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## The Responsible Board

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## The Responsible Board

by Ira M. Millstein \*

*The debate over the role of the corporation in our society is as old as the corporation itself. With increased board activation, boards are positioned to play a critical role in balancing and integrating societal demands and expectations with the corporate polestar of shareholder gain.*

The corporation is a chameleon-like legal creation capable of adjusting to changing environments and responding to both competitive and social pressures. As surrogate for dispersed ownership, the board is at the center of corporate governance, empowered to oversee the corporation's affairs, set its strategic course, and, importantly, change its organization and management as necessary. This governance paradigm—management accountable to the board and the board accountable to shareholders—is at the core of our market economy which, in turn, supports our democratic form of government.

Our free-market system relies on the corporation to integrate and coordinate financial, human, and natural resources for the production and distribution of goods and services. Society wants and needs corporations to prosper and profit by providing superior goods and services more efficiently as compared to international competitors. In doing so, corporations not only create shareholder profit, they benefit consumers with lower prices and provide employees with critical jobs and incomes. As the engine of our economy, corporate success drives the success of the free market and our democratic system.

Because the overall performance of corporations is key to the functioning of the economy, traditionally, both government and society at large

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have been concerned with corporate performance. Our populist society has also been concerned with the power in corporate hands and the extent to which such power is or should be limited. Certainly, corporations should be allowed to act with as much free discretion as possible to perform their competitive market function. There is no guarantee, however, that corporations, being comprised of imperfect human beings, will not wander off the path now and again—especially because the polestar of profit and shareholder gain can at times conflict with other demands on the corporation and its managers.

Limitations on corporate discretion in the form of heavy antitrust and securities law enforcement have been relied upon, at times, to ensure that U.S., corporations compete, do not achieve unbridled power, and keep their shareholders and the public at large fully informed. This focus on competition and disclosure reflects our faith that the free market, with the corporation as its driving force, allocates resources more efficiently than government regulation can, and the related belief that guarding against restraints on the market and propagating transparency are the least restrictive means of protecting shareholder interests. The relationship between our society and the corporation, however, is even more complex.

Our national populist tendencies and general distaste for “government” lead us to rely on the corporation to help address a number of complex social issues either alone or in partnership with the government. For example, corporations are urged to train current workers and provide them with access to affordable health care, to be active in the education of the next generation of workers, to maintain drug-free workplaces, to provide equal opportunity and encourage diversity of race and gender at all levels of the organization, and, ultimately, to provide some portion of retirement security.

In the United States, such social concerns are far less exclusively the government’s province than in many other advanced economies. These societal concerns can be labeled “extrinsics” because they fall outside a very narrowly defined corporate goal of profit maximization. This author contends, however, that corporations *are expected*, wherever possible, to integrate extrinsics with the corporation’s primary obligation to maximize shareholder value. To the extent corporations attempt to do so, they are viewed as credible and accountable, and are likely to be less regulated. To the extent they do not meet expectations in addressing extrinsics, there will be more governmental intervention and intrusion.

The challenge is to balance, wherever possible, society’s demands with the goal of maximizing shareholder profit. The task is complicated because the public’s view of what constitutes the minimum threshold of constructive action regarding extrinsics changes over time—the target is always moving. This is not mere “do-good” or “ethics” advice. The reality is that private sector responsiveness to public concerns is part of our system.

As Ralph Larsen, Chairman and Chief Executive Officer (CEO) of

Johnson & Johnson describes it, treating social responsibility and profit maximization as mutually exclusive is “the tyranny of the ‘or.’”<sup>1</sup> When asked whether he would rather be a good corporate citizen “or” maximize profits, rather deliver monthly financials “or” produce high-quality products, Mr. Larsen simply replies “Yes”—because he understands that meeting these expectations can be good business and is the very balancing expected of the corporation.<sup>2</sup>

The need to balance extrinsics and the corporation’s profitability goal is not confined within our domestic borders. In the global economy, U.S. corporations operate as multinationals and are increasingly scrutinized with respect to how they handle social issues abroad.<sup>3</sup> The tensions are apparent: should a U.S. corporation forego financial opportunity in a mineral-rich country or a country that affords greater economies than the United States because of oppressive politics and policies? The challenge is how to maintain corporate credibility and integrity while capitalizing on such opportunities. Certainly, in view of the competition for capital and technological expertise among developing countries, U.S. corporations have the opportunity to exert influence. “When?” and “to what degree?” are precisely the questions the corporation must address.

