Maximizing Value in Board Decisions: The Role of the Decision Quality Officer

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Abstract

In this paper we integrate the literature on decision quality with considerations specific to boards of directors. In order to maximize the value of their decisions, boards of directors must look beyond their legal obligations and incorporate business ethics and the latest developments in social, scientific and managerial learning on governance and decision-making processes. Organizations will benefit from identifying an internal staff member who can fill the role of Decision Quality Officer ("DQO") to advise the board on decision quality on an ongoing basis. We summarize some of the factors affecting board decisions, and explain the benefit of designating a DQO. Finally, we propose topics for a board policy on the role of a DQO.

Introduction

Under state corporation law, the board of directors is charged with overseeing the business and affairs of a corporation in accordance with the fiduciary duties of loyalty and care. These fiduciary duties require directors to be fully informed, to act in good faith and to exercise due care, in a manner that they reasonably believe to be in the best interest of the company, placing the interests of the company and its shareholders ahead of their own. However, general corporation law and fiduciary duties alone cannot ensure optimal board decision-making processes, which are essential for maximizing the value of board decisions.

A variety of groups have developed corporate governance principles to provide more specific guidance for a well-functioning corporate governance system.[1] The principles can include recommendations on decision-making procedures, such as board composition, access to information and meeting discussions. For example, the Common Sense Principles of Corporate Governance, released in 2016 as guidance for public companies, recommend that, in order to encourage open and free discussion of an issue, board members should reserve time on meeting dates for an executive session without the CEO or management.[2] The G20/OECD Principles of Corporate Governance provide that an organization's board should develop criteria for determining whether directors are sufficiently independent, enabling them to exercise objective judgment on corporate affairs.[3]

As a supplement to state corporation law and corporate governance principles, a growing body of laws, listing standards, guidelines, tools and research provide insight into board practices. Included are rules and behavioral research on the "independent" status of directors, analyses on the impact of biases in decision-making, business ethics principles and tools for high-quality decision processes. Staying abreast of this growing body of requirements and best practice guidance related to board decision-making has become an increasingly more complex task for non-profit, for-profit, and government organizations of all sizes. Adding to this growing complexity is an increasingly more competitive and global marketplace, where optimal board decision-making is more critical than ever.

A decision adviser can help boards comply with law and listing standards, and gain the benefit of the latest research and best practices on decision-making. For strategic decisions that require outside expertise or when organizations have limited internal staff, organizations can retain an outside professional consultant as a decision adviser to assist the board. Otherwise, organizations will benefit from identifying an internal staff member to serve as Decision Quality Officer ("DQO") to advise the board on decision quality on an ongoing basis. The DQO should be well-educated in the key factors that affect decision quality, and should be charged with working with the board of directors by advising them not only with respect to legal obligations, listing standards and recommended governance principles, but also on business ethics and social, scientific and managerial learning on decision-making. In what follows, we summarize some of the factors affecting board decisions, and explain the benefit of designating a DQO who would assist a board of directors in maximizing the value of board decisions. Finally, we propose topics for a board policy on the role of a DQO.

Law and Listing Standards re "Independence" of Directors

In an effort to increase objectivity, improve the quality of board oversight, and lessen the possibility of damaging conflicts of interest, the federal government and stock exchanges have developed laws and listing standards requiring certain members of boards of regulated companies to have "independent" status. For example, full boards of directors of companies listed by the New York Stock Exchange ("NYSE") must have a majority of "independent" directors, defined as having "no material relationship" with the company, broadly considering all relevant facts and circumstances.[4] The NASDAQ Listing Rules require that a majority of the full board of directors be "independent," precluding anyone from having a relationship that would "interfere with the exercise of independent judgment in carrying out the responsibilities of a director."[5] Federal law and listing standards also have independence rules with respect to board committees. For example, The Sarbanes-Oxley Act of 2002, The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the NYSE and NASDAQ have imposed independence requirements on companies listed on a national securities exchange for one or more of the board audit committee, compensation committee and nominating/governance committee.[6, 7, 8, 9]

State law also imposes certain "independence" requirements on board actions that may be different than those standards set by federal law or listing standards. For example, Delaware courts have interpreted state corporation law "independent" director status requirements in shareholder derivative actions as potentially affected by factors such as particularly close personal, philanthropic or ongoing outside business relationships between parties.[10] In addressing director independence, the Delaware Supreme Court has considered whether "the director may feel either subject to the interest party's dominion or beholden to that interested party."[11] Lack of "independence" of directors under state law can cause the board to lose the benefit of the business judgment rule that gives a board decision a presumption of legitimacy, and, if the board's action is challenged in court, can result in a heightened level of scrutiny of the board's decision.

