

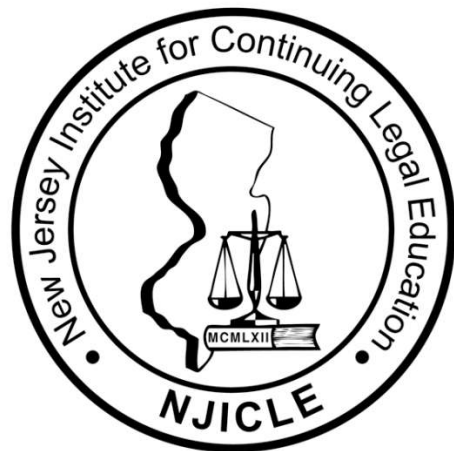
NEW STRATEGIES IN CORPORATE GOVERNANCE TO MEET EVOLVING RISKS

2023 Seminar Material

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NEW STRATEGIES IN CORPORATE GOVERNANCE TO MEET EVOLVING RISKS

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New Strategies in Corporate Governance to Meet Evolving Legal Risks

Presenters

- | | |
|----------------------------|---|
| Moderator / Speaker | John P. Murdoch II
Shareholder; Zager Fuchs, PC |
| Panelist | Ida Araya-Brumskine
Counsel; Davis Polk & Wardwell LLP |
| Panelist | Michael R. Clarke
Vice President, Deputy General Counsel & Global Chief Compliance Officer; Convatec |
| Panelist | Stephanie Kelly
Associate General Counsel, Securities & Governance and Assistant Secretary; Becton, Dickinson and Company |
| Panelist | Amy Todd Klug
Executive Associate General Counsel, Litigation, Corporate Functions & Legal Operations; Daiichi Sankyo, Inc. |

Agenda

Section

- 01** Structuring High-Functioning Boards: Proactive Legal and Business Requirements
- 02** Banishing Boilerplate Corporate Governance: Designing Customized Documents and Processes
- 03** Protecting Growth and Minimizing Ever-Changing Litigation Risks: Developing Robust Risk Functions
- 04** Making Proper Use of Special Committees to Protect Your Client's Business

Structuring High-Functioning Boards

Proactive Legal and Business Requirements

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Analyzing the fundamental and changing obligations for building boards and for evaluating their performance

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Building boards

- Leadership structure: presiding director (Chair); lead independent director considerations; considerations around combined CEO and Chair role
- Competencies and diversity of the members
- Committees and committee charters

Evaluating board performance

- Board oversight of: company strategy, performance, enterprise risk, management development and succession planning, CEO and executive compensation and evaluation
- Board engagement, culture, and “tone at the top”
- Information flow and discussions
- Composition and governance
- Committee structure and performance
- Relationship with management
- Agendas, meetings, logistics and support

Assessing significant business considerations impacting board composition

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Diversity, size and skill set

- When considering the size, composition and refreshment the Board, consider diversity in a broad sense, including work experience, skills, and perspectives
 - Does the Board reflect the diversity of experience, skills and perspectives that continuously enhance its ability to carry out its oversight role and support the company's strategic priorities and initiatives?
 - Diversity includes diversity of personal background and professional experience, skills and qualifications as well as gender identity, race, ethnicity, religion, nationality, disability, sexual orientation, and cultural background
- For public companies, consider voting guidelines and recommendations from proxy advisory firms (ISS and Glass Lewis) and large institutional investors
 - E.g., beginning with shareholder meetings held after January 1, 2023, Glass Lewis will generally recommend against the chair of the nominating committee of a board that is not at least 30% gender diverse at companies within the Russell 3000 index

Forming collaborative and trusting work groups open to dissent

- Engaging in consensus based decision-making after rigorous debate and effective challenge, including through active discussion with management
- Keeping open and transparent communication, and sharing information, knowledge and positions on issues – both with each other and with management
- Creating a Board culture in which individual members of management are comfortable escalating important issues to the Board and requesting time to meet with the Board in executive session, as appropriate
- Supporting an atmosphere of inclusion and diversity in thoughts, experiences and backgrounds

