

# The Informed Board

Spring 2022

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As strict economic sanctions become more common, what can multinationals do to prepare for forced exits from countries or JVs? With employees quitting in record numbers and millions of jobs going unfilled, how can boards ensure a healthy corporate culture that attracts and retains essential talent? We offer some answers to both questions in this issue of *The Informed Board*.

You will also find help in understanding and responding to duplicative suits and demands many companies face from shareholders claiming to assert the company's legal rights. And, in a podcast, three Skadden partners discuss how antitrust regulators and the SEC are employing rulemaking and other powers to fulfill the Biden administration's broader social policy goals — and whether they have stretched beyond their legal mandates. Finally, two experienced directors offer tips about making boards most effective.

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## In the Name of the Company: When Stockholders Interfere in the Boardroom

- Corporations can face a wave of stockholder actions purporting to enforce the corporations' own legal rights, from books and records requests to derivative suits and litigation demands.
- In contrast to class actions, there are few established procedures for resolving these disputes in a centralized forum, so companies often find themselves responding to many similar demands and suits, sometimes in multiple jurisdictions.
- Stockholder actions can be both expensive and distracting for companies to address, even though they are intended to benefit the company.
- Companies can impose some order by requiring all derivative suits to be filed in one jurisdiction and by responding uniformly to all books and records demands.

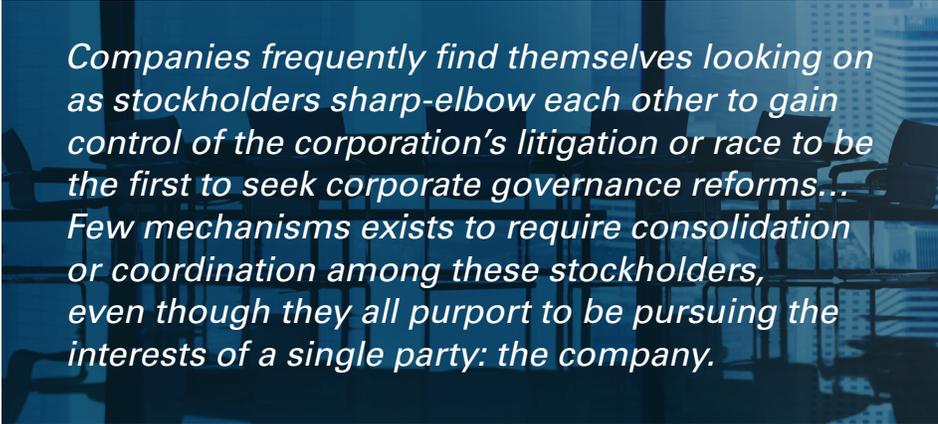
It is a cardinal precept of corporate law that directors, not stockholders, manage the business and affairs of the corporation. Indeed, under the business judgment rule, a cornerstone of Delaware law, an independent and disinterested board cannot be second-guessed legally by courts or stockholders. That's true even when a corporation has purportedly been harmed. The board retains the authority to decide how to respond, including whether the corporation should file suit against those — including its own officers and directors — who may have harmed it.

But Delaware law provides checks on management and the board that allow stockholders to insert themselves into the management process. They can request access to corporate books and records; they can demand that the board pursue litigation against its officers and directors; and they can bring derivative suits to press claims on behalf of the company against its officers and directors that the corporation has not yet pursued.

Companies frequently find themselves looking on as stockholders sharp-elbow each other to gain control of the corporation's litigation or race to be the first to seek corporate governance reforms. Sometimes companies will receive more than a dozen stockholder books and records demands, as well as multiple litigation demands and derivative suits, simultaneously, as well as securities class action lawsuits — all arising out of essentially the same underlying facts and claims.

As a director, this issue is likely frustrating and puzzling because significant company funds and resources are required to address these stockholder actions, even though the claims actually belong to the company and boards are typically well-equipped to handle them without stockholder input.

We describe below the legal framework that provides grounds for these stockholders actions, and some ways boards can attempt to achieve order to protect the real party in interest: the corporation.



