases over many years.[1]

Similar complexity is involved in the obligations of boards of directors to monitor, oversee, and direct the affairs of a public corporation—to carry out effective corporate governance. In companies of all sizes, the fact that board meetings occur only on a periodic basis can make it challenging to meet these obligations. To fulfill governance responsibilities, a board must be able to understand and address issues and developments that can arise in a company at any time.

Given that management is a continuous process and boards of directors processes are intermittent, the creation of an "executive committee" can improve the flow of information that assists a company's management and board in governing effectively. Providing relevant and timely information is one of the important checks and balances in managing and directing the affairs of a company.

WHAT IS A BOARD EXECUTIVE COMMITTEE?

Public company boards of directors typically have three standing committees that are mandated by regulators and listing exchanges: an audit committee, a nominating and governance committee, and a compensation committee. The responsibilities of these standing committees are described and discussed in a company's public disclosures. Financial institutions are also mandated to have a committee to address risk.

Companies may have other committees of the board to specialize in such matters as technology; risk identification and management; safety and security; environmental issues; human capital; and other subject areas. In addition, some companies have created an executive committee to address matters that may need monitoring and attention between regularly scheduled board meetings. The roles of such executive committees can vary among companies and with changing circumstances within a company. One company describes its executive committee in its annual report as follows:

Executive Committee (3 directors) is to, as more fully specified herein, (1) monitor and review the operations of the Company and its subsidiaries (collectively, the "Group"), (2) exercise specific delegated powers of the Board, (3) review and provide recommendations on matters that would require the approval of the Board and (4) exercise such other powers and responsibilities as may be delegated to the Committee by the Board from time to time consistent with the Company's Amended and Restated Certificate of Incorporation (the "Certificate") and Amended and Restated Bylaws (the "Bylaws"), within the parameters delegated by the Board. *The Committee shall meet as and when any member of the Committee deems necessary or desirable, subject to notice (or waiver of notice) being given in accordance with the rules and procedures of the Committee.*[2]

Charters for executive committees may also describe specific limitations on committee activities. Information about a company's board committees and board committee charters can generally be obtained from annual reports, proxy statements, or upon request to a company's investor relations organization.

THREE REASONS FOR A COMPANY TO CONSIDER THE USE OF AN EXECUTIVE COMMITTEE

First, an executive committee can be a flexible resource to monitor a wide range of developments on a continuous basis. Without a necessity for periodic meetings requiring scheduling or travel, and with good use of technology, such a group can be nimble in staying abreast of internal and external developments affecting the business and can act *whenever such matters arise*. It can be on the lookout for issues that warrant consultation and discussion among the CEO, CFO, general counsel, and other senior management.

Second, an executive committee can serve as a sounding board for the general counsel and CEO, other members of senior management, and/or independent directors to explore emerging issues or concerns that may or may not ultimately require a presentation to the full board. Having a small, knowledgeable group with whom the CEO and general counsel can consult can facilitate preliminary evaluation of a matter and provide practical and useful advice. Such an approach enables issues to be discussed and evaluated—and possibly in some cases resolved—before they progress to a point needing to be placed upon the formal board agenda. Preliminary evaluation also facilitates definition and preparation of matters that do go forward to the full board.

Third, the effectiveness of a company's corporate governance—its system of "governing the corporation"—is heavily dependent on creating the right checks and balances and information flows. A small executive committee can institute flexible and efficient information processes that start, stop, and change easily as needed.

Executive committee access to "inside the company" sources, with an ability to inquire about matters as needed, can strengthen the checks and balances in the corporation. One cannot help but wonder if better communications and stronger information flows at early stages might have helped to avoid the widespread and highly publicized control breakdowns that occurred at Enron, Worldcom, and more recently at Wells Fargo. In these cases, massive reputational and financial damage was done to companies and individuals.

SOME CAVEATS FOR CREATING AND USING AN EXECUTIVE COMMITTEE

It is important to distinguish between "monitor, discuss, and advise" versus "make decisions." In creating an executive committee, a company must not create an undesirable "two-tier" power dynamic inside the board, whereby the executive committee takes on decision-making authority that under the bylaws properly belongs with the full board. To minimize this risk, the committee should have a well-defined charter with clearly described delegations, along with its own internal set of checks and balances.

An executive committee's processes for information gathering should be relevant, timely, and efficient, as well as cognizant of the need to avoid placing unnecessary burdens on management. Reporting to the full board should similarly be efficient, using written summaries to advantage in order to avoid taking up time on routine matters in periodic board meetings.

An executive committee should be small, generally not more than three to five people, including the CEO. It should include two independent directors who have relevant experience and business knowledge, as well as a mix of desirable personal and professional attributes.

The authors wish to thank other members of the Grace & Co. Board of Advisors and Senior Paralegal, Allison Hawkins, for their input and assistance.

[1] *See* E. Norman Veasey & Christine T. Di Guglielmo, Indispensable Counsel (Oxford University Press, 2012) (a comprehensive description of the responsibilities and obligations of counsel, the relevant legal environment, and numerous experiences of job incumbents).

[2] BOE Annual Report 2019, at www.cboe.com.

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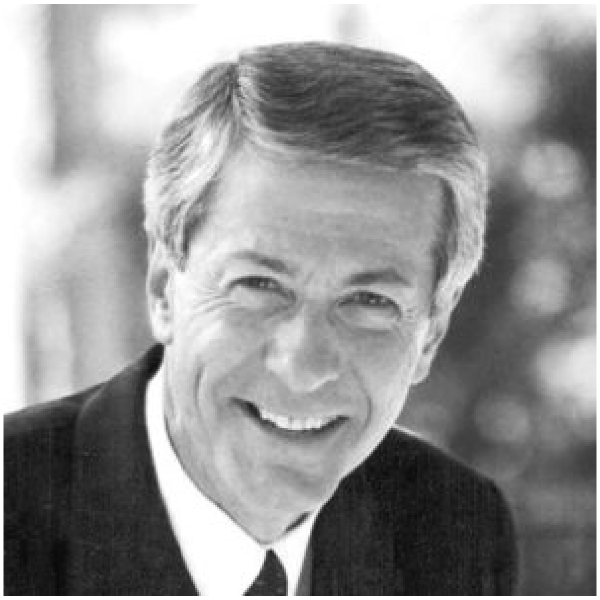

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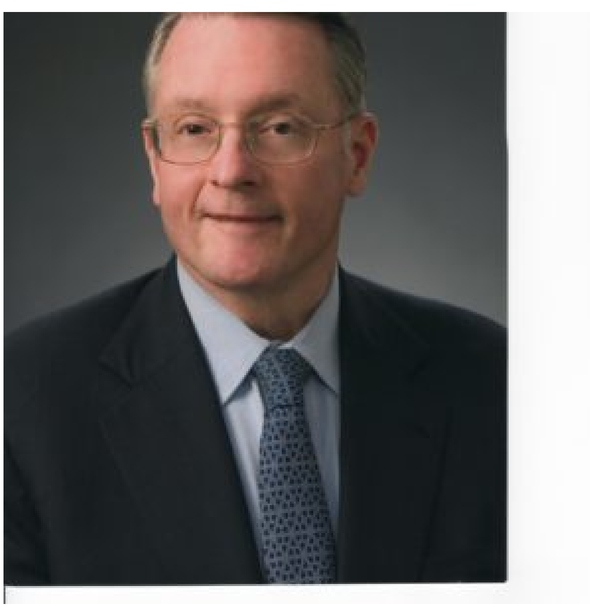

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