Guiding boards on compensation matters in an era of intense examination

- Consider compensation risk mitigants such as:
 - Balancing mix of fixed v. variable compensation
 - Balancing horizon of incentives: short-term v. long-term
 - Balancing metrics: financial v. non-financial; earnings v. share price
 - Imposing discretion as to payout
 - Imposing holdbacks and bonus banks
 - Stock holding requirements
 - Clawbacks
 - Performance reviews with a risk rating component

Banishing Boilerplate Corporate Governance

Designing Customized Documents and Processes

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02

How to acquire a comprehensive understanding of your client's unique needs, business and operating environment

- Acting diligently to become and remain informed about the company's operations and its industry
- Regularly assessing the key strategic, financial, operational, regulatory, competitive and other risks facing the company and its industry
- Having access to operating levels of management
- Working in a hybrid environment (if applicable)
 - Design for inclusion
 - Establish meeting norms
 - Transparency of work locations and work schedules
 - Optimize meeting rooms

Developing efficient governance processes (cont.)

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- Considerations for scheduling Board and committee meetings
 - Board calendar: frequency, timing and length
 - Regularly scheduled Board meetings are usually set at least one year in advance; however, some companies prefer a multi-year schedule
 - Confirm agenda is compliant with charters and other regulatory requirements; optimize attendance
 - If applicable, timing of quarterly earnings announcements and 10-K / 10-Q filings and need for Audit Committee or Board to meet
 - Timing of proxy-related decisions and need for comp and governance committees to meet
 - Committee meetings
 - Usually before or same day as Board meetings
 - Some held concurrently and others sequentially
 - Timing of committee reports to full Board
 - Policy on whether directors can attend all committee meetings
 - Practices on management attending committee meetings

Developing efficient governance processes (cont.)

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- Develop guidelines/policy for materials
 - Common template – see next slide for sample template for unanimous written consent
 - Memos vs. PowerPoint slides
 - Use of executive summaries
 - Suggest using visuals (charts, graphs) over text, or limiting amount of text per slide
 - Consider limiting number of slides based on time allocated to agenda item
 - Other considerations: drafts vs. finals; confidentiality; adequacy for maintaining records evidencing Board deliberation and consideration
 - Timing for distributions to meet needs of Board and management
- Pre-reads vs. meeting materials
 - Consider more detailed pre-reads with more concise materials for actual meeting to facilitate discussion
- Practical considerations
 - Consider adopting an internal policy on when materials being drafted by internal presenters can and cannot be modified, with deadlines
 - Consider materiality of changes/updates that would warrant re-distributing to the Board after pre-reads have gone out
 - Consider most effective way presentations are given at the meeting for information-sharing and to keep to time

UNANIMOUS WRITTEN CONSENT OF
THE BOARD OF DIRECTORS
OF
ABC CORPORATION, INC.

WHEREAS, the Board of Directors of ABC Corporation. (the "Company") wishes to [enter details of resolution here]. The undersigned, being all of the members of the Board of Directors of the Company, do hereby unanimously consent to and authorize the adoption of the following resolutions as of the dates indicated below:

1. RESOLVED, that [enter first part of resolution].
2. RESOLVED FURTHER, [enter second part of resolution].
3. This Written Consent may be executed in several counterparts, and each counterpart shall serve as an original for all purposes, but all counterparts together shall constitute one and the same consent.
4. Execution and delivery of this Written Consent by electronic signature, facsimile or pdf transmission shall constitute execution and delivery of this Written Consent for all purposes, with the same force and effect as execution and delivery of an original manually signed copy hereof.
5. This Written Consent shall be filed with the Secretary of the Company.

The undersigned have executed this Consent effective as of [date].