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### **An Overview of Stockholder Action**

When negative events — *e.g.*, disappointing earnings, a government investigation, a regulatory setback or allegations of internal malfeasance — cause a company's stock to fall, litigation often follows, and often a lot of it, in multiple forums, by multiple players and in multiple forms.

**Class actions.** In the wake of such news, stockholders often sue the company to address *their own direct losses*, typically claiming that the company concealed information or misled them. These are the stockholders' own claims and are almost always cast as class actions on behalf of all similarly situated stockholders.

This litigation can create major financial exposure for companies, but all related cases are generally consolidated in a single court where lead counsel is appointed for the putative class, so companies are unlikely to face splintered litigation in different courts. Moreover, federal statutory reforms enacted by Congress in 1995 and subsequent

case law have circumscribed some of the more egregious litigation that was routine previously. Importantly, and in contrast to the litigation described below, discovery in federal class actions is now typically stayed pending disposition of initial motions by the defendants.

**Derivative suits.** Ironically, companies face an entirely different scenario in derivative litigation, when stockholders take action *on behalf of the company*. Few mechanisms exist to require consolidation or coordination among these stockholders, even though they all purport to be pursuing the interests of a single party, the company.

In a derivative suit, a stockholder aims to take control of the company's own legal claims. In practice, the core allegations in these suits typically parallel class actions filed by other stockholders. For example, a derivative suit might claim that mismanagement led to litigation that has cost the company money to resolve. In the derivative action, a stockholder will seek to recoup those costs from the alleged wrongdoers — typically, officers or directors of the company — for the benefit of the company.

There are no limits on the number of stockholders who can pursue derivative claims related to the same issue. Although derivative actions filed in the same forum may be consolidated, financial incentives may compel stockholders to deliberately file in separate forums in the hope of retaining control and seeking compensation for allegedly conferring a benefit on the company.

### **Books and records demands.**

Stockholders who can satisfy the statutory requirements may also demand access to corporate books and records to support derivative suits that they intend to file. Delaware courts have long recognized that pre-suit investigation is a proper purpose for demanding books and records. In recent years, they have narrowed corporations' defenses to these requests and, as a result, companies are often swamped with books and records demands. See our October 7, 2021, Informed Board article, "[This Isn't Your Grandparents' Books and Records Demand.](#)"

There is no limit on the number of stockholders who can seek books and records related to the same issues. Nor are stockholders required to seek the documents before pursuing derivative litigation. So companies already defending derivative claims by one or more stockholders may be required to respond to multiple nearly identical books and records requests from other stockholders at the same time. Stockholders who obtain books and records can use those to support their own derivative suits, potentially giving them a leg up on any stockholder that filed a derivative claim without non-public information.

It remains to be seen whether the Delaware courts will at some point pull the pendulum back in the other direction after seeing how books and records demands have come to replace, at least partially, the discovery process in class action and derivative litigation, without atten-

dant procedural protections. But, so far, the courts have expanded, not retracted, these access rights.

**Litigation demands.** Still other stockholders will demand that the board itself initiate litigation against the officers or directors who allegedly harmed the company. Although sending a litigation demand is a tacit concession that the board is disinterested and independent, and therefore can decide for itself whether to bring litigation against the alleged wrongdoers, these stockholders may still file litigation if the board chooses not to initiate litigation, arguing that the refusal was wrongful. The substance of these "demand refused" cases is typically the same as other derivative suits, but, because the initial procedural issues are distinct, they almost always proceed on a different track from other derivative litigation.

There is no limit to the number of stockholders who can lodge litigation demands related to the same issues.

### **Overuse of Stockholder Actions Harms the Corporation**

The intense posturing for control among stockholders all trying to supplant the board can be both expensive and distracting. The corporation is the one footing the bill, including advancing litigation expenses for its officers and directors implicated in derivative suits. So the stockholders are causing the very thing they seek to redress — monetary damages

purportedly caused by fiduciaries — where it is unlikely that the company will be reimbursed for any expenses it advanced. Worse still is the fact that this can, and often does, happen to corporations that are managed by fully disinterested and independent boards that do not need stockholder protection.

