

AN ATTORNEY OFFERS A LIST OF CONSIDERATIONS THAT EXECUTIVES SHOULD CONSIDER BEFORE JOINING ANY CORPORATE BOARD. A CENTRAL QUESTION: WOULD THE BOARD FIRE THE CEO?



INTERESTED IN BEING A DIRECTOR? DO YOUR HOMEWORK

BY PAUL MARTIN WOLFF

Company executives and managers already lead busy lives, with myriad demands on their time and energy. So when they are approached with the prospect of becoming a member of a corporate board, logical questions arise about the wisdom of such an undertaking. Add to the mix the recent tightening of corporate governance rules enacted in the wake of scandals such as

those at Enron Corp. and WorldCom Inc. — which has exposed officers and directors to greater scrutiny and increased potential liability for their conduct as corporate officers — and the prospect of joining a board becomes downright daunting, if not outright risky.

Given this new landscape, it may be surprising to learn that an attorney would still recommend serving

on a corporate board. Why? Not because of the honor or social prestige popularly associated with corporate board positions, but because it is a good job. It's often well-paid, interesting and rewarding. Yet, like any other job under consideration, it is advisable to meticulously research the position and weigh all the pros and cons. People should make the decision to go on a board very care-



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fully and very systematically.

If caution breeds comfort, there is a range of questions to ask yourself and the nominating committee when considering a board position. The areas to look into involve the structure and policies of the board and your ability to have an impact on company operations, as well as more personal aspects related to compensation, personality and liability.

Here is a recommended course:

First, look at the corporate culture. It makes no difference what the compliance documents say. If there's not a corporate culture of shared values, honesty and decency, it's not going to work. In a recent New York Times crossword puzzle, the clue was a corporation with a 65-page book on ethics and compliance. The answer? Enron.

The culture has to be ingrained in the company, not simply stored in a three-ring binder. Look to see if excellence is built into the culture of the corporation, rather than found in "the quality-control experts" such as the lawyers, the auditors and accountants.

Look at the CEO. Is this individual a man or woman of integrity, energy, intelligence? (Notice that integrity is put first.) Does this person have a passion for their business, or do you think that he or she will go to the next company that waives a higher paycheck in front of them? Are they — like too many athletes — more interested in free agency than they are in a legacy?

Do you believe you're joining a board that would fire the CEO? If you answer positively to all of the above questions, you'll get a yes to this question, which is ultimately the litmus test.

Look at the audit committee. Who is on it? Look at their backgrounds and decide if the person chairing the audit committee is a person that you would want running your corporation. Does the audit committee have the ability to — if it needs to, not that it must — hire outside advisers and lawyers?

Is this a board where you seriously believe you are going to be useful? Or are you going to be used? Are you being brought on as a director because they think that with your pedigree, they can probably do a lot of things "as usual," because they have you to parade around in front of their shareholders and regulators?

Thoroughly research the compensation committee. We have seen enough corporate cases this year to know that compensation is a hot-button issue. Prof. Lucian Bebchuk of Harvard Law School has put us on notice with the book he co-authored with Alma Cohen, *Pay Without Performance*. You must ask: does the compensation committee have the kind of freedom you think it should have?

Does the committee have the right to go out and hire compensation experts? Does it look at the cost across the entire corporation to find the true cost of an executive and not simply his or her income? How much influence does the CEO have on compensation? Is it a corporation that historically has been a pay-for-play corporation — when you hit .350, you're rewarded, and when you hit .245, you're not rewarded?

Is there a strong conflicts policy? Is there a policy that, if you're on the board, your firm — be it a law firm or other service provider — should not be providing services except on an independent competitive bidding process? Are family members of board members appearing in jobs, especially in jobs that seem to have really no ostensible purpose? Is the corporation making large gifts to favored charities of the board? If the corporation does have a philanthropic bent, how is the mon-

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ey given? Too often, we've seen directors and corporation executives listed as making huge contributions to charities, and then find out that the corporation actually has been the entity that paid.

Don't do it on the cheap. It's a difficult job, and even if you do it well, there is still much risk involved. So, you ought to be well-compensated. As a rule of thumb, you should get paid as much as a key member of an audit partnership, or a senior partner in a law firm. We know from a Korn/Ferry International survey that the average publicly traded corporation board director made about \$57,000 last year, while many made in excess of a \$100,000. If you do your job well and you take on the risk, this is fair compensation.

After consideration of these and other aspects of serving on a board, it is also recommended that you investigate the company's directors and officers' (D&O) insurance policy. If all else fails, this coverage can protect you against potential liabilities. However, the broad coverage

policies and limited exclusions that prevailed before the recent spate of corporate scandals have been largely replaced by limited coverage and higher premiums.

This makes it imperative to investigate the company's D&O coverage and your coverage options. Does the policy primarily protect innocent directors and corporate officers, not those who perpetrate fraud? Is the carrier well-respected and have a reputation for fairly handling claims? Has the company opted for lowered limits so that it pays minimal out-of-pocket costs? Is the policy written in a general way or more specific to the business sector and the company's potential liabilities? See what is available, consult with an expert and make sure the policy includes provisions such as so-called "Side A" coverage for independent directors.

Once you make the decision to join a board, also commit to remaining active — not intrusively, but definitely as someone who takes the responsibility and opportunity seriously. The best guide on director behavior was given to me almost 10 years ago while serving on a university board. My mentor on the board advised to "keep your nose in and your fingers out." Sniff around and learn exactly what the company's doing, but keep out of the day-to-day management. If you think you have to get involved in day-to-day matters, then replace some managers. Don't insert yourself.

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takeaways

- Executives need to ask themselves a series of questions and do thorough research before committing to service on a corporate board.
- Board service may seem risky today, but it can be well-paid and very satisfying work. In fact, executives should insist on being well-compensated for their work.
- The ultimate litmus test for a board is: would it fire the CEO? That's the kind of board worth joining. Anything less suggests too little independence for directors.
- As a final act before committing to serve, check out the company's directors and officers' liability coverage and assure yourself that it would cover you in a calamity.