_____	Signed on: _____
XXXX XXXXX	[Date]
_____	Signed on: _____
XXXX XXXXX	[Date]
_____	Signed on: _____
XXXX XXXXX	[Date]
_____	Signed on: _____
XXXX XXXXX	[Date]
_____	Signed on: _____
XXXX XXXXX	[Date]

Creating the most appropriate governance documents: modern approaches for drafting

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Corporate governance documents to consider

- Board committee charters
- Corporate governance guidelines
- Insider trading policy
- Related person transaction policy
- Whistleblower policy
- Code of business conduct and ethics
- Other (e.g., political contributions, social media, conflicts, confidentiality, privilege)

Drafting considerations

- Who is the intended audience?
- Using “plain English”
- Who is responsible for periodically refreshing governance documents to reflect best practices and legal and regulatory updates?

Protecting Growth and Minimizing Ever- Changing Litigation Risks

Developing Robust Risk Functions

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Crafting suitable risk oversight protocols to protect against data breaches

- Cybersecurity and data protection are increasingly important concerns for corporations, their regulators, auditors and insurers. The financial and reputational costs associated with a data breach can be significant.
- There are three components to consider in incident prevention
 - Technology systems
 - Multi-factor authentication, remote access controls, role-based account controls, hardware inventories, software management
 - Processes and procedures
 - Device, data use policies, data governance (minimization/disposal) procedures, incident response plan, vendor policies
 - Personnel and insider risks
 - Tone from the top, training, tabletop exercises

Crafting suitable risk oversight protocols to protect against ESG and corporate responsibility failures, inappropriate conduct and more

Five main areas of effective programs

- Assess risks
- Establish / revise company policies to address risks
- Establish procedures to ensure compliance with company policies
 - Training
 - Reporting / monitoring
 - Investigations / enforcement
- Board and management oversight
- Implement improvements

Programs and procedures must be (1) closely tailored to the company's particular business and associated legal risks and (2) currently verifiable and effectively understood by all employees

Helping boards fulfill their fiduciary duties with the right policies and procedures

- **Duty of loyalty:** Requires directors to act in good faith and in the best interests of the company and its stockholders.
 - Implicated when potential conflicts of interest arise from a transaction involving the company in which a director has a financial or personal interest. The director should disclose all material facts regarding the director's interest in the transaction and answer any questions the other directors may have; generally should not participate in board deliberations regarding the transaction in order to enable the disinterested directors to discuss the matter freely
 - Corporate opportunity doctrine and confidential information
- **Duty of care:** Requires directors to act with the level of care that a "reasonably prudent" director would use under the circumstances, including by informing themselves of all material information that is reasonably available
 - Act diligently to become and remain informed about the company's operations and its industry
- **Business judgment rule:** A director is presumed to have met the duty of care and to have acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the corporation and its stockholders

Risk oversight

- Being knowledgeable about risks facing company. For example:
 - Review risk assessment periodically
 - Receive periodic reports from chief compliance officer
 - Know content and operation of compliance program in light of company risk assessment
- Ensure that high-level personnel given overall responsibility, and have sufficient resources and access to Board or appropriate committee (e.g., Audit Committee)
- Follow up with senior management to ensure “tone from the top”
- Many of these functions can be delegated to a committee (e.g., Audit Committee), with reports to the Board

Advising on prevailing standards for board oversight and director accountability

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Role of Board

- Oversee management and provide strategic direction / approve overall strategy
- Select and evaluate the CEO and other senior executives
- Succession planning
- Oversee financial/operational performance
- Approve major decisions
- Manage risk oversight
- Address the expectations of and undertake engagement with shareholders

Matters for Board approval

- Formal Board policy
 - Some companies have a Board-adopted guideline/policy for decision-making that can be made by management vs. requiring Board approval
- Matters/factors that may be incorporated in Board policy for delegated authority
 - The impact of the decision on the company (i.e., a major shift in strategy, significant undertaking or new venture)
 - The company's long-term vision and focus; high-level policy decisions
 - Red flags (i.e., significant regulatory developments, whistleblowers, major items identified under risk oversight system)
 - Transaction category or type / monetary thresholds

Director training

- Key topics and issues related to company's business
- Training/refreshers on Board-level policies (e.g., code of conduct, insider trading policy)
- Tabletop exercises (cyber)
- Outside speakers

