Board Governance: Maintaining Balance in Uncertainty

Strategies to assist boards in maintaining a balanced approach to governance as they navigate an uncertain, dynamic, and complex regulatory and economic environment.

Holly J. Gregory
Partner at Sidley Austin LLP

The high degree of uncertainty in the current business, regulatory, and geopolitical environment adds complexity to the already demanding role of corporate director. To govern effectively, directors must understand the changing global and domestic landscape and its implications for corporate strategy, risk, and performance. At the same time, the board must focus its attention on the critical matters relevant to the board's specific governance role, resisting the natural tendency in times of tension to overstep into management's role.

A balanced approach to governance is one that contemplates the implications of fast-moving developments for the company's strategy, risks, and performance, yet respects the board's oversight role. Maintaining a balanced approach to governance is critical to empowering management to adapt and respond to uncertainty with prudent agility.

This article discusses strategies to guide boards and their advisors in maintaining an appropriately balanced and focused approach to governance in the current environment.

Understanding the Current Environment

Basic principles of effective governance are remarkably durable. They provide a framework and guidance for helping boards and their advisors maintain an appropriately balanced and focused approach to the current dynamic context in which boards must govern.

Informed judgment is the foundation for effective governance. In the current environment, the board's balanced focus should be well-grounded in an understanding of the global business context, as well as U.S. policy and other geopolitical developments that are relevant to the company's strategy and risks.

According to the World Economic Forum (WEF), five interconnected forces — deglobalization, decarbonization, demographic change, rising debt levels, and digitalization — are transforming the global economy and financial markets, and testing economic resilience in an environment marked by a fracturing of trust and escalating geopolitical, environmental, societal, and technological threats (WEF: **5 Transformational Trends Shaping Global Finance** (Jan. 6, 2025)). Additionally, the WEF has identified the risks most likely to present a material crisis on a global scale in 2025, which are:

- An expansion and escalation of state-based armed conflict.
- Extreme weather events associated with climate change.
- Geoeconomic confrontation.
- Misinformation and disinformation accelerated by technology.
- Widespread societal polarization. (**WEF: Global Risks Report 2025** at 7 (Jan. 15, 2025).)

(For more on the geopolitical risk landscape, see **Geopolitical Outlook for Investors in 2025** in the March 2025 issue of *Practical Law The Journal*.)

Boards and corporate managers must adapt to prepare for these forces and risks while also ensuring that the company is well positioned to navigate regulatory change and related pressures that impact business operations and policies, supply chains, human capital, and customers in the evolving and uncertain U.S. political environment.

Each change in presidential administration brings shifts in policy and regulation that influence the environment in which U.S. companies compete and boards govern. The second Trump administration inherited a strong U.S. economy albeit with some labor market softening, entrenched inflation, continued high interest rates, and national debt approaching $36 trillion. Amid the recent flurry of executive orders, cabinet appointments, and cuts to the federal workforce, the impact of the Trump administration's policies are not yet clear, but they can be expected to present both benefits and challenges to businesses. It remains to be seen whether these policies will usher in economic growth or decline, and corporate boards and legal counsel need to be aware of these potential shifts and their implications.

The regulatory environment for public companies is expected to ease. For example, Securities and Exchange Commission (SEC) climate disclosure requirements have been stayed and are being challenged in court, while other environmental, social, and governance (ESG) matters have been put on hold (for a summary of recent and expected future developments related to ESG- and climate-related disclosure in the U.S., as well as developments in related litigation, see Key Developments in ESG and Climate Disclosure Tracker on Practical Law).

Both public and private companies may experience a softened approach to enforcement of antitrust and anti-bribery laws, as well as laws and regulations that apply to companies in the financial services and food and drug sectors (for more information, see **Kilpatrick: President Trump Hits 'Pause' (But Not 'Stop')**: **The Scope of the New Executive Order on The DOJ's FCPA Enforcement Against American Companies** and **Trump Administration Issues Executive Order on Deregulation Initiative** on Practical Law; see also **Reuters: Trump's DOJ Antitrust Nominee Reveals Enforcement Focus** (Feb. 20, 2025)).

Companies may also benefit from a reduction in corporate taxes. At the same time, immigration policies may put pressure on labor markets, while higher tariffs may increase supply chain costs, both potentially adding to inflationary pressures. Additionally, pressures to abandon environmental commitments and diversity, equity, and inclusion (DEI) policies may result in pushback on companies from customers, employees, and shareholders.

Boards and managers must consider the potential economic and geopolitical impacts of these policies and activities, while also being mindful that perceived corporate tax and regulatory benefits could increase public discontent with companies, especially if they spur inflation or unemployment. The **2025 Edelman Trust Barometer** reports a growing and widespread "sense of grievance" associated with declining trust not only in government, non-governmental organizations, and the media but in business as well.