Derivative litigation and litigation demands are supposed to afford stockholders limited ability to pursue claims belonging to the company only when the board is disqualified from exercising its authority because of a disabling interest. Likewise, books and records requests in the litigation context are intended, in part, to help determine whether corporate governance may have failed. Unfortunately, stockholders can and do interfere even where directors have no conflicts of interest and the board has conducted its own investigation and appropriately addressed the issue.

### **What Companies Can Do**

There is no existing statutory or judicial mechanism to impose order on suits and demands by stockholders pursuing the company's rights. However, there are some ways that companies can assert a modicum of control:

- Companies can adopt and enforce bylaws requiring all derivative suits

to be filed in one jurisdiction (*e.g.*, the Delaware Court of Chancery for Delaware-incorporated companies). That increases the chances that parallel suits will be consolidated or coordinated in some way.

- Similarly, companies can coordinate any stockholder claims arising from a board's refusal to agree to litigation demands.
- To promote efficiency, the corporation can disclose the identity of stockholders seeking books and records, offer the same documents to each and condition production on an agreement that any litigation over the demand take place in the same court, on the same schedule and in a coordinated manner.
- Companies may request that derivative actions be stayed until the resolution of any underlying class actions growing out of the same events.

Until there is a statutory or judicial fix, these steps may create some order for corporations facing duplicative stockholder actions and may curb the expense and distraction that come with them.

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#### **Authors**

*Jenness E. Parker, Elisa M. Klein*



## Winning the War for Talent: It's the Board's Responsibility, Too

- In a post-pandemic talent market, where employees are quitting and jobs are going unfilled, directors need to take an active role in shaping workplace culture.
- With culture an increasingly important factor in attracting and retaining talent, boards need to be well-informed about employee issues and attuned to concerns.
- Although culture can seem nebulous, a combination of employee engagement, regular HR data reports to the board and other tools such as employee focus groups can help directors to oversee and influence culture and company-employee relations.
- Employees may have greater loyalty to an employer whose mission and values align with their own, and accordingly, companies may need to consider whether to take positions on societal issues that are important to their employees.

The global pandemic has transformed the employer-employee relationship in ways that we could not have imagined two years ago, including widespread remote working and hybrid schedules. Moreover, the labor market has been profoundly altered by the so-called “Great Resignation,” which shows no sign of letting up: March 2022 set new records in the U.S. for both the number of employees who quit their jobs and positions that are unfilled.

With talent at such a premium today, recruiting and human resources practices that were once routinely left to management have become mission-critical for many businesses and demand board attention.

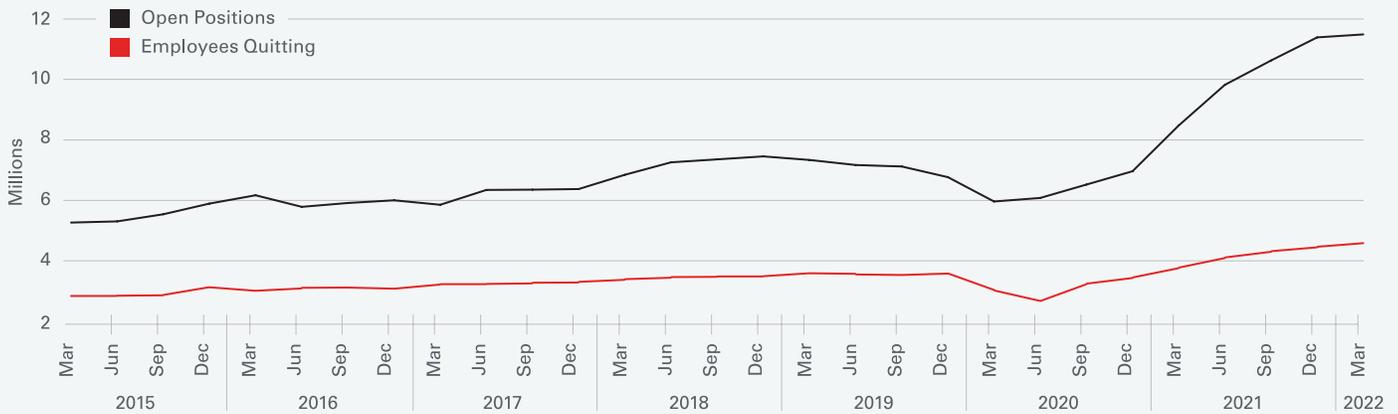
Compensation is always a key component of recruiting and retention, of course, and many companies have increased wages to draw workers. But in the competition for the most valuable and skilled employees, culture is increasingly important.