Recent Research on Independence

In addition to state and federal law and exchange listing standards, recent research results indicate that certain facts and relationships have an effect on the decision-making of those who might otherwise meet the standard of "independent."

Hwang and Kim (2009) found that social relationships between a director and a CEO based on any of the criteria below correlated with higher executive compensation, lower probability of CEO turnover following poor performance, and higher likelihood that the CEO will manipulate earnings to increase his or her bonus:[12]

- both served in the military

- graduated from the same university, and born no more than 3 years apart
- born in the same U.S. region or non-U.S. country
- same academic discipline
- same industry of primary employment
- 3rd party connection through another director to whom each is directly independent

Comparing the track records of directors who were brought to the board by the then-sitting CEO ("co-opted" directors) versus those directors who were not, Coles, Daniel and Naveen (2013) found that "co-opted" directors are likely to have stronger allegiance to the CEO and are weaker monitors than directors who were not "co-opted." [13]

Fogel, Ma and Morck (2014) looked at the effect on decision-making of an independent director being "professionally socially powerful," defined as an individual's connectedness to the top 304,000 top executives and directors of 6,000 listed United States firms.[14] They found that being professionally socially powerful was associated with fewer value destroying mergers and acquisitions, less free cash flow retention, greater CEO accountability and less earnings management.

Studying the effect of political connections on corporate insiders in the context of the 2008-2009 financial crisis, Jagolinzer, Larcker, Ormazabal and Taylor (2016) found that, in organizations that benefitted from TARP funds, politically connected insiders who had an information advantage on the eve of the TARP decision traded to exploit that advantage.[15]

Nili (2016) has shown that the long-term tenure of a director reduces the likelihood that he or she will voice an opinion that might jeopardize closeness and cause conflict.[16]

Thus, while director independence can optimize board decisions, boards may be ill prepared to assess whether a director is truly independent. In practice, to gain the legal protections and decision-making benefits of independence, boards must not only comply with applicable laws and listing standards, but must look more deeply into the background and relationships that can undermine director independence.

A designated DQO can advise the board on how to achieve greater director independence for board decisions. The DQO should not only consider compliance with applicable laws and standards, but should also take into account the latest studies on the effect of history and relationships on decision-making, looking carefully at who might be in a position to influence company decisions. The DQO can work with the board and nominating committee to develop a policy for the recruitment of directors that increases independence. For example, board policy could impose director term limits and prohibit the CEO from submitting names of potential new board members to the nominating committee. DQOs should also advise the board with respect to an optimal process for a particular decision, and advise the board to include measures that are tailored to increase the board's prospects of making an objective judgment on the matter that is before the board. These additional steps could include setting up a special subcommittee of the board to make the decision, gathering data, seeking the opinion of outside consultants, and ensuring that individuals and groups outside the inner circle have an opportunity to be heard by board members.

Information Flow to Board

Information received by the board will also have a significant impact on the quality of board decisions. Prior to meetings, the corporate secretary, CEO and other members of management must pay adequate attention to the information that directors need in order to make informed decisions and to monitor their implementation. This means that board members must receive not just the standardized reports by default, but also high-quality, accurate, relevant and timely information related to issues to be considered at that meeting. Board members should receive their meeting packets with adequate time to review and consider the information. Adequate time to review will depend upon the complexity and volume of information provided to the board prior to the meeting. The board chair should determine with the CEO and others which members of management should attend an upcoming meeting to provide the board with further information, answer questions and to advise the board as necessary.

In addition to meeting preparation, board members should have direct access to management on an ongoing basis for information gathering purposes to educate themselves further on company operations.[17] In some organizations, the CEO prefers to be the gatekeeper between board members and management, and to control information flow between the two groups. However, a board cannot fulfill its fiduciary duties without gathering information from multiple sources – the CEO and management – in order to receive multiple viewpoints and gain a deeper understanding of operations. The board's information gathering activity must not, however, spill into direct oversight and control of management, a function rightfully reserved to the CEO.