While trust in business has typically outpaced trust in other institutions, there has been a global decline in employee trust for employers, with a five-point decline for U.S. employers since 2024. Alarmingly, the survey results show that more than 50% of adults aged 18 to 34 approve of "hostile activism" (which may include attacking people online, intentionally spreading disinformation, threatening or committing violence, and damaging public or private property) to drive change. (See **Edelman Trust Institute, 2025 Edelman Trust Barometer: Global Report**, at 8,12, 20, 22, 39.)

Against this background, directors should expect greater demands on their attention, with more time in regular and special board and committee meetings and the corresponding need to stay well-informed and current on key developments expected to impact the company's business. The board should also discuss with management how management is positioned to identify, follow, and engage in contingency planning with respect to the developments that are likely to be relevant to the company's strategy, risks, and operations. The board and management should align on how management will keep the board or relevant board committees up to date on material developments, and on what should be considered material.

Aligning the Board's Focus with Its Key Roles

The board's approach to governance must be grounded in an understanding of the board's roles. The board should avoid overstepping into areas that have been clearly delegated to management. A board's micro-management and second-guessing can cause management to become risk-averse, while neutralizing the board's ability to hold management accountable.

As noted by the National Association of Corporate Directors (NACD), while "effective governance in a fast-moving world [may] require more direct and active involvement by directors and, to a greater degree than in the past ..., [a]gility must not be confused with overstepping into management's arena; the line between the board's role and management's role may become blurred with the speed of events, and it is critical to keep those spheres separate to ensure that the board can function as an oversight body and hold management accountable" (NACD: The Future of the American Board: A Framework for Governing into the Future: Executive Summary, at 4-5 (2022) (subscription required)).

Clarity regarding the board's roles can help guide the setting of the board agenda and information priorities, while supporting an appropriate relationship of respect and trust between the board and management. As the highest decision-making authority in the company, the board plays three key roles:

- **Decision-maker**. The board is responsible for making decisions that cannot be delegated, including, but not limited to, how much authority to delegate and to whom. Delegation is a matter of business judgment that may be impacted by a dynamic and uncertain environment. The determination of what authority to reserve to the board and what to delegate to management should take into consideration whether the board has time, information, expertise, and understanding superior to (and more efficient than) management, such that the board's involvement is likely to improve the quality of the decision and the agility with which it is made. (For a model policy on delegation of authority, with explanatory notes and drafting tips, see **Signature Authorization and Delegation of Authority Policy** on Practical Law.)
- **Oversight provider**. Oversight is the continual inquiry by directors into whether the board's delegation of authority to management is reasonable, and whether the information that management provides to the board can be relied on. Critical areas of oversight include strategic initiatives, financial performance (and the integrity of financial statements and accounting and financial reporting processes), risk management, and compliance.
- **Advisor**. Management may turn to the collective experience and wisdom of the board for input on matters within management's delegated authority. The board should act as a sounding board where management can test and hone ideas. When the relationship between the board and management is one of mutual trust, respect, and candor, management is more likely to seek board discussion of matters that are within management's delegated authority. The board, in turn, benefits by having enhanced transparency into management's decision processes and often earlier involvement in matters that may ultimately be appropriate for oversight or even board decision-making. This balanced collaboration and constructive challenge in a board-management relationship is the foundation for effectively navigating dynamic and uncertain times.

Where the line between board and management roles is drawn is highly context-dependent. The board should set expectations about the circumstances that may alter the level of the board's involvement, for example, in certain types of crises or where issues of management integrity, credibility, or capacity are raised. Strong board-management relationships require a constructive and respectful give-and-take, a recognition of the distinction between board and management roles, and transparency grounded in the expectation that management will deliver bad news promptly.

(For more information, see **Three Key Roles of the Board of Directors** in the November 2023 issue of Practical Law The Journal.)

Crisis Preparedness

In most circumstances, management is well positioned to address a crisis on a day-to-day basis, but the board should expect to meet more frequently and be kept up to date. Directors should understand what is known, what information is still needed, what management is doing to investigate the matter further, and who is on the crisis team (both within management and with respect to key advisors). Management typically handles communications and keeps the board informed of the communication plan and high-level messaging. The board (and management) should avoid making statements in early stages that assume a positive outcome or express confidence in management when there is not yet full visibility into the circumstances.

In matters that involve management conflicts of interest or integrity, the board will need to take a more active role, usually through an existing committee or by creating a special committee composed of independent and disinterested (unconflicted) directors. The board should expect to hire counsel and, potentially, other advisors and to direct counsel in the investigation of the facts.