Board/director evaluations

- Define evaluation objectives
- Determine who will be evaluated: Board, Board committees and/or individual directors

Liability insurance

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- Typically, the company indemnifies each director to the fullest extent permitted by law and will advance / reimburse litigation expenses to any director sued or investigated in his or her capacity as a director
 - Indemnification rights survive the termination of the director's service
 - Amendment or repeal of the indemnification provision of the company's bylaws does not impair the right of any director arising at any time with respect to events occurring prior to such amendment or repeal
- The company will not indemnify or advance / reimburse litigation expenses in any suit initiated by a director (except for suits by directors to enforce their indemnification rights against the company, counterclaims or cross claims) unless the board has consented to such proceeding
- The company's director and officer (D&O) liability insurance policies in favor of the company and its directors should be reviewed periodically

Making Proper Use of Special Committees to Protect Your Client's Business

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Identifying general principles related to the use of special committees

- A special committee is used to provide assurance that a corporate decision has not been coerced or unduly influenced by directors who have an existing or potential interest in a matter
 - It may be needed whenever the majority of the members of a Board has, or could appear to have, a conflict of interest in the transaction or matter at hand
- Special committees are often used in four categories:
 - Going private transactions
 - Leveraged buyouts in which management is participating with the group proposing the transaction and will have an interest in the surviving company
 - Certain other M&A transactions where an actual or potential conflict might exist
 - Stockholder derivative litigation

Setting up a special committee: key considerations

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- Independence of committee members
 - Each member of the committee should have no direct or indirect interest in the transaction (or the proponents of the transaction)
- Independent advisors
 - Consider retaining (legal and financial) advisors who have not had any significant previous relationship with a controlling stockholder or other party to the transaction
- Committee's mandate
 - Access to information required to make an informed decision
 - Ability to negotiate on behalf of the company's stockholders
 - Power to enforce a decision to reject the proposed transaction
- Size of the committee
 - Consider including at least three members

Setting up a special committee: key considerations (cont.)

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- To conduct its functions properly, special committees should:
 - Have access to all material information
 - Take an active role in negotiating the transaction
 - Have the ability to do a “market check”
 - Have the power to say no to the transaction
 - Obtain an independent fairness opinion
 - Consider obtaining approval by a majority-of-the-minority stockholders in a “freeze-out” transaction
 - Preserve a proper record of the proceedings
 - Reports and analyses—whether from the committee or its financial advisors—should be carefully and thoughtfully prepared

Knowing the right approach for drafting mandates and duties and for making disclosures

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- The record of the deliberation and investigation of the special committee and its advisors should reflect careful and informed consideration of material issues
 - Counsel can help frame the agenda, review in advance the nature and contents of reports from financial advisors, and review or assist in the preparation of appropriate minutes.
- A special committee may occasionally undertake one or more formal, written reports to the entire Board regarding the transaction
 - The report may contain the committee's recommendation, a description of the process it undertook in reviewing the transaction, and a summary of the reasons for its conclusions
- Reports and analyses—whether from the committee or financial advisors—should be carefully and thoughtfully prepared
 - Many conflict transactions are subject to enhanced public disclosure of the approval process for the transaction, including the public filing of such reports as exhibits with the SEC
- Many documents (including drafts and notes) prepared by or for a special committee could be discoverable in litigation, and this should be kept in mind in connection with all written materials

Defining relationships amongst the board, management and other advisors and managing conflicts of interest

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- A special committee should be sufficiently empowered to act independently of conflicted directors, controlling stockholders and management
 - In determining director independence and disinterestedness, a Board should consider requiring its directors to disclose their compensatory, financial and business relationships, as well as any significant social or personal ties that could be expected to impair their ability to discharge their duties
- A special committee should also be empowered to:
 - Determine the timing, manner and content of its meetings
 - Deliberate in a confidential manner from management, the conflicted directors on the Board and the controlling stockholder, if any
 - Choose its own financial and legal advisors (rather than having management choose)
 - Whether the special committee should retain advisors with a previous relationship with the company is a context-specific decision

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About the Panelists...

