

## Resource

October 16, 2023

As a lawyer in a venture backed company, you may find yourself responsible for the creation, implementation, updating and/or tracking of your company's corporate governance programs. At a high level, Corporate Governance can be thought of as the system of policies, rules, procedures and controls by which a company is managed and directed. Many people will often think of corporate governance as a feature of publicly traded companies, but it is equally important for startups and other private companies.

A set of core elements of corporate governance – meaning, the ideas of risk management, responsibility, transparency and accountability –can be imparted across the business in order to support the interests of the company's various stakeholders and to ensure compliance with applicable laws and rules as well as the company's own specific principals, culture and sense of business integrity/ethics.

No matter what those core elements consist of, a Corporate Governance program, like most strategies pursued by companies of all types, is ultimately aimed at one underlying foundational goal: creating and preserving stockholder value.

This overview will discuss some initial high-level considerations to take into account when thinking through your company's corporate governance practices and procedures, especially in the context of the company's legal function.

## Corporate Governance Overview

While every company will have its own goals for their individual programs, the ultimate goal of a complete corporate governance program is to protect stockholder value and interests: some key features of any program with these underlying goals in mind might include the following:

- Promote Accountability
- Provide Transparency
- Establish Standards & Culture for Ethical Conduct
- Effectively Manage Risk
- Enhance the Effectiveness of the Board & Executives
- Balance Short Term Objectives with Long Term Goals & Vision

Corporate governance matters might be handled by way of documents, processes & procedures, rules, policies or directives. Certain matters may have one or more specific aims as part of the larger program, but each can work to strengthen each other corporate governance goal – for example, with respect to some topics covered below, a culture of ethical conduct can promote accountability, and accountability can promote transparency, and so on. While the company's board is the main and most influential force behind the corporate governance requirements for a company, there will often be various additional stakeholders responsible for implementation and compliance with any corporate governance programs.

The sections below will look at some of the myriad goals of corporate governance programs that you may want to consider in shaping and implementing your own policies.

## Promoting Accountability

Establishing a culture and system of accountability is a key goal of corporate governance within an organization. This covers accountability for each level of internal stakeholder, including the board of directors, executives, employees and other service providers, to ensure they act in the best interest of the company and its stockholders. Putting in place systems of accountability, including upholding expectations and consequences for breaches of the companies rules, policies and/or procedures, can help prevent instances or occurrences of misconduct, conflicts of interest, unethical behavior or other conduct that could be detrimental to the company or otherwise hurt its value to its stockholders.

## Providing Transparency

Corporate governance programs should aim to provide appropriate transparency to its stakeholders, including to its stockholders, the internal stakeholders like the board of directors, and other outside parties like government entities and interest holders like debt lenders. The programs should seek to balance levels of transparency with the confidentiality needs of the organization. The systems should cover the appropriateness, timeliness and fulsomeness of informational, financial, legal and other updates, etc., to parties who have an interest in receiving such information. Transparency can help build and promote trust and confidence in the organization, ultimately helping increase long term value for the company.

## Establish Standards & Culture for Ethical Conduct

A key goal for any corporate governance program is to create and maintain an organization-wide culture of ethical conduct. This may include a developing a code of ethics & standards of conduct, and to develop and communicate expectations around behaviors, with the intent of creating a culture of honesty and integrity, and compliance with all types and levels of rules touching the company: from applicable laws and governmental regulations; to industry standards, requirement or mandates; and any internal institutional guidelines, etc. Developing such a culture helps prevent misconduct across the organization, can promote better and more ethics-based decision making and can enhance the company's reputation across its industry – all features that can enhance the value of the company.

## Effectively Manage Risk

Successful corporate governance programs aim to identify, assess, categorize and otherwise manage risk that can negatively affect the company or impede it from achieving its goals. Comprehensive risk management programs go beyond simply trying to avoid classic legal risks (or just asking, “will we be sued?”), but seek to cover other financial, data, information and reputational risks as well. This includes developing robust risk management policies and processes, implementing internal controls and ensuring compliance with laws and regulations. Proactively managing risks in all parts of the business helps the company protect assets, limit losses and enhance shareholder value.

## Enhance the Effectiveness of the Board & Executives

The company's board is tasked with the oversight of the company's management and in this role is accountable to the company's stockholders. Then, accountable to the board, the company's top executive(s) are responsible for the actual day to day management of the company, including the corporate governance initiatives of the company. Creating a corporate governance program that aims at identifying, training,

and improving the performance of the company's board members and its key executives in their respective roles can strengthen the company's overall performance. Initiatives can include seeking out well trained, diverse and experienced potential board members, as well as providing the board with appropriate outside expertise and training: for example, bringing in outside counsel to educate them on a specific legal matter facing the company. Executives can similarly be provided ample training, coaching and development opportunities to increase performance to drive outcomes for the company. The promotion of strong top-down leadership can help better the performance across the organization as well as better uphold all other aspects of a corporate governance program, like creating a culture of integrity and compliance with standards of conduct.