The DQO should serve as watchdog to ensure that the information flow to the board is high-quality, relevant, adequate and timely. In the event that an organization is falling short, the DQO should work with the board, CEO and management to make improvements. It is important that the DQO be in regular communication with board members, and also attend board meetings to learn how information flow can be improved.

Board Meeting Management and Culture

For high-quality decision-making, board chairs must run meetings so as to allow adequate opportunity for board members to absorb information and to ask questions. The board culture must be one of critical thinking and problem-solving, and supportive of directors bringing new information and voicing their concerns and opinions without fear of damaging relationships. Essential to decision quality is the review of diverse opinions and proposed alternatives. The board should have a regular schedule of meetings in executive session without the CEO and members of management, allowing directors the opportunity to raise and discuss sensitive issues within a formal discussion.[18] Small group private "parking lot discussions" should not be the only way for board members to discuss matters that they feel uncomfortable raising in front of management.

A meeting culture that prioritizes ending the meeting on a rigid schedule can also shortchange discussion and negatively impact the organization as a result. It should be noted, however, that excessive meeting length can adversely affect board decisions. Some might believe that decisions regarding breaks and refreshments at board meetings are clerical matters, and not for executive concern. However, we disagree. A recent study of criminal parole decisions showed that significant decisions can be affected by whether the decision-maker is tired or hungry, with the likelihood of a ruling in favor of parole being greater at the very beginning of the work day or after a food break than at other times of the workday.[19] With this in mind, providing refreshments at meetings not only maintains goodwill with busy directors, but can have a positive effect on decision quality.

A DQO should identify any board meeting management or culture issues and discuss them with the board chair and the board as a whole. Board members may not understand that certain decisions on board meeting management can affect discussions and ultimately board decisions. Board meetings that are too quiet call for the DQO to advise the board chair about measures to increase meeting participation.

Board Composition

Decisions will also be impacted by board composition factors, such as director expertise, board size, engagement, and racial, gender and age diversity. There is a benefit to the board to seeking directors who have relevant expertise, such as finance or technology; however, recruiting individuals with specific expertise will not result in good governance if the recruits do not become directors who are fully engaged in their governance obligations. Lack of engagement on the board will affect meeting preparation and the quality of meeting discussions, and therefore decisions. A better governance structure may be to appoint individuals committed to their governance obligations as directors, and to retain subject matter experts as consultants. Although board sizes in recent years have decreased, a board that is too stretched will not be able to adequately fulfill its duties and make high quality decisions. On the other hand, a larger board made up of some directors who are not engaged is not an advantage and can have a negative effect on decision quality. Racial, gender and age diversity will increase the likelihood of a wider range of viewpoints, provided that board culture supports open and free discussion. As noted above, the board should remain abreast of and implement the findings of studies regarding factors affecting director independence. The DQO should work with the board chair and nominating committee to monitor board composition and advise the board on how to maximize their prospects of high-quality decisions.

Biases

In addition to principles, process and practices for maximizing the value of board decisions, obtaining high quality decisions requires an understanding of behavioral decision science. All people, regardless of intelligence, education and experience, are affected by unconscious biases in their thinking.[20] These unconscious biases have been grouped into six categories as follows:[21]

- *Social Influences* – We can be inclined to: accept and act on the suggestions of others; match our attitudes, beliefs and behaviors to group norms; accept groupthink without evaluation of alternatives; and mistakenly believe that consensus is evidence of a high-quality decision. If board members see cooperation and consensus as indicators of a well-functioning board, they may wrongly see disagreement as something to avoid rather than as allowing for a more comprehensive evaluation of ideas or viewpoints.
- *Habits and Personality* – Personality types can differ as to whether to define a problem narrowly based on the present or more broadly with big picture possibilities, and whether their decisions are led by facts and logic or person-centered values. It is important to be sensitive to the different personality types in order to get the most out of a board and understand that a board with a range of personality types will lead to different approaches to an issue and more diverse viewpoints and ideas to consider.