Of course, the primary responsibility for this balance lies with management but the balancing act also implicates the board. It is a critical part of the board’s role to view the corporation in a broader context and to integrate extrinsics into management’s decision-making process. Because the board is not as steeped in day-to-day concerns as management, it can pull back and regard these issues in conjunction with the immediate management concerns at hand.

In this author’s view, the board of directors has at least a dual oversight function: overseeing management’s dedication to the polestar of profit maximization and overseeing the integration of extrinsics. The traditional legal definition of the board’s role, however, places this latter oversight role on the periphery of board activity. The American Law Institute’s (ALI’s) definition of the central functions of the board is mainstream and predictable, focusing on the board’s traditional oversight and review of management, corporate accounting, and business plans.<sup>4</sup> The ALI principles do not view more active board participation as obligatory; heightened degrees of director involvement, such as initiating corporate plans or action, or advising senior executives, are discretionary board actions and are not given priority.<sup>5</sup>

1. *Competing in the Global Economy*, PARTNERSHIP POL’Y CENTER (The Partnership Pol’y Center, New York City Partnership & Chamber of Commerce, New York, N.Y.), Aug. 1996, at 7.

2. *Id.*

3. *See, e.g., Companies and their Consciences*, ECONOMIST, July 20, 1996, at 15-16.

4. 1 American Law Institute, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 3.02 (a)(1)-(5) (1992).

5. *Id.* § 3.02 (b)(1)-(7).

The ALI principles do, however, recognize that the corporation may, “within reason,” accommodate certain “public welfare concerns” in seeking long-term profit maximization:

It is now widely accepted that the corporation should at least consider the social impact of its activities, so as to be aware of the social costs those activities entail. By implication, the corporation should be permitted to take such costs into account, within reason. For example, the corporation may take into account, within reason, public-welfare concerns relevant to groups with whom the corporation has a legitimate concern, such as employees, customers, suppliers, and members of the communities within which the corporation operates.<sup>6</sup>

Constituent-related concerns, however, are of marginal importance and not expressed as boardroom issues.<sup>7</sup> In contrast, this author sees the integration of extrinsics—the corporation’s efforts to balance societal concerns of employees, customers, suppliers, and communities, without compromising shareholder wealth—as central to the perpetuation of the corporation and our system, and central to the board’s role.

Boards are evolving and becoming better equipped to rise to this challenge. In the past decade, the historically passive U.S. board of directors has been transforming itself into an independent, active monitor, capable of real—rather than merely nominal—management and business performance oversight.<sup>8</sup> Professional studies are in consensus: there is a palpable emergence of a “new” board in terms of board diligence, focus, and culture. These studies and surveys reflect the structural and especially the cultural changes taking place in boardrooms today.

The statistics on the activism and new focus of the board are revealing. Korn/Ferry International reports:

- (i) an increase in board activism regarding CEO performance, with seventy-eight percent of directors surveyed reporting that their boards have a formal process for evaluating CEO performance in 1995 (up from sixty-seven percent in 1994);<sup>9</sup>

6. *Id.* § 2.01 cmt. i.

7. The ALI’s discussion of the integration of extrinsics is described only in a general section of the ALI “Conduct of the Corporation” guidelines, where, unlike the fundamental board oversight duties, the balancing act is not delineated as a positive board responsibility. *Id.* § 2.01.