## Balance Short Term Objectives with Long Term Goals & Vision

Companies focused on growth, especially those seeking hyper-growth and business relying on scale, can benefit from corporate governance program features that aim to balance the company's long term goals with its shorter term needs and strategy. Corporate governance programs are aimed at sustainable value creation for the company's stockholders, so implementing policies that support sustainable growth practices can benefit such long-term shareholder value creation. Corporate governance policies need not inhibit flexibility or hamstring operational nimbleness, but can help promote a culture of promoting balanced decision making focused on both the company's short term needs but also whether such short term strategy conflicts with or might negatively impact the long-term value creation goals of the organization.

## Key Takeaways

Corporate Governance programs seek to enhance shareholder value by implementing policies and procedures across the organization aimed at a set of core principals, including risk management, responsibility, transparency and accountability. Implementing these policies will often fall under the purview of the in-house legal team, though everyone in the company will be responsible to uphold the standards the program seeks to achieve. Your Gunderson team can assist with a wide range of corporate governance issues, from planning, to drafting policies and guidelines, to implementing rules and programs. Reach out to your Gunderson attorneys to discuss reviewing, updating or enhancing your core corporate governance programs.

## The Board of Directors

In-house lawyers are often tasked with assisting the company's CEO and other executives with managing and liaising with the company's board of directors. This can

seem like both a big opportunity to make a large impact on the company, as well as a relatively big challenge, especially for attorneys new to the venture capital space.

But what does “managing the board” mean?

It’s often unclear with this responsibility will entail and the expectations can be wide-ranging: from advising the board on corporate issues all the way down to literally “managing” the calls and meetings – setting up video conferences, reserving meeting rooms, and even the occasional lunch order.

But assuming you can handle any of the administrative items (which may fall to you just because the company doesn’t want to give *just anyone* access to board), what might fall into the category of “board management” that can help have an efficiently operating board of directors with solid hygiene and better still, bolster your company’s overall corporate governance program?

Below are some items to consider when thinking about how to implement corporate governance concepts into your company’s board protocols and processes.

## Record Keeping

Of all of the important concepts involved with having good board hygiene, record keeping and document management are among the most critical. Having all of the relevant board materials be accurate, organized, secure and accessible to board members should be a priority. A few tips and suggestions if you find yourself responsible for the company’s board documents:

**Consider a dedicated record keeping system:** You should consider using a dedicated document management system or platform solely for purposes of your board’s documents. Whether this be a specific section of your company’s existing document management platform that can be secured so only you and any other appropriate employees have access, or a completely different system separate from the rest of the company’s documents, you’ll want to make sure that you can secure these records, as often the content is highly confidential.

**Know (and communicate) which actions require approval:** Creating a clean corporate record of board level approvals for actions taken by the company is important for both internal purposes, as a part of a robust corporate governance program, as well as for your current and potential investors, who’ll want to be sure that the board has acted in compliance with their obligations under the DGCL. But not all corporate actions the company takes will need to be approved by the board. In addition, which corporate actions rise to the level of requiring “board approval” is not necessarily the same for every company: while some approvals are called for by the



DGCL, others sit in a company's governing documents like its charter or bylaws, or even the company's investor agreements. Getting your hands around this list of board-level approval requirements will be an important part of the board management process: both to keep an accurate record book, and also make sure to manage expectations with the board on what and when they will be asked to approved certain items. An overview of corporate actions requiring board approval can be reviewed below.

**Learn how to keep good minutes:** As the company's in-house lawyer, your role may often include "corporate secretary," even if informally. This means you may be expected to take notes on the board's meetings and be responsible for the corporate record book. If you don't have experience in this area, knowing what to include can be a steep learning curve, as you'll want to be appropriately detailed to accurately reflect the meeting, while keeping an eye on confidentiality, as minutes are often requested in diligence and other situation to be reviewed by third parties. Reach out to your Gunderson team, as we have extensive experience in minute keeping and can help you craft high quality sets of minutes from your meetings. But more importantly – have your Gunderson attorney attend the meetings directly, and we can keep the minutes so you don't have to. This can add an important layer of protection for the company's board to have its outside counsel involved, and for you as the lawyer to have the assurance of a second set of eyes.

**Know which records matter:** It may seem obvious that a set of minutes from a board meeting should be saved and organized in the board files, but what else needs to be documented? You should take time to review the company's process with respect to documents used at board meetings or that are sent to board members to get a sense of the whole universe of what constitutes "board materials" for your company. At a minimum, any decks, presentations, documents or other materials sent in advance or as a follow up to a meeting, or in connection with a request for approvals of actions, should be saved and organized. But further, things like calendar invites might be important in the event of a schedule dispute, and emails with follow ups or answering members' questions can be important for the record as well. Keep an eye on everything that goes to, or is received from, directors in their capacity as board members.