Surveys suggest that employees may experience higher job satisfaction when sharing a workplace with colleagues whose views align with their own. Conversely, social and political divisions among employees can be distracting and lead to disruption in the workplace. According to the 2022 [Edelman Trust Barometer](#), almost six in ten employees choose a workplace based on shared values and expect their organization’s chief executive officer to take a position on major societal issues. And more employees believe that their employers should take a stance on societal and cultural issues, even if unrelated to the organization’s business. Organizations are increasingly being forced to consider if and when to acknowledge social and political events, and the appropriate corporate response.

### **The importance of culture, beginning at the top**

In the current market, more than ever, it is vital that organizations

### Jobs Go Begging



Source: U.S. Dept. of Labor, Bureau of Labor Statistics. Seasonally adjusted figures. March 2022 figures are preliminary.

cultivate a culture where employees feel connected to the organization’s values and mission. A positive workplace culture where employees feel valued is not simply a “nice to have,” but a major differentiating factor in recruiting and retention.

Boards need to work proactively with their management teams to set the tone at the top. An organization’s values and strategic intent should be clearly communicated to employees. Management and the board should demonstrate commitment to these stated principles and be prepared to “walk the talk.” That includes calling out unacceptable behavior and rooting out “bad apples.” Work-from-home and the hybrid work model have complicated the task of cultivating corporate culture, but the imperative has not changed.

At the same time, it should be a priority to engage with employees

to understand their priorities and concerns. Engagement can strengthen the employer-employee relationship and help make employees feel that they have a voice in defining the organization’s values and improving the employee experience. This can take the form of focus groups, listening sessions, committee representation and special projects, with the aim of garnering information about employees needs and conveying to employees that they are valued contributors to the success of the organization.

An organization that does not focus on cultivating a positive culture risks losing critical talent. Studies have shown a high correlation between negative workplace culture and attrition. In addition, an organization’s reputation for a negative workplace environment will likely spread quickly through social media and can negatively impact hiring efforts. What’s more, an organization that does not



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act to address negative workplace conditions or uphold its core values risks lawsuits, bad press, customer blowback and damage to its reputation among investors, all of which can have a significant impact on an organization's results and stock price.

Culture can seem nebulous, though. How can boards help shape it? Here are some concrete steps.

**Receive regular reports with employment data and monitor progress in addressing any negative trends.**

Good data is an important starting point. A board should receive regular reports from management with hiring and attrition data by office, department, job title, protected status and geographic location. This data can highlight what is working and areas that need attention. As part of their corporate oversight, directors need to be informed about risks to the organization with respect to hiring, attrition and workplace culture. Detailed reports can help directors spot patterns and potential problems.

Management should also report on the needs, desires and work styles

of the workforce, including attitudes about remote work and work-life balance. Working with management, the board can develop an action plan to address any negative findings, then monitor progress in addressing areas of employee dissatisfaction. Boards may consider adding a director with human resources experience and/or forming a workplace culture subcommittee to oversee and monitor workplace culture issues

**Clearly define the organization's values and consistently communicate these principles to its employees.**

Boards should play an active role in defining the company's values, communicating to employees the importance of its values and ensuring that the organization acts in accordance with them. A strong commitment to clearly stated values can distinguish the company in a competitive job market. Employees are more likely to join and remain loyal to an organization with values that align with their own.