8. See American Soc’y of Corporate Secretaries, CURRENT BOARD PRACTICES (1996); THE CONFERENCE BD., CORPORATE DIRECTORS’ COMPENSATION, 1996 EDITION: A RESEARCH REPORT 34 (1995); KORN/FERRY INT’L, 23rd ANNUAL BOARD OF DIRECTORS STUDY 3 (1996); NATIONAL ASS’N OF CORPORATE DIRS., THE 1995 CORPORATE GOVERNANCE SURVEY 1 (1995); SPENCER STUART, 1996 BOARD INDEX: BOARD TRENDS & PRACTICES AT MAJOR AMERICAN CORPORATIONS 3 (1996); TOWERS PERRIN, PERSPECTIVES ON BEST PRACTICES IN CORPORATE GOVERNANCE: PARTICIPANT’S REPORT 2 (1996).

9. KORN/FERRY INT’L, *supra* note 8, at 25.

- (ii) an increase in the number of directors who report that their boards assess their own performance, with thirty-six percent having formal board evaluations (up from twenty-six percent);<sup>10</sup> and
- (iii) an increase in focus on the nuts and bolts of board structure and policy, reflected by fifty-nine percent of directors reporting that their boards have written guidelines, sixty-one percent of which are made available to the public.<sup>11</sup>

Similarly, Towers Perrin relates increased board independence, growing board participation in strategic formulation, and more rigorous CEO evaluation and board self-evaluation.<sup>12</sup> The Conference Board's 1996 study, *The Corporate Board: A Growing Role in Strategic Assessment*, documents a growing recognition of the legitimacy of board involvement in strategy formulation, primarily in response to global competition in capital markets and the worldwide trend toward industry privatization. In the ten-country study, fifty-one percent of respondents stated that their boards have a greater role in strategy than three years ago and nearly forty-nine percent stated that their board is "actively engaged in the choice of strategic options."<sup>13</sup>

Indicia of the cultural changes have been documented as well. Directors are actually going to school to learn how to carry out their responsibilities better. Harvard, Stanford, and Wharton business schools all have seminars and workshops that give instruction and direction on the best boardroom practices.<sup>14</sup> The Spencer Stuart survey of 1996 proxy materials documents that the number of director compensation plans with a stock grant/option component (designed to link director compensation to shareholder value) has increased.<sup>15</sup> Spencer Stuart's 1995 survey reported that sixty-three percent of boards have a formal indoctrination process for new directors and the number of women and minority board members has increased.<sup>16</sup>

Changes in boardroom structure and culture are beginning to move beyond the largest U.S. Fortune 500 companies. The National Association of Corporate Directors (NACD), which includes both large-cap and many small- and mid-cap companies, recently formed a Blue Ribbon Commission on Director Professionalism (Commission), which this author chaired, to consider how directors can best meet the increasing demands of board service. The Commission's Report expresses a broad consensus about the

10. *Id.* at 28.

11. *Id.* at 27.

12. See TOWERS PERRIN, *supra* note 8.

13. THE CONFERENCE BD., *THE CORPORATE BOARD: A GROWING ROLE IN STRATEGIC ASSESSMENT* 12 (1996).

14. Judith H. Dobrzynski, *For Directors, Board Room Survival 101*, N.Y. TIMES, Mar. 30, 1996, at D1.

15. SPENCER STUART, *supra* note 8, at 7-9.

16. SPENCER STUART, 1995 BOARD INDEX: BOARD TRENDS AND PRACTICES AT MAJOR AMERICAN CORPORATIONS 7, 8-9 (1995).

roles and responsibilities of directors and the function of the board as it evolves toward increased independence and activism.<sup>17</sup>

Structural change and cultural adjustments—as increasingly observed and as advocated in the report—arm the board to fulfill its critical oversight role, not only as to financial performance but in the balancing and integrating of societal demands and expectations with the polestar of shareholder gain. For the corporation to be allowed to continue to enjoy its place and privilege, it must perform as an investment vehicle and contribute value to our economy, *and* it must achieve this integration of extrinsics at a level acceptable to the public. This endeavor cannot be dictated by formulas and rules; it requires deep consideration, creativity, and vision. Indeed, the development of the corporate governance paradigm as a mechanism for corporate accountability provides a flexible remedy for the fact that law cannot always efficiently ensure that corporate conduct comports with societal expectations.