- *Protection of Mindset* – In order to maintain our view of the world, our self-esteem and self-confidence, we engage in the following: self-serving bias (tendency to overestimate one's positive qualities and underestimate one's negative qualities); overconfidence (widespread with experts); confirmation bias (tendency to favor information that confirms one's beliefs); and hindsight bias (tendency to see past events as more predictable than before they took place). Inviting non-board members to challenge a viewpoint will reduce the effect of our protectionist mindsets.
- *Automatic Associations* – The following biases influence our probability judgments, evaluations and predictions: availability effect (tendency to focus on recent, vivid and salient events); ease of recall (focusing on familiarity and easily recalled events); anchoring effect (tendency to rely on one piece of information when making a decision); the halo effect (tendency to infer that someone has a positive trait given positive information about another trait); and the narrative fallacy (forcing a narrative link among a sequence of facts). Taking care to carefully word proposals, collecting data and seeking opinions from diverse sources will reduce the effect of automatic associations on decisions.
- *Faulty Reasoning due to Complexity and/or Uncertainty* – When we deal with complexity, we often respond with: selective attention (possibly missing important information); order effects (tending to forget items in the middle of a list); an inability to combine many cues reliably (we tend to limit the number of alternatives that we will consider or the number of dimensions to compare); and a substitution heuristic (if a satisfactory answer to a hard question is not found quickly, we will substitute the answer to an easier question). Actively working to reduce behaviors that make a complex problem too simple will lead to decisions that are more likely to incorporate all relevant information.
- *Relative Thinking* – Our judgments can be affected by: framing effects (how the problem is stated can affect judgments and choices relative to an articulated status quo – Is it a "credit card surcharge" or "cash discount" policy?); status quo effects (irrational preference for the current state of affairs); and sunk cost effects (refusing to let go of the past and considering money already irrevocably spent instead of focusing on future spending). A board can benefit from inviting the views of others not involved in past decisions or establishing the status quo.

What is essential for boards to recognize is that biases exist with all people, even well-intentioned, experienced, highly educated individuals. Biases can distort reasoning in business decisions, and human nature is such that it is difficult to identify one's own biases. According to Daniel Kahneman, in our System One intuitive thinking, as opposed to our System Two deliberate reflective thinking, we almost never catch our intuitive errors.[22]

Board members should not only be aware of how biases can distort decisions, but must design the decision process to reduce the effect of biases. The DQO should advise and assist the board in reducing the effect of unconscious biases by taking steps such as assuring that there are diverse voices heard by the board, that new information and adequate data are gathered and considered, that there is a board culture prioritizing critical thinking and respecting dissent, and that the board retain outside consultants when appropriate. It is noteworthy that some Delaware court cases have acknowledged or discussed cognitive biases when evaluating questions of director independence.[23]

A large body of research, ranging from the classic Milgram and Asch experiments to more recent work by Sunstein and others, supports the proposition that the pitfalls to effective and sensible decisions often lie in the desire to support leadership and to be part of a consensus.[24, 25, 26] That bias toward agreeability, valuable as it typically is, lies behind many flawed board decisions. An important aspect of the DQO's role is to be conscious of agreeability bias and to combat its distorting influence, while at the same time respecting the need for harmonizing and mutual respect in board processes.

Business Ethics and Short-Term Interests

Short-term interests, such as the short-term tenure of CEOs and short-term interests of shareholders, can lead to suboptimal decisions focused on short-term results. On the other side of the spectrum, undue rigidity can lead board members and CEOs to fail to see how the organization could make better decisions and obtain better results. Business ethics can be useful to the organization in regard to both of these problems. First, ethics can be a check against a decision process that focuses unduly on the short-term and underrates long-term risks. Second, business ethics can also be a means for an organization to challenge members of the organization to become more open-minded and to unlock value on the upside.

In minimizing downside risk, a DQO can encourage board members to consider whether a given decision passes the transparency test: Can we defend a potential decision with ethical risk to a reporter for the New York

Times or the Wall Street Journal, knowing that what we say will appear in the paper? In for-profit organizations in which shareholder value is an important factor, the DQO can also urge upon board members the value of looking at the effect of their decisions not only upon investors with 100% of their holdings in company stock, but also on the large and important group of investors with diversified portfolios, who will not be attracted to narrowly short-term strategies that hurt the market as a whole. The DQO should be mindful of the circumstances in which short-termism is likely to occur. For example, CEOs who lose out on an award have been shown to be more likely to pursue acquisitions.[27] Aware of that finding, a DQO can apply a useful counterweight to what might otherwise be a rushed, short-term decision by a board that wants to go along with a disappointed CEO.