**Consider framing a policy with respect to commenting on political and social issues.**

A board should consider establishing a clear policy that defines the circumstances in which the corporation will take a position on political and social issues, the process for approving the substance of any statement made on behalf of the corporation and whether any such statement will be limited to internal communications or disseminated more broadly. A board should

consider requiring that statements made on behalf of the corporation be vetted with a board committee and the corporation's internal and external communications team before dissemination.

### **Develop programs to engage with employees.**

If the organization does not already have focus groups and listening sessions with employees, the board may want to suggest those to elicit information about the employee experience.

Another tool is upward feedback and/or 360-degree reviews that incorporate the perspective of direct reports, supervisors and peers. These can provide a more holistic view of employees' performance and experiences and potentially identify managers who may be undermining the organization's culture and values. (A third-party human resources consultant can be retained to preserve the confidentiality of feedback from individual employees.)

Information can be used by management and the board to identify and address negative workplace conditions and develop tools to incentivize and retain employees. The board and management can also use employee engagement to solicit input on potential corporate initiatives.

### **Maintain employee trust, confidentiality and anti-retaliation protections.**

It is essential that management and any human resources consultant keep employee feedback confidential to the extent practicable, communicate those confidentiality protections to employees and assure employees that the organization prohibits all forms of retaliation in response to complaints or reports of negative workplace conditions. This is another area where board oversight is essential because it is possible that some feedback may be critical of management.

### **Ensure compliance with company policies and disciplinary procedures.**

Workplace policies need to be continuously updated with changes of laws and circumstances. Moreover, employee training and compliance with policies need to be monitored on an on-going basis — additional areas where board oversight may be appropriate. If there are specific employee complaints, the board should ensure that the organization's legal and human resources teams and/or outside counsel conduct prompt, impartial and thorough investigations. The board should ensure that the organization takes swift action through appropriate disciplinary measures against bad actors, no matter how critical those individuals are to the organization.

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#### **Authors**

*Anne Villanueva, Ann Beth Stebbins*



## Preparing for the Unexpected: Problematic Partners, Forced Exits and Extractions

- Boards need to ensure that their companies understand who their foreign partners are and that there are legal provisions in place in case the company is forced to exit a business or region on short notice.
- Directors should make sure that management has contingency plans for the possibility that employees and their families need to be extricated from a country quickly.
- Management should prepare for alternative sources of vital components in the event of disruption.
- Internal and external communications strategies for geopolitical disruptions need to be mapped out ahead of a crisis.

Companies with international operations have had to face a series of unexpected and largely unwelcome geopolitical events in recent years. Globalization and the 24-7 news cycle means that regional and even local events can trigger corporate crises and cause headaches for even the most experienced board. Given the near impossibility of avoiding the impact of global politics, directors can and should ensure that the companies they guide are as prepared as they can be. Here are suggested questions they can ask to test preparedness.

**Who are our partners?** It is very common for international investments to be owned through partnerships or joint ventures, either to comply with a local regulatory obligation or to access knowledge of the relevant market. But ownership interests can be transferred indirectly through opaque structures and governments can, directly or indirectly, nationalize or exert control over what was previously a private enterprise. This needs to be monitored as closely as possible.

Directors should confirm that processes are in place to verify the ultimate beneficial ownership and reputation of local partners, and to verify those on a regular basis.

Commercial partners can become subject to sanctions (and counter-sanctions) in various jurisdictions, sometimes overnight. Companies should have a process in place to determine if any partners, including counterparties, become subject to sanctions as those proliferate and are updated.

### **Can we exit at speed if necessary?**

Most joint ventures include restrictions on the transfer of interests. These typically give the other partner, at the very least, a right to be notified of an intention to exit and a period of time to formulate an offer, and they often include detailed formulations for an exit process.

Companies seeking a swift exit from a partnership or a territory may face a significant challenge, and an inevitable

*Companies seeking a swift exit from a partnership or a territory may face a significant challenge, and an inevitable risk of rapid value destruction, if the deal documentation does not facilitate an “emergency exit.”*

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Directors should ask management to review important existing partnership agreements to determine whether transfer restrictions cease to apply if the other partner becomes subject to sanctions, and directors should ask management to consider requiring that future partnership agreements include such provisions.