Clearly, the balancing of societal expectations and shareholder interests is a tall order for the board. Maximizing shareholder wealth in the long term is the appropriate corporate polestar; sometimes difficult, though necessary, corporate decisions will have perceived negative effects on a societal issue. We all understand that how a company responds to an accident (such as an oil spill) or sabotage (like the adulteration of a product) can dictate a lasting public impression, positive or negative, of the company. The goal is to make positive corporate responses—whether to a gross mistake, corruption, or fraud, or to general employee, community, and societal needs (through philanthropy, education, and health care)—an element to be considered seriously in corporate decision-making.

Much current public pressure arises out of the proliferation of downsizings and apparently inequitable executive compensation packages. The corporation's right to be free of regulation in these areas will vary directly with the extent to which they are handled sensibly in both the micro and the macro (where the micro considers the effect on corporate profits and the macro takes a broader view and includes the long-term market and societal impacts).

In March 1996, *The New York Times* published a series of articles entitled "The Downsizing of America."<sup>18</sup> The series described, without providing

17. BLUE RIBBON COMM'N ON DIR. PROFESSIONALISM, NATIONAL ASS'N OF CORPORATE RATE DIRS., REPORT (1996).

18. Rick Bragg, *Big Holes Where the Dignity Used to Be*, N.Y. TIMES, Mar. 5, 1996, at A1; Kirk Johnson, *In the Class of '70, Wounded Winners*, N.Y. TIMES, Mar. 7, 1996, at A1; N.R. Kleinfeld, *The Company as Family, No More*. N.Y. TIMES, Mar. 4, 1996, at A1; Elizabeth Kolbert & Adam Clymer, *The Politics of Layoffs: In Search of a Message*, N.Y. TIMES, Mar. 8, 1996, at A1; Sara Rimer, *A Hometown Feels Less Like Home*, N.Y. TIMES, Mar. 6, 1996, at A1; David E. Sanger & Steve Lohr, *A Search for Answers to Avoid the Layoffs*, N.Y. TIMES, Mar. 9, 1996, at A1; Louis Uchitelle & N.R. Kleinfeld, *On the Battlefields of Business, Millions of Casualties*, N.Y. TIMES, Mar. 3, 1996, at A1.

much by way of solution, the challenges and pain workers are facing as America's largest corporations permanently eliminate certain high-wage labor and white-collar positions. A few weeks later, *The New York Times* published an article on the outstanding compensation packages awarded to CEOs of America's large public corporations.<sup>19</sup> Together, the articles highlight how economic decisions by corporations can become targets of media scrutiny and public concern.

It is obvious: when large numbers of employees are being let go at the same time that senior managers are earning large bonuses and the gap between the factory floor and the executive suite is widening, the understandable public perception is that corporations are not acting as responsible citizens. In an election year, such perception posed a special danger, for public concern can easily translate into government policy when candidates for office tap into such sentiment. Patrick Buchanan proclaimed that executives are "bloodless, corporate butchers";<sup>20</sup> in a more moderate, presidential tone, Bill Clinton called for corporations to exercise better "corporate citizenship."<sup>21</sup>

### **EXAMPLES: DOWNSIZING AND EXECUTIVE COMPENSATION**

As global competition increases and improvements in technology accelerate, U.S. corporations must respond in order to maintain, if not improve, their position in the international marketplace. As human capital becomes superseded by technological efficiencies, the result of downsizing is inevitable. When a corporation is facing a course which causes serious dislocations, however, the corporation is expected to consider alternatives. Certainly, the board has a role in determining whether the elimination of jobs is a valid, necessary strategy but, moreover, if it is, the board should consider how it can be done in the least harmful way. During the Great Depression, when faced with the need to lay off workers, some companies, including Sears and Kellogg, cut working hours by twenty-five percent so that more workers could have at least some employment.<sup>22</sup> The human pain was eased by spreading it out. It is this kind of analysis that boards should be doing today.