On the ethics side as well as on the law and social science sides, it is important that the DQO's role be an affirmative one as well as an admonitory, checking and balancing one. An effective DQO will be able to encourage board members to see the ethical dimension of maximizing value. One upside equivalent of the transparency test is the invisible hand test: Are we as an organization missing a chance to unlock value with a new form of win-win transaction? Another is the "break up the system" test: Is there a way to help the organization by breaking down outdated business or social norms? An effective DQO will be able to help boards see their role in these upside terms, as well as in the terms of countering the downside risks of short-termism.

High-Quality Decision-Making Processes

In order to obtain high-quality decisions, appropriate processes by which the board addresses issues must be in place. Boards will be held accountable by both the law and investors for strategic decisions and organizational oversight. The commonplace practice of board strategic decision-making based on the advocacy of management can leave the board in a reactive mode and faced, without adequate information, with the options of approving or rejecting a proposal that can be affected by bias and lack of thorough evaluation of alternatives. This can result in a "win/lose" attitude from management, and a board that does not have enough information to be a check on the quality of the decision.[28]

Boards must be proactive in clearly establishing the board decision agenda in order to avoid disagreements and misunderstandings with management with respect to decision-making authority on specific issues.[29] As part of setting the annual strategic agenda of the organization, the board must work in a timely manner with C-level executives in determining which decisions are to be made by management without direct involvement by the board other than a limited approval role or being informed, and which issues the board reserves for its own decision agenda. The DQO should have a major role in the facilitation of the decision agenda setting process for the board, working with the board leadership, CEO and senior management to establish clear understanding as to the board and C-level decision agendas. Given that the boards and board committees can only participate significantly in a few strategic issues per year, the DQO should ensure that the board's attention is on the right strategic decisions.

With a decision agenda set, Spetzler, Winter and Meyer provide a decision quality framework for a collaborative approach to high-quality decision-making that includes concepts, tools and processes that maximize the value of decisions.[30] For board decisions, the framework is based on decision quality principles that raise the bar above that set by director legal fiduciary duties. The framework calls for the tailoring of an efficient process for any specific decision based on the extent to which the decision at hand has analytical complexity and/or organizational complexity. For questions that require only common sense and a rule of thumb, there is no need for a multi-step decision-making process. In all other cases, the framework calls for a decision-making process that includes the following six elements and supporting tools in order to achieve high-quality decisions:[31]

1. *Appropriate framing of the problem* - Clear agreement and statement of purpose, scope, perspective, and decisions to be addressed.
2. *Creative doable alternatives* – Fully explored wide range of options.
3. *Meaningful, reliable information* – Important, accurate information based on appropriate facts and explicit about uncertainties.
4. *Clear values and trade-offs* – Explicit statement of wants as decision criteria and trade-offs among the criteria.
5. *Logically correct reasoning* – Thorough and reliable analysis of each alternative.
6. *Commitment to action* – Buy-in from those affected by decision.

The DQO's role in connection with decision-making processes will vary depending on whether a decision is routine, or whether it involves organizational and/or analytical complexity. Routine decisions made utilizing common sense and a rule of thumb do not call for DQO involvement. With other decisions, the DQO should tailor advice and assistance as appropriate, ranging from ensuring that the board uses the above six elements of the decision quality framework as a decision process checklist, to advising the board regarding specific impediments to high-quality decisions both large and small, to working with the board to establish a project team and decision body and working with all decision participants through an iterative process of high-quality decision-making.

The appropriate decision-making process for a specific decision should include measures tailored to counterbalance biases of the decision-makers and obtain a high-quality decision. Finkelstein, Whitehead and Campbell describe four "red flag" conditions under which flawed thinking is likely to happen on boards even with experienced decision-makers: misleading experiences, misleading prejudgments, inappropriate self-interest and inappropriate attachments.[32] They note that when we have insufficient relevant experience, our brains are more likely to connect with misleading experiences and misleading prejudgments to sort through an important uncertainty. These "red flag" conditions are more likely to arise when directors, even those considered "independent" in a broad sense, don't have experience leading a similar organization. The DQO should be vigilant about the presence of "red flag" conditions, and recommend to the board appropriate measures to reduce their effect, such as involving other people, collecting more data, conducting a more thorough debate and increasing the amount of analysis.