(For more information, see **Shaping the Board Agenda in a Dynamic Environment** in the May 2024 issue of Practical Law The Journal.)

Maintaining a Balanced Focus on Priority Matters

Boards should define their priorities based on the unique circumstances facing the company. Demands for board time and attention continue to expand, and boards must ensure that they are focused on the most important matters consistent with their fiduciary obligations. A board's primary responsibilities involve:

- Monitoring management's performance and determining CEO succession and compensation.
- Approval of strategic direction and implementation of strategic plans and related risk management.
- Oversight of financial reporting, audits, internal controls, enterprise risk management (ERM), and compliance.
- Attending to stakeholder relations.
- Determining matters not delegated to management, such as governance matters, retention and oversight of the independent auditor, approval of major transactions, determination of dividend payments, and bylaw amendments.

Management Performance and CEO Succession

Assessing whether management is performing in line with expectations is an essential board task and permeates almost all board activities and discussions, whether the topic is corporate long-term strategy, a particular M&A transaction, annual and quarterly financial performance, ERM and compliance, management development, succession planning, or CEO compensation. Management development and succession planning continue to be key board priorities, and boards should review emergency succession plans to ensure they are up to date for the CEO and other key officer roles. In an increasingly knowledge-based and data-driven economy, human capital management issues are particularly critical to the ability of the company to perform.

(For more information, see **CEO Succession Planning: Principles and Considerations** and **Planning for Leadership Succession and Unexpected CEO Transitions** on Practical Law.)

Strategy and Risk

In an environment of rising expectations about the role of corporations in society, and given the high level of polarization with respect to environmental and social issues, boards need to continue to assess the link between these issues and corporate strategy and risk. Boards can help management focus on how economic, geopolitical, and technological trends may impact both near-term and longer-term opportunities and risks for the company.

Boards should not be distracted from providing guidance and oversight on critical issues relating to corporate strategy, risk, and management performance. These are the issues that should dominate the agenda for most boards. While each company is unique in its strategic focus and implementation, articulating the link between the company's approach to environmental and social issues, long-term strategy, risk mitigation, and financial performance will help ensure consistency with the company's best interests and enhancement of long-term value.

Financial Reporting and Audit, Internal Controls, and Compliance

Board attention to the integrity of financial reporting and audit processes and the internal control and compliance environment are of particular importance in dynamic and uncertain times. Boards must remain focused, with the assistance of the Audit and other committees, on overseeing financial reports and disclosures, disclosure controls and procedures, external and internal audits, and capital allocation processes and controls. Additionally, boards must ensure that the company's internal controls and information reporting systems, including ERM and compliance, are well matched to the changing regulatory environment. Boards must evaluate policies and processes and ensure the corporate culture supports and incentivizes appropriate behaviors.

Even in an environment of lax enforcement of existing laws and regulations, companies should avoid reducing their own emphasis on compliance and internal controls. In many cases, the statute of limitations may be longer than the duration of a regulator's enforcement approach. Boards should support management in continuing to invest in appropriate controls.

(For more information, see **Accounting, Auditing and Financial Reporting in the US: Governing Authorities** and **Internal Control Over Financial Reporting for Counsel: Why Should You Care?** on Practical Law.)

Stakeholder Relations

The fiduciary duties of directors remain durable, but expectations of shareholders, regulators, employees, and other important constituents continue to evolve. Providing clear and effective oversight of management performance, corporate strategy, and the significant risks facing the company in this dynamic environment requires understanding stakeholder expectations. Stakeholder engagement provides an opportunity to gain insights into shareholder and stakeholder viewpoints, which can be valuable in formulating approaches to strategy and in understanding risk and potential impact.

While directors should consider (but not defer to) shareholder viewpoints, they must always make informed business judgments that they believe are in the best interests of the corporation as they help management focus on corporate resiliency and sustainable performance for the long term. One benefit of developing a relationship with key shareholders built on trust, transparency, and understanding is that shareholders may be more willing to support the board and management in the face of shareholder activism and other pressures.

Governance and Related Processes

Board composition and refreshment are under increased scrutiny by shareholders (including activists), who are paying closer attention to the degree of alignment between director qualifications and company needs, and to company disclosure on these issues.

Boards should consider board composition, culture, and processes during their annual evaluation and re-nomination processes, including whether new director skills and perspectives are needed (or would be beneficial), and attend to refreshment mechanisms. In addition to ensuring that the board is "fit for purpose," with a composition that reflects relevant diversity of skills, experience, and perspectives for effective, objective oversight of the business, the board must develop its own culture of trust, respect, and openness. The ability to bring objective judgment to bear and to express and consider diverse viewpoints while driving toward consensus are necessary qualities. (For more on reviewing board qualifications, see **Board of Directors Matrix** on Practical Law.)