Felix Rohatyn, managing director of Lazard Freres, recently noted that it is no longer the case that when the market is bad, business is bad and people are laid off.<sup>23</sup> Now, one man's unemployment generates another

19. Louis Uchitelle, *1995 Was Good for Companies and Great for a Lot of C.E.O.'s*, N.Y. TIMES, Mar. 29, 1996, at A1.

20. Bennett Roth, *Buchanan Wins New Hampshire*, HOUSTON CHRON., Feb. 21, 1996, at A1.

21. Hilary Stout, *Clinton, Aiming at Economic Anxiety, Pitches Better Corporate Citizenship*, WALL ST. J., Mar. 25, 1996, at B7.

22. See, e.g., Benjamin Kline Hunnicutt, *KELLOGG'S SIX-HOUR DAY* (1996).

23. *Competing in the Global Economy*, *supra* note 1, at 8.

man's wealth because the market reacts positively to massive layoffs.<sup>24</sup> Mr. Rohatyn suggests curing this inequity by giving laid-off employees company stock so "at least they walk away with a little bit of capital to compensate for the fact that they are losing their jobs to make all the stockholders wealthier."<sup>25</sup> As he recognizes, this may not be a universally appropriate response: each business context necessitates individual analysis. This is the type of analysis, however, that boards are beginning to, and should continue to, conduct.

The case of AT&T is also instructive. When AT&T announced a layoff of 40,000 workers and then its CEO was awarded a bonus, the public perception of an uncaring corporate citizen was inevitable.<sup>26</sup>

AT&T, apparently realizing the perceptions that its actions were generating, then took a different approach. AT&T published ads that praised and marketed the skills of its ex-workers and publicly offered ex-employees job counseling, relocation, and back-to-school and training grants.<sup>27</sup> Had these efforts been instituted part and parcel with the layoffs, the positive impact would have clearly been more marked. In the author's view, a board faced with layoffs should consider the social environment and the "menu" of options with an eye towards the least harmful method of carrying out the layoffs for those workers and their communities. For example, the board should consider other alternatives such as longer payouts, continued health care, and portable pensions.

This is not simply a matter of public relations. What AT&T originally did harmed the image of a corporate icon; what it ultimately did was more in keeping with the perception the company needs to be an effective competitor in a highly competitive, vast consumer market. At a minimum, the experience provided a "heads-up" for boards facing downsizing.

Executive compensation has always been a board issue; it is a subset of the board's duty to manage and oversee the company's executives. Increasingly, it is an issue that requires the kind of integrating and balancing this author advocates.

In spring 1996, both *The New York Times* and *The Wall Street Journal* published articles reporting on the millions paid in salary, bonuses, and stock or stock options in 1995 to certain CEOs.<sup>28</sup> In reaction, the public questioned the legitimacy of exorbitant remuneration.

Of course, the 1992 proxy rules requiring disclosure of executive pay provide a forum for the board to respond to public scrutiny by way of the "Board Compensation Committee Report on Executive Compensa-

24. *Id.*

25. *Id.*

26. Joann S. Lublin, *Some Big AT&T Holders to Withhold Support for Board to Protest CEO's Pay*, WALL ST. J., Apr. 16, 1996, at A2.

27. Rance Crain, *AT&T Ad Will Work Only Once*, ADVERTISING AGE, Mar. 25, 1996, at 19.

28. *The Boss's Pay*, WALL ST. J., Apr. 11, 1996, at R15; Uchitelle, *supra* note 19, at A1.

tion.”<sup>29</sup> The report must set forth the relationship between pay and performance for all executives, and the bases for, and criteria used in, determining the CEO’s reported compensation.<sup>30</sup> In sum, the board must disclose how the CEO and other executives “earned” their pay.