Summary

Consideration of an ever-widening range of decision quality factors, from legal requirements and recommended governance principles to social science, principles of business ethics and best practices on high-quality decision-making processes, can be a heavy lift for a board of directors that functions on a part-time basis and may be stretched already. Beyond the factor of limited time is the difficulty of directors in identifying their own biases. Therefore, in order for a board to maximize the value of its decisions, boards should appoint a decision leader to serve as adviser to the board with respect to the legal, governance, social science, business ethics and managerial considerations impacting board decision-making.

For strategic decisions that require outside expertise or when organizations have limited internal staff, organizations can retain an outside professional consultant as a decision adviser to assist the board. Otherwise, organizations will benefit from identifying an internal staff member who can fill the role of DQO to advise the board on decision quality on an ongoing basis. The DQO should be a non-board member who is appointed by the board, is adequately trained on the legal, social science and managerial aspects of decision quality, is committed to remaining educated on the latest decision quality developments, and has knowledge about the organization, the staff and the board members.[33] The general counsel, corporate secretary and ethics officer are potential candidates.[34] Although an organization may have a number of staff members who have expertise in one or more of the areas discussed, a board will benefit from retaining one individual to serve as

DQO who has knowledge about the factors affecting decision quality, is in regular communication with the board leadership and CEO, is aware of directors' issues, concerns and meeting agenda development, and attends board meetings, all of which allows the DQO to advise the board on decision quality in a comprehensive manner. Critical to the success of the DQO is that the board fully respect the training and knowledge of the DQO, understand the DQO's role of proactive, independent adviser acting in the organization's best interest, and utilize the DQO's advice in order to maximize the value of their decisions.

The DQO should be in communication with board members, the CEO and management with respect to meeting preparation and should attend board meetings. He or she should tailor advice and assistance as appropriate in order to maximize the value of decision-making. Such advice and assistance can range from ensuring that the board follows the six elements of decision quality as a decision process checklist, to advising the board regarding specific impediments to high-quality decisions both large and small, to working with the board to establish a project team and decision body and working with all decision participants through an iterative process of high quality decision-making.

For a DQO to be effective, it is desirable to have a board policy delineating the approved DQO position that reflects a consensus on the part of the board, the CEO, other management, employees, and other major stakeholders. In the Appendix, we outline six areas that we believe should be covered in the policy; the specific language can and should be tailored to the specific circumstances facing the organization.

It is understandable that there can be resistance to implementing change in board decision-making through the introduction of a DQO. Board members are typically intelligent and highly successful people who believe that they are making thoughtful and well-reasoned decisions. However, boards of for-profit, non-profit and government organizations of all sizes should understand that creating a DQO role and improving decision quality are about increasing the value of board decisions, which is important even for successful organizations and should be a part of the continuous improvement that boards should always be seeking. A DQO can assist busy board members in optimizing board decisions and can give boards the confidence that they are improving their ability to do what is in the best interest of the company.

Key Topics in a DQO Policy

Rationale for the appointment of the DQO

Begin the DQO Policy with a statement of the goal of making high-quality board decisions, the need to be attuned to director status and process in decision-making, and the desire to utilize a DQO to advise the board on high-quality decision-making.

DQO's role as independent adviser

Include clear language indicating that the DQO role is as independent adviser to the board, reporting to the board only, and without the authority to compel the board, the CEO or another party authorized to act for the organization to act or to refrain from action. Include the requirement that the DQO be adequately trained in the legal, ethical, social science and managerial aspects of decision quality.

Factors to be considered by DQO; Role of DQO

Describe in broad terms the factors and information that the DQO shall consider in its advisory role, including law, ethics, social science and management principles. It may be desirable to specify further the nature of the DQO's role, through noting, e.g., that the DQO shall attend board meetings, shall advise the board regarding board composition, board culture and meeting management and the annual board decision agenda, shall make recommendations aimed at ensuring that the board follows a high-quality decision process, shall make the board aware of impediments to high-quality decisions, and shall work with the board to establish a project team or decision group for a particular board decision.