To achieve balance in board processes, boards should fine-tune:

- The attention allocated to strategic and long-term planning versus short-term results and operational matters.
- The formality or informality of board meetings, to ensure efficient use of time, an opportunity for fulsome deliberation, and clarity regarding outcomes.
- The time spent with the management team in the boardroom, with the CEO individually, and with outside and independent directors in executive session.
- The provision of both constructive challenge and support to management.
- Board succession plans to ensure appropriate refreshment versus recognition of the value that tenure in board service brings.
- The duration, length, and detail of management presentations and reports necessary to ensure the board is well-informed versus the benefits of not overwhelming the board with over-long presentations and detailed information that may not be highly relevant to board decisions and oversight.

(For more information, see **Board Self-Evaluation** and **Issues to Consider Before Conducting a Board Evaluation: Checklist** on Practical Law.)

Practical Guidance

In the current dynamic and uncertain environment, boards should:

- Stay attuned to the changing context.

- Align focus with decision roles.
- Focus on priorities.

Stay Attuned to the Changing Context

As the legal and regulatory landscape continues to evolve, boards should:

- Consider deep dives on new developments that are likely to be key to understanding emerging opportunities and risks.
- Understand how management is positioned to identify and follow key developments that are likely to be relevant to the company's strategy, risks, and operations (for example, the potential impact of changes related to tariffs, immigration, and ESG and DEI issues).
- Oversee management's contingency planning efforts.
- Set clear expectations for how management will keep the board appropriately informed in the relevant time frame on material macroeconomic, technological, and regulatory trends likely to impact the company's business.

Align Focus with Decision Roles

To reinforce the board's key roles and position directors to engage on an agile and informed basis while resisting micromanaging, boards should:

- Periodically review their delegation of authority (or reservation of authority) policy to ensure that it is clear and up to date. In doing so, boards should recognize that while the line between board and management authority may change in certain contexts, clarity regarding decision roles supports effective governance.
- Encourage discipline and respect regarding management's delegated authority by clarifying in board materials and agendas why the information or topic is being presented and whether the board is being asked to provide a decision, oversight, or advice.
- Set clear expectations about circumstances in which the board expects to be informed of developments in real time and may want to become more deeply involved in a matter.
- Review crisis management plans to ensure the company is well-positioned to respond appropriately, without under- or over-reacting.
- Reassess the adequacy of business continuity plans to ensure they are appropriate to the potential risks of disruption, including through a discussion with management of relevant contingencies.

Focus on Priorities

Boards should:

- Determine board agenda and information needs to ensure they align with board priorities, which are likely to involve issues of management performance and succession, strategic direction and the risks associated with strategy, and ensuring appropriate internal controls, compliance, and ERM in a changing and uncertain environment.
- Ensure that a considerable proportion of board time is focused on long-term strategic objectives, significant strategic initiatives, and related transactions, supported by clear goals and agreed key performance indicators.

- Treat succession planning as an ongoing activity focused on identifying and developing high-potential members of the management team.

- In relation to changing regulatory expectations and related risks:

  - examine compliance policies and the control environment;

  - ensure that risk management systems, compliance policies, and internal controls are well-matched to these expectations and risks;

  - discuss with management their efforts to understand the impact of executive orders and legal or regulatory changes that could impact the company's compliance; and

  - recognize that executive orders and enforcement policies may differ from laws and regulations in effect and be mindful that statutes of limitations may be longer than administrative tenure.

- Ensure that DEI- and ESG-related policies, programs, and practices comply with law and regulation and that the business rationale for the company's approach is appropriately focused and articulated.

- Continue to actively oversee and participate as appropriate in engagement with key shareholders, other stakeholders, and proxy advisors, with an emphasis on learning about their viewpoints and developing enduring relationships.

- Review board composition to ensure that the board is made up of directors with appropriately diverse skills, experience, and perspectives relevant to the company's business and the board's decision-making and oversight roles.

- Consider whether the board's approach to board refreshment is aligned with the pace of change affecting the business.

- Ensure that governance structures and practices support a board culture in which consensus can be readily achieved after full and informed discussion, independent viewpoints are respected and valued, and confidentiality is protected.

The views stated above are solely attributable to Ms. Gregory and do not necessarily reflect the views of Sidley Austin LLP or its clients.

https://www.reuters.com/practical-law-the-journal/transactional/board-governance-maintaining-balance-uncertainty-2025-04-01/