The 1992 changes to the proxy rules were adopted in large part in response to public, press, and institutional investor criticisms of “excessive” compensation paid to corporate executives, lack of accountability in compensation decisions, and the perceived failure of companies to tie executive compensation to corporate performance as measured by enhancement of shareholder value.<sup>31</sup> Yet, after three years of pay disclosure, compensation is still the subject of criticism. While disclosure may provide some accountability, there remains a wide range for board action.

The primary issue is how to structure compensation most effectively to spur the company’s management to perform. The conventional wisdom is to use additions to basic salary, in the form of bonuses linked to improvements in company performance. According to a 1995 study conducted by Russell Reynolds Associates and the Wirthlin Group, ninety-seven percent of the investment institutions and fund managers surveyed favored linking CEO compensation with performance, where “performance” is primarily measured by changes in stock price.<sup>32</sup>

Consequently, there has been a movement toward relying more on performance incentives in the form of stock and stock options. The theory is that paying executives in stock creates an incentive for senior management to take action intended to improve stock price and the long-term prospects of the company. Of course, this is based on the premise that the stock price reflects investors’ expectation of the company’s long-term value and that increases in stock prices reflect expected improvements in that value.

We know, however, that stock price is not based exclusively on investors’ expectations of the company’s long-term value. Factors other than managerial performance account for significant changes in the market price of any company’s securities. The potential for variance in stock prices from expected returns based on company performance may yield either large windfall gains in management compensation or the disappearance of incentives altogether.

In an extended bear market, compensation which includes a substantial stock-option component may take a drastic fall. In the past, under such conditions, some boards have repriced options which were no longer “in the money.” If the board automatically bails out the management com-

29. A PRACTICAL GUIDE TO SEC AND PROXY COMPENSATION RULES § 4.1 (Amy L. Goodman & John E. Olson, eds., 2d ed. supp. 1996).

30. *Id.* § 4.2.

31. *Id.* § 1.1.

32. RUSSELL REYNOLDS ASSOCS. & THE WIRTHLIN GROUP, REDEFINING CORPORATE GOVERNANCE: 1995 U.S. SURVEY OF INSTITUTIONAL INVESTORS 21 (1995).

pensation plan whenever stock prices fall, though, such grants become meaningless as incentives.

On the other hand, in an extended bull market, executives may gain a benefit for which they cannot and should not take credit. Since the market crash in October 1987, the Dow Jones Industrial Average (Dow) has risen well over 240%.<sup>33</sup> For a company whose stock price varies directly with the Dow, even ordinary managerial performance will lead to a spread between exercise and market price well beyond that reasonable for rewarding good performance. As stock-option grants increase, the potential for large windfalls increases exponentially. Under these circumstances, total executive compensation packages rise out of line with those of other professional occupations. Moreover, the ratio of CEO pay to that of the average worker becomes glaring and a serious factor to consider. *The New York Times* recently reported a 100-to-1 ratio, compared to a 30-to-1 ratio in the 1960s.<sup>34</sup> The perception of disproportionate increases for the CEO can negatively affect worker efficiency and morale, and lead to public concerns about corporate responsiveness to inequities.

For stock-option plans to make sense, the value of the grant should be linked to company performance, rather, than to stock market performance. To achieve that link, at a minimum, requires factoring out high variances in the company's stock price due to general changes in the stock market. Some companies attempt to factor out the effect of a steadily advancing stock market by increasing their option exercise prices. Boards should consider a plan, however, which factors out both the bull and bear sides of the market.

The NACD has suggested an indexed stock-option plan as a way to link compensation to company performance.<sup>35</sup> Under such a plan, executives would obtain achievement rewards based on changes in their company's share price only if the changes exceeded changes in an industry stock-price index.

The details of indexed option plans can vary widely but the point is that these more sophisticated plans are capable of adjusting to a variety of market conditions so as to reward the achievement of a particular company's performance goals. The task for the board is to identify the type of indexing appropriate for the company so that the variable portion of compensation is truly tied to company growth, product development, or earnings-per-share. The plan may use a focused industry index or a competitor index, rather than the broader S&P, or Dow. The plan may also use sophisticated techniques -- now available -- to factor out variables that are

33. Search of Bloomberg Financial Markets Database, Bloomberg, New York, N.Y. (Jan. 21, 1997) (search for Dow Jones Industrial Average).