Corporate representatives appointed as directors of a joint venture company that becomes subject to sanctions may need to step down immediately to avoid incurring personal liability for continuing in the role. (At the very least, they will need to seek legal advice.) Are there other contractual rights in the joint venture agreements that allow your company to continue to monitor and control the JV? Or is the exercise of control rights entirely through having one or more representatives on the board of the JV?

Even with these protections, dealing with a counterparty that is subject to sanctions presents practical issues. The sanctioned person or entity will usually be unable to utilize banking facilities outside of their home terri-

tory and the company itself may be severely restricted or even prohibited from negotiating or dealing with the sanctioned party.

Beyond the legal protections, directors should ask about the practical issues that would need to be resolved and verify that management has anticipated them and has a plan in place to address these.

**Can we get our people out?** It is common for international companies to have expatriate managers in their overseas operations and joint ventures. These roles are often interesting and rewarding career options. If there is a change of the local or international political situation, though, companies may need to bring their staff and their families home quickly. There may also be local nationals in an affected territory who are vital to the wider business or who may face reprisals for having worked for a business now on the opposite side of a diplomatic divide. Companies are likely to face a business need, and feel a moral obligation, to extricate these people as well and find them new homes in a new country.

Boards can do their part by confirming that there are contingency plans in place to extract important or vulnerable employees and that the robustness of those plans has been tested.

**Do we have alternative sources and markets?** Maintaining diversity of customers and suppliers is standard good business practice. Recent events have highlighted how quickly situations can change and jurisdictions or regions that seemed stable can, overnight, close down.

Boards should query management about resilience and fall-back options for critical supplies of raw materials, key components and personnel. Directors should also test whether a business has become overly reliant on customers in a particular territory or region and whether the company can pivot to find new customers if operations must cease abruptly.

**What will we tell our customers, our people, our investors and our regulators?** In a crisis situation, a misjudged statement or comment, however well-intentioned, can do lasting damage or lead to legal expense. Directors should ensure that crisis management and communication plans are in place. Marketing, human resources, investor relations and government relations teams should be involved in the scenario planning process so that they can communicate with their respective constituencies

in a coordinated manner quickly and accurately when events break.

**Can we find some good in the bad?** Change brings opportunity. If a business has to withdraw from a territory, will that open up new markets and create new jobs, either in the home market or in other jurisdictions?

Directors should ask their management teams to assess, as part of their contingency planning for withdrawal, where new suppliers, employees and customers could be found. Businesses should be cautious and plan carefully, but they should continue to look for new opportunities for growth and value creation in areas where they have competitive advantage. They will benefit from the wisdom and experience of their directors as they do so.

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**Author**  
*George Knighton*



**Listen to the podcast**

### **Episode Summary**

In this inaugural episode of the *Informed Board* podcast, Skadden partners Maria Raptis and Raquel Fox join our host Ann Beth Stebbins to discuss changing approaches to antitrust and securities regulation in Washington. They talk about new priorities in antitrust enforcement, new disclosure initiatives by the Securities and Exchange Commission (SEC), and the obstacles that could hinder regulatory rulemaking.

Since President Biden took office, there has been a shift in Washington. The administration's policies were no surprise; the president campaigned on them. But the ways in which regulatory agencies have been harnessed to pursue the administration's objectives is new: broadly exercising their review authority and proposing a host of new regulations with expansive goals unrelated to their traditional mandates. In part, this reflects the difficulty of passing legislation in areas that are priorities for the administration.

In antitrust, the focus has broadened under the Biden administration. Top officials believe that antitrust enforcement has been too lax, leading to too much consolidation and too much concentration of economic power. Antitrust officials contend that the consumer welfare criteria that have dominated antitrust analysis for the past 50 years are too narrow, and that antitrust laws give antitrust agencies a broader mandate to consider the impact of mergers on workers and small business.

