Responsibilities of Corporate Directors

By Alan S. Gutterman

A. Board Responsibilities

The overall responsibilities of the board of directors have been succinctly described in various editions of the Corporate Director's Guidebook prepared and revised from time-to-time by the Committee on Corporate Laws of the ABA Section of Business Law. For example, the Fourth Edition published in 1994[1] generally required that directors fulfill the following responsibilities:

- Approve fundamental operating strategies;
- Evaluate the performance of management and the corporation, and taking appropriate remedial action when necessary;
- Establish and regularly review executive compensation and succession plans;
- Take steps to ensure that the corporation complies with applicable laws and regulations and that it maintains accounting, financial, and other controls;
- Review the process of providing appropriate financial and operational information to directors, executives and others within the organization holding substantial responsibility for business and operating decisions; and
- Evaluate the overall effectiveness of the board.

Each of the responsibilities listed above remain relevant and true today and the latest edition of the Guidebook (the Fifth Edition) published in 2007[2] listed the following tasks for the board and its committees:

- Monitoring the corporation's performance in light of its operating, financial, and other significant corporate plans, strategies, and objectives, and approving major changes in plans and strategies;
- Selecting the CEO, setting the goals for the CEO and other senior executives, evaluating and establishing their compensation, and making changes when appropriate;
- Developing, approving, and implementing succession plans for the CEO and top senior executives;
- Understanding the corporation's risk profile and reviewing and overseeing risk management programs;
- Understanding the corporation's financial statements and monitoring the adequacy of its financial and other internal controls as well as its disclosure controls and procedures; and

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[1] See 49 Business Lawyer 1243 (1994).

[2] See 62 Business Lawyer 1479, 1491 (2007).

- Establishing and monitoring effective compliance systems and policies for ethical conduct.

As the list above illustrates, recent changes in law and regulatory policy with regard to corporate governance have made it clear that board members will no longer be allowed to passively delegate corporate governance issues to managers, particularly in the case of public companies. While audit committees of the board of directors of public companies have attracted the highest level of attention, each director must be actively involved in the formulation and monitoring of the company's plans and procedures regarding oversight of the business and reporting of financial and business developments. Among other things, directors should be actively involved in establishing and monitoring an effective compliance program for the corporation. In addition, directors must work with the CEO and other members of the executive team to ensure that business activities are conducted with integrity and that ethical behavior is a foundational principle for the company, its officers and employees.

B. Individual Director Responsibilities

In order for the board as a whole to effectively discharges its responsibilities each member must understand the business operations of the company and the competitive environment in which the company operates and must acquire and maintain a level of knowledge about the company and the factors important to its strategy to allow him or her to provide critical and intelligent input to discussion regarding the overall goals and strategic plans of the company. Put another way, directors can no longer blindly follow the path chosen by the CEO and the other members of the executive team and must be prepared to challenge the company's managers and evaluate their performance. The Corporate Director's Guidebook (Fifth Edition) [3] suggests that directors must collect and study sufficient information to understand:

- The corporation's business activities;
- The key drivers underlying the corporation's profitability and cash flow—how the corporation makes money—as a whole and also in its significant business segments;
- The corporation's operational and financial plans, strategies, and objectives and how they further the goal of enhancing shareholder value;
- The corporation's economic, financial, regulatory, and competitive risks, as well as risks to the corporation's physical assets, intellectual property, and personnel;
- The corporation's financial condition and the results of its operations and of its significant business segments for recent periods; and
- The corporation's performance compared with that of its competitors.

In addition, in order for directors to be in a position to discharge their responsibilities with respect to evaluating the merits of the company's objectives and strategies they should insist on implementation of effective systems for collecting and timely reporting

[3] See 62 Business Lawyer 1479, 1492 (2007).

information regarding the current business and financial performance of the corporation and its significant business segments. Directors should also demand regular reports on the corporation's internal controls and compliance programs and the status of material risk and liability contingencies.

Some of the other tasks that a director needs to perform to meet his or her minimum standard of care and diligence include the following:

- Regularly attend directors' meetings;
- Require adequate reports to directors and carefully review such reports when received;
- Acquire and maintain a good understanding of the corporation's principal policies and operational procedures;
- Read and understand the articles of incorporation and bylaws of the corporation, particularly those provisions which directly bear on the directors' responsibilities and management of the corporation;
- Diligently and carefully participate in the selection and oversight of the corporation's senior managers;
- Ensure that all questionable actions taken by senior managers and other agents of the corporation are carefully investigated and fully resolved; and
- Critically review and analyze proposed actions by the board and, if appropriate, register dissent and objection.

The content in this report has been adapted from material that will appear in December 2009 in Alan Gutterman's forthcoming new publication entitled "Organizational Management and Administration—A Guide for Managers and Professional Advisors" and is presented with permission of Thomson Reuters/West. *For more information or to order call 1-800-762-5272. Alan Gutterman is the Founder/Principal of Gutterman Law & Business (www.alangutterman.com), which publishes the Emerging Companies Blog and the Business Counselor Blog, and a Partner of The General Counsel LLC (www.thegeneralcounsel.net).*