34. Uchitelle, *supra* note 19, at A1.

35. BLUE RIBBON COMM'N ON EXECUTIVE COMPENSATION, NATIONAL ASS'N OF CORPORATE DIRS., GUIDELINES FOR CORPORATE DIRECTORS 18-19 (1993).

beyond management's control: for example, interest rates or commodity prices.

Indexed systems set up more meaningful incentive plans because executives are rewarded only for outperforming the market or, through the use of an industry index, outperforming competitors. The proxy rules already require that a company disclose in its proxy statement a chart that matches shareholder return with both a broad equity market index and an industry index.<sup>36</sup> In this way, a company's performance is compared to that of its peers in the same market segment. The indexed system is merely a more sophisticated use of data to set the level of annual awards.

Clearly, executive compensation has once again come to the fore in the public's consciousness. The law has gone as far as it can on this; it is now up to boards to step back from the immediate corporate decision of compensation to articulate a true and realistic incentive scheme.

### **THE LAWYER'S ROLE**

From the very beginning of U.S. history, the corporate form has been criticized and feared by the public. Over time, however, the scrutiny and criticism to which the corporation has been subject has been addressed and countered (sometimes more effectively than others) to a great extent by voluntary action and, if not, by law and regulation. We have devised a relatively minimally intrusive legal framework within which the corporation operates. Our system is one of accommodation: it encourages the corporation to change as necessary.

We do not rely solely on the law to ensure that corporations live up to public expectation. Today, many public concerns are too complex to be remedied by laws that proscribe unfair practices or criminal penalties for wrongdoing; current public focus is not so much on "wrongs" but rather on that which needs to be improved—specifically how the corporation can enhance performance and how it can best fulfill its responsibilities to shareholders and the public at large. As the failure of highly regulated economies has proved, external forces of law and regulation cannot make a more efficient, productive, and competitive company—performance enhancement requires judgment and wisdom and risk-taking. It is for this very reason, the author believes, that the focus of so much attention is now on the board. It is not yet apparent, however, how deeply accepted this mandate is in today's boardrooms. This brings us to the lawyer's role.

More than three years ago, this author called for lawyers to exercise their counsel and advise management clients to establish a "certifying board" which provides real accountability for the board and management.<sup>37</sup> The author endorsed the lawyer's role in this arena because there

36. A PRACTICAL GUIDE TO SEC AND PROXY COMPENSATION RULES, *supra* note 29, § 1.3.

37. See Ira M. Millstein, *The Evolution of the Certifying Board*, 48 BUS. LAW. 1485 (1993).

exists, as Chancellor Allen of the Delaware Court of Chancery articulated, “a huge zone of ambiguity in the corporate directors’ role.”<sup>38</sup> Lawyers can help fill in that zone of ambiguity by guiding discretionary board behavior with the underlying spirit and purpose of corporate law.<sup>39</sup>

This author invokes this concept again but, today, the lawyer’s guidance must fill another zone of ambiguity in corporate governance: the role of the board in the integration of extrinsics. If the broader responsibilities of the new, more active board are to take hold, lawyers must encourage the evolution of an expanded understanding of the board’s role, including oversight of this balancing act. Lawyers can help management and directors ensure that the duty to maximize shareholder wealth is achieved but not at any expense.

Boards must be counselled to understand that thoughtful efforts to integrate varying and sometimes divergent interests are and should be expectations imposed on directors because of the nature of our democracy and free-market system, and our unique structure of corporate governance. Careful and conscientious performance of an effort to integrate is central to a prosperous economy, to the corporation’s continued freedom to act, and to the perpetuation of the private sector.

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38. Letter from William T. Allen, Chancellor, Court of the Chancery of the State of Delaware, to Ira M. Millstein, Senior Partner, Weil, Gotshal & Manges (Apr. 20, 1992) (on file with THE BUSINESS LAWYER).

39. *Id.*