However, Maria says we're unlikely to see a sea change in antitrust law anytime soon unless legislation is passed to change the legal standards and make it easier for the FTC and the Department of Justice to challenge mergers. Despite antitrust regulators' ambitious goals, there are many obstacles to swift, sizeable change, including many decades of court precedent that focus on consumer welfare tests.

On the SEC side, for the first time in many years, the agency's rulemaking resources are not devoted to congress-

sionally mandated regulations, so the commission can take up broader issues prioritized by the White House, including climate change and human capital. The SEC recently proposed new rules requiring detailed climate disclosure, and we expect proposed rules requiring additional workforce-related disclosures before the end of the year.

But, like the new antitrust policies, the SEC's initiatives may be challenged in court. Critics say the climate disclosures would require costly outside audits and attestations, as well as complex greenhouse gas measurements, Raquel explains. The proposed rules might be challenged either on the ground that the costs outweigh the benefits or that, with no explicit legislative mandate, the proposed disclosure requirements are beyond the SEC's remit.

### Key Takeaways

- **New antitrust leadership purports to be returning to the original intent of the U.S. antitrust law:**

The 1890 Sherman Anti-Trust Act was a response to concerns about the harmful effects of monopolies and large new concentrations of economic wealth. The Clayton Act and Federal Trade Commission Act and the Clayton Act were enacted in 1914 to remedy perceived weaknesses of the Sherman Act. Current antitrust leadership assert that these foundational statutes were focused on a myriad of concerns arising from concentrated market power, not just the economic effects on the ultimate consumer, which has dominated antitrust policy for decades.

- **SEC proposals would require prescriptive new disclosures:**

The SEC has proposed rules that would require detailed climate disclosures from companies. We are also expecting new rules this year that will require detailed disclosures about companies' human capital management, such as their workforce demographics and turnover. While the SEC has clear authority to require disclosures that protect investors, some argue that detailed climate and other specialized disclosures go beyond the agency's mandate. In the past, the SEC has imposed disclosure requirements about matters that are material to investors or mandated by Congress. Opponents may challenge the new proposals on the grounds that they exceed the agency's authority, and may argue that the cost of providing such disclosure exceeds the benefits to investors.

- **What lies in store for antitrust enforcement and the SEC:**

Maria Raptis says that the bipartisan support for antitrust reform, particularly in the area of Big Tech, that appeared substantial in 2021 has diminished, and other issues have pushed antitrust to the back burner in the run-up to the 2022 midterm elections. If the Republicans regain control of Congress in the midterm elections, they might rein in the SEC by putting conditions on funding, Raquel Fox says.

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#### Authors

*Ann Beth Stebbins, Maria Raptis, Raquel Fox*



## Two Directors Share Lessons on Building a Highly Functioning Board

“Once we have done our best to select the right [directors], we turn to giving them the latitude to function powerfully as a group. Essential to this, in my view, is establishing a cadence of board executive sessions immediately before and following the full board meetings to facilitate proactive involvement by the board in meeting content and direction.”

– **Alexander M. Cutler,**  
lead director of DuPont

We asked two seasoned directors for their thoughts on what boards should do to ensure the operate most effectively.

**Alexander M. Cutler,**  
lead director of DuPont

**Q:** Based on your experience, what are some of the key elements of a highly functioning board?

**A:** Recognizing that there is no “one size fits all” blueprint, my experience has taught me that there are some best practices that, once established, empower a board to capitalize fully on the skills, background and expertise of its individual members.

First, just as the key to a great meal is assembling the best ingredients, a highly functioning board begins with identifying the directors who are best suited to guide the company through its challenges and opportunities. We have found that a skills matrix, honed by reflecting on the output of the company’s strategic planning process, is the ideal tool for assessing

the board’s existing mix of skills and what needs to be added by new members. Critically, the nominating and governance committee should be using the skills matrix to drive a continuous process of recruitment and refreshment and dialoguing with directors so that all are clear that each is nominated on a year-to-year basis in light of the company’s needs.

