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CGC INSIGHT

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Editorial In Sight: The Twin Forces of Regulation and Private Ordering

Guest Commentary: The Erosion of Boardroom Lawyering

Reconsideration of Pay Ratio Rule Implementation

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GUEST COMMENTARY

CGC In Sight is actively seeking articles and commentary from practitioners who have insights on corporate governance matters to share with the ABA Corporate Governance Committee membership. The following contribution comes courtesy of Adam J. Epstein, a former institutional investor and founder of Third Creek Advisors, LLC, which provides corporate governance advice to small cap companies.

The Erosion of Boardroom Lawyering

By Adam J. Epstein

Whether it's Warren Buffett, Jamie Dimon, BlackRock, CalPERS, CalSTRS, or any one of the growing list of shareholder activists, the spotlight on corporate governance efficacy has never burned brighter in the history of global capital markets. Given the uptick in scrutiny of boardroom practices, you would think that the quality of boardroom lawyering has correspondingly risen to the challenge. You would, however, be mistaken.

As a former lawyer and institutional investor who now advises myriad pre-IPO and small-cap boards about how to navigate the boardroom issues investors care most about, I am constantly in boardrooms. Whether it's solo practitioners, regional firms, or global titans, the quality of counsel I see day in and day out in boardrooms is underwhelming at best, and arguably declining with the passage of time. It's no wonder that many of my firm's clients repeatedly state that the leading cause of changing counsel isn't price or responsiveness, but the quality of advice.

To be sure, counseling public company boards is predominantly an exercise in ensuring that board members are discharging their multifaceted duties in accord with applicable laws and regulations. But today's capital markets don't reward companies overseen by boards that are principally in the business of "box checking" or "culpability avoidance."

To keep pace with a rapidly evolving public company ecosystem, boardroom lawyering needs to be fine-tuned to the "zeitgeist" of a given board. A nascent, cash-starved public company run and overseen by officers and directors with little public company experience is a fundamentally different situation than advising a large multinational company with a boardroom of internationally known business leaders. Board members know when lawyers do a poor job of differentiating the two.

There is a poignant rub in the marketplace: too many boardroom lawyers are focused only on compliance, while stakeholders are demanding governance excellence. Query whether you would invest in a company governed by model fiduciaries, who don't know the first thing about what constitutes governance best practices in 2017. For example, a board member could follow the letter of the law, and decline to meet individually with investors. But that company mightn't have too terribly many investors at the end of the day, since this dialogue is increasingly demanded by investors.

When I speak at law firms and advise lawyers keen on providing high quality boardroom counsel, I urge them to consider the following four measures.

1. While corporate governance best practices have historically been handed down from larger public companies in the United States, corporate oversight is not "one size fits all." Governing Pfizer is nothing like governing a nascent, one-product biotech company. Inasmuch as the overwhelming preponderance of public companies are small (e.g., nearly 80% have market capitalizations below $500 million), counsel need to be mindful of resources, experience (both in the C-suite and boardroom), and the unique capital markets realities that affect smaller public companies when providing advice.

2. Lawyers intent on providing great governance advice need to have a more rounded sense of business, including, but not limited to, accounting, capital markets, and corporate finance. Whether this education is undertaken formally or informally, the law industry needs to pay more than lip service to the fact that boardroom advisory doesn't take place in a vacuum. Operating and governing public companies today is a complex, three-dimensional chessboard; firm command of relevant laws and applicable industry, market, and securities regulations is only part of the puzzle.

3. Lawyers should attend industry trade shows and investor conferences with their clients. Trade shows are a cost-effective way to get a sense of business trends and competitive landscapes; it's challenging to proffer value-added legal advice to a client if you don't understand their business. Investor conferences provide valuable insights into top-of-mind issues for institutional investors. Far too many lawyers fail to appreciate that institutional investors, who transact the majority of U.S. equities, are ultimately the most important arbiters of governance efficacy, not the remedial, after-the-fact judgments of the judiciary.

4. Lawyers should strongly consider attending corporate governance continuing education programs to get a better sense of what constitutes best practices (you might find the specialized programs geared towards directors particularly helpful). It's shocking how few corporate lawyers have refined understandings of how issues like, for example, board composition, cybersecurity, strategic innovation, shareholder engagement, globalism, and diversity are impacting what transpires inside America's boardrooms.

There are lots of superior boardroom counselors in the United States. But to those who are regularly in boardrooms, the gulf between the legends of boardroom lawyering and everyone else is growing . . . fast. Consequently, shareholders are suffering, and law firms of all sizes are losing business every day as a result.

Adam J. Epstein is the founder of Third Creek Advisors, LLC, the only small-cap corporate governance advisory firm run by a former institutional investor. He is the author of The Perfect Corporate Board: A Handbook for Mastering the Unique Challenges of Small-Cap Companies (McGraw Hill, 2012) and contributing author to The Handbook of Board Governance: A Comprehensive Guide for Public, Private and Not for Profit Board Members (Wiley, 2016), and he writes the "Entrepreneurial Governance" column in Directorship magazine. He can be reached at ae@thirdcreekadvisors.com.