Ida Araya-Brumskine is counsel at Davis Polk & Wardwell LLP in Washington, D.C.

Ms. Araya-Brumskine received her undergraduate degree from Eastern University and her J.D. from Yale Law School, where she was a member of the *Yale Law Journal*, the *Yale Journal on Regulation* and the *Yale Journal of International Law*. She was a judicial law clerk in the Second Circuit Court of Appeals.

Michael R. Clarke, CCEP, NACD.DC® is Vice President, Deputy General Counsel and Global Chief Compliance Officer for Convatec in Bridgewater, New Jersey. A senior executive who provides employment law guidance and ethics & compliance assurance services to business functions of the medical technology firm, he works with commercial and non-commercial functions as a resource for employment law counseling and guidance; risk mitigation in product promotion & field medical interactions; mitigation of third-party risks; and counseling on best practices in HCP interaction and patient engagement.

A Certified Compliance and Ethics Professional (CCEP), Mr. Clarke also holds the NACD (National Association of Corporate Directors) designation and is a member of the Association of Corporate Counsel and 100 Black Men of New Jersey, Inc. He served for 20 years as Executive Vice President for the latter, is a Trustee of Legal Services Foundation of Essex County and has lectured for professional organizations.

Mr. Clarke received his A.B. from Brown University and his J.D. from Cornell Law School, where he was a member of the Black Law Students Association.

Stephanie Kelly is Associate General Counsel, Securities & Governance, and Assistant Secretary at BD in Franklin Lakes, New Jersey. She has also served as Assistant General Counsel, Corporate and Commercial, for CR Bard and as an associate with Cleary Gottlieb Steen & Hamilton LLP.

Ms. Kelly received her B.A. from The George Washington University, where she was elected to *Alpha Delta Pi*, and her J.D. from Brooklyn Law School.

Amy Todd Klug is Executive Associate General Counsel, Litigation, Corporate Functions and Legal Operations at Daiichi Sankyo, Inc. in Basking Ridge, New Jersey. She is responsible for all general (non-IP) litigation and the management of legal support for the U.S. Corporate Division and an associated team of attorneys, as well as oversight and accountability for legal operations. She serves as assistant secretary for Daiichi Sankyo, Inc. and other DS group companies in the United States.

Ms. Klug is admitted to practice in New York and New Jersey. She was formerly a Life Sciences Attorney with Axiom and prior to that was a litigation associate with McCarter & English, LLP and Connell Foley LLP.

Ms. Klug received her B.A. from Georgetown University and her law degree from Emory University School of Law.

John P. Murdoch II is a Shareholder in Zager Fuchs, P.C. in Red Bank, New Jersey. He concentrates his practice in business transactions and regulatory compliance issues affecting healthcare professionals and healthcare facilities as well as business transactions for general corporate clients. He has assisted many healthcare providers and licensed facilities in complying with the HIPAA Privacy Regulations.

Admitted to practice in New Jersey and before the United States District Court for the District of New Jersey, Mr. Murdoch has been a member of the American Health Lawyers Association and the American Bar Association. He is a Past Chair of the Health and Hospital Law Section of the New Jersey State Bar Association, has served as a member of the Association's Business Entities Committee and is Secretary of the NJSBA Business Law Section. Prior to entering into the private practice of law he was Special Assistant to the Honorable Karen L. Suter, Commissioner of the New Jersey Department of Banking and Insurance, and has also been a state investigator for insurance fraud, most recently as principal investigator in the Department of Banking and Insurance Division of Anti-Fraud Compliance.

Certified by the Police Training Commission as an instructor for police academies in New Jersey, Mr. Murdoch has lectured on insurance fraud, health care fraud, HIPAA privacy regulations, HIPAA security regulations and regulatory compliance to health care professionals and business and community groups. He has also authored articles on HIPAA for the American Health Lawyers Association's *Physician Organizations* and the *New Jersey Law Journal*.

Mr. Murdoch received his B.A. from Kean University and his J.D. from Seton Hall University School of Law.