Once we have done our best to select the right individuals, we turn to giving them the latitude to function powerfully as a group. Essential to this, in my view, is establishing a cadence of board executive sessions immediately before and following the full board meetings to facilitate proactive involvement by the board in meeting content and direction. The pre-meeting executive sessions allow the board members to share with each other their views on the most critical elements in the board materials and then to communicate them to the CEO to ensure proper coverage in the meeting. The post-meeting sessions allow directors to reflect on

what was covered well, what needs further development and, perhaps most importantly, what topics should be addressed by management in future board and committee meetings. The independent board chair or lead director should insist that each member speaks at these sessions, even those who may usually be more reticent.

Finally, a highly functioning board must itself take responsibility for coordinating its activities, ensuring effective communication among its members and, perhaps most importantly, allowing each director to fully bring to bear their skills and experience. In my experience, much of the role of the independent board chair or lead director consists of working to ensure that the board meets this collective responsibility. When all functions as it should, each board member will have the opportunity to see the board's work in the round — rotating through the various committees, serving as a committee chair, evaluating peers — and feel empowered to use all of its talents on behalf of the company and its shareholders.

*“Core functions for any board are strategy and governance. But it’s important to ask whether we’re spending enough time on the things where a board can help make a difference and drive value. One board on which I serve spends 70% to 80% of its time on the company’s strategy. That is forward-leaning and seems to me a good balance for that particular company.”*

— **Yoshiaki Fujimori, director of Boston Scientific, Takeda Pharmaceutical, Oracle Corporation Japan and Shiseido**

*Alexander M. Cutler serves as the lead director of DuPont de Nemours, Inc., and also serves on the boards of KeyCorp, United Way Services of Greater Cleveland and the Musical Arts Association. Mr. Cutler was chairman and chief executive officer of Eaton Corp., a global, diversified industrial manufacturer, from 2000 to 2016. Mr. Cutler formerly served as Eaton’s president and chief operating officer, executive vice president and chief operating officer-controls and executive vice president-operations.*

**Yoshiaki Fujimori, director of Boston Scientific, Takeda Pharmaceutical Company, Oracle Corporation Japan and Shiseido Company**

**Q:** Where do you think boards should be focusing their attention these days?

**A:** As the responsibilities of boards only expand and become more important for the success of our companies, I think boards would be well-served by focusing with discipline on time management. Where is our board spending our time? Where should we be spending our time?

Core functions for any board are strategy and governance. But it’s important to ask whether we’re spending enough time on the things where a board can help make a difference and drive value. One board on which I serve spends 70% to 80% of its time on the company’s strategy. That is forward-leaning and seems to me a good balance for that particular company. That involved cutting out from board meetings, among other

things, backwards-looking reviews of financial results. Board members can, and are expected to, get that on their own through reviewing the company's earnings releases, listening to the earnings calls and reading post-earnings analyst reports.

One approach I find useful is to map out exactly what topics will be covered, and the time spent on each, during the course of the year during regularly scheduled board meetings. When and how much time will we spend on succession planning, cybersecurity, human capital management, etc., and how that time is blocked off.

Japanese companies tend to have more frequent board meetings but of short duration covering more rote matters, so it is more difficult to have the in-depth review and discussion where boards can make the most impact. For example, one board might meet once every month for two hours. That adds up to 24 hours

over the year, but it doesn't provide the format for what may be a more valuable discussion on strategy that could better take place in a 16-hour segment over two successive days. I think we all need to stay focused not just on the quantum of time spent in board meetings but the quality of how that time is used so that we better guide management and deliver value for shareholders.

*Yoshiaki Fujimori serves as a director of Boston Scientific, Takeda Pharmaceutical Company, Oracle Corporation Japan and Shiseido Company. He formerly served as a director of Tokyo Electric Power Company Holdings and Toshiba Corporation, and has been senior executive advisor to CVC Capital Partners since 2017. He was president and chief executive officer of the Japanese building materials and equipment maker LIXIL Group from 2011 to 2016.*

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**Authors**

*Brandon Van Dyke, Kenton King*

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