Circumstances under which the DQO must, or can, become involved

Include policy language indicating when DQO involvement is required, and other circumstances in which, whether at the initiative of the DQO, of the CEO, of one or more board members, or (if desired) of one or more organizational employees, the DQO may be involved in order to maximize the value of board decisions.

DQO to be concerned with upside optimization as well as with downside risk minimization

Include language indicating that the DQO's role is one that focuses on unlocking value for the organization as well as recognizing risks.

DQO's role in Board-CEO relations

Particularly if it is the case that the DQO's appointment is an outcome of difficulties that existed between the board and a previous CEO, it may be desirable to include language that alludes to the role of the DQO in fostering an effective board-CEO relationship that recognizes both the paramount role of the board in setting policy and the importance of the board respecting the administrative leadership of the CEO.

Authors

Andrea Marino is a corporate attorney who counsels for-profit companies and non-profit organizations regarding law, governance, policy and operations. She has served 11 years as in-house counsel, partnering with the CEO, board and staff, bringing dimensions of law, governance, risk, compliance and ethics to decision-making. With her undergraduate business degree as a foundation, she has provided leadership in day-to-day and long-term business decisions, with a focus on creative and practical solutions. Prior to working in-house, she practiced corporate law at law firms with broad experience that included representation of new and ongoing businesses, mergers and acquisitions, securities law, and regulatory compliance. Andrea Marino's knowledge about board governance and high-quality decision-making has been enhanced by a Strategic Decision and Risk Management Certificate she earned from Stanford University, with coursework that included decision analysis, decision quality, bias in decision-making, and strategic innovation and design thinking. She has partnered with Rutgers Business School Professor Wayne Eastman for research and practical thought leadership related to best practices in organizational board governance. In addition to her professional experience, Andrea Marino has been a board member in a number of community and non-profit organizations ranging from municipal government advisory committees to school/community associations to an alumni association, and has had a leadership role in several of them. She has also been a Board of Education watcher for years, and has chaired the political campaign committees of a number of candidates for Board of Education over an 11-year period.
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Endnotes

1. See, e.g., Common Sense Principles of Corporate Governance (2016). Retrieved from http://www.governanceprinciples.org; G20/OECD Principles of Corporate Governance (2015). Retrieved from https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf.
2. Common Sense Principles of Corporate Governance, supra note 1, at § II(b).
3. G20/OECD Principles of Corporate Governance, supra note 1, at 57-58.
4. NYSE Listed Company Manual §§ 303A.01, 303A.02 (2017).
5. NASDAQ Listing Rules 5605(a)(2), (b)(1) (2017).
6. The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 775-777 (codified at 15 U.S.C. 78j-1(m)(3)) (audit committees).
7. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 952, 124 Stat. 1376, 1900-1903 (2010) (codified at 15 U.S.C. 78j-3(a)) (compensation committees).
8. NYSE Listed Company Manual, supra note 4, at §§ 303A.04, 303A.05, 303A.07 (nominating/corporate governance, compensation and audit committees).
9. NASDAQ Listing Rules, supra note 5, at 5605(c), (d), (e) (audit, compensation and nominating committees).
10. See Sandys v. Pincus, 152 A.3d 124 (Del. 2016); Delaware County Employees Retirement Fund et al. v. Sanchez et al., 124 A.3d 1017 (Del. 2015); In re Oracle Corp Derivative Litigation, 824 A.2d 917 (Del. Ch. 2003).
11. See Sandys v. Pincus, 152 A.3d at 128 (quoting Delaware County Employees Retirement Fund et al. v. Sanchez et al., 124 A.3d at 1024 n.25).
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33. In the event that the DQO is not an attorney, he or she would need to consult with an attorney for advice on legal matters.
34. General counsel would be well-suited for the additional role of DQO, given the fact that an in-house attorney represents the organization, and is charged with working in the best interest of company, not the CEO or other supervisor. ABA Model Rule of Professional Conduct 1.13(a). ABA Model Rule of Professional Conduct 2.1 regarding a lawyer's advisory role, provides: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social and political facts, that may be relevant to the client's situation."