**Track everything:** While record keeping is discussed above, keeping good minutes and records of approvals and materials should likely represent a base-line of the board level information that is kept and tracked. All formal board communications, while confidential, should be tracked appropriately in case questions arise on if and when certain information was made available to the board. You also might track any notices or invites to board meetings, thereby tracking compliance with statutory laws

governing duly noticing meetings. If directors will not attend meetings, the company should have a form of waiver for that meeting that it can send and collect to avoid any notice issues. You may also consider employing your email server's delivery tracking functions (like "read" and/or "receipt" tracking), in order to eliminate questions on when and if a particular board member was sent information or materials and that it was sent to the correct email address.

## Create Consistency

Whether you're organizing a video conference, asking for the approval of the last meeting's minutes, or calling an emergency board meeting, don't overlook the benefits of maintaining a consistent approach to managing the board. Consistency in communications, in process and in documentation all work to help organize individual matters, help increase efficiency, and can help the entire board process look and feel professional.

Two key areas where you might find yourself responsible for managing the board where an approach focused on consistency is useful is in preparing for, and running, individual board meetings.

**Develop a communication cadence:** When sending records, materials or any other communications to the board, especially in advance of (or following up to) each meeting, you should keep consistency in mind. A defined cadence with predictable, known timelines not only can help you and the company remain organized and on task to prepare for meetings, but can help board members know when and how to expect to receive materials.

For example, if you have quarterly board meetings, determine how far in advance you'd like to send drafts of the board deck and any proposed resolutions that you might be asking the board to approve. You can use these cadences as internal deadlines to manage any of your team members responsible for preparing any portions of the decks, other board materials and needed approvals in advance of the meeting. A defined cadence can be helpful to keep all relevant internal parties on track.

Working in parallel to keeping the company on track, the board members themselves will also know when to expect to receive materials in advance of the meeting. This can allow them to set aside appropriate time to review all necessary materials, and simply to know that these materials are important to the meeting, and not "skip" over them while attending to other matters. You might also consider keeping the tone, style and messenger consistent as well –if you generally send an email from your

company email, your board members may expect to see board materials continue to come from you in the future, and may miss an email from, say, your CFO.

**Create a reusable meeting agenda:** Don't overlook the important of developing a reusable agenda format for your board meetings, which is shared with the attendees in advance. You should consider allocating period of time to each agenda item, to keep the pacing of the meeting on track to try your best to cover all relevant agenda items. This can help make sure items of highest importance are given appropriate time coverage, and that items are not missed inadvertently.

Having a set, predictable plan for the operation of a board meeting can serve many purposes, not the least of which is making the entire meeting look and feel more organized and professional. Some other important uses of an agenda for a meeting include:

- Orienting the Board to the topics that will be discussed, allowing them to prepare in advance;
- Keeping the discussion on track – avoiding rabbit holes and immaterial side discussions;
- Providing a consistent framework from meeting to meeting;
- Allowing for appropriate time scheduling, for example:
  - If an outside resource (like a legal specialist) is required, allowing them to join for the appropriate portion(s) of the meeting
  - If the company expects to exclude any attendees, for example, during an executive session, those attendees can schedule appropriately; and
- Creates space (often at the beginning of the meetings) to accomplish important but less interesting board level work, like recurring standard approvals and high level updates.

The use of an effective and organized agenda can significantly improve the effectiveness of a board meeting. Your Gunderson team has extensive experience attending board meetings and can help you prepare an agenda for your meetings that fits your specific needs and circumstances. And of course, if Gunderson is attending your meetings, can help keep the board members on track and on topic in accordance with the agenda.

## Understand Board Dynamics



The Delaware General Corporate Law does not create or specify any differences in the powers and/or authority of one board over another. In general, each member has the same fiduciary responsibility, rights, and voting powers (unless voting arrangements are agreed otherwise in the company's governing documents).

However, that doesn't mean that in practice every board member takes on similar roles and approaches to their service as a board member. Understanding your own board and its members' dynamics, and managing those dynamics effectively, can be an important feature of a well-run board with productive board meetings.

For instance, some members may take a more vocal and front facing role, raising questions and issues, leading conversations, requesting and/or suggesting topics for discussion and even helping set the board's calendar. This can be useful to spark discussion and thoughtful interaction, however, if it goes so far as to drown out other voices, you may need to determine the best way create space for all voices to be heard.

Other members may choose to take a more passive role. They may prefer observing the meetings and only participating briefly or momentarily, and to have certain discussions or receive certain information in advance or via sidebar conversation.

While certainly sidebar conversations can be critical to deeper dives on topics and understanding certain information, if those thoughts are not presented to the whole board, or a members' concerns go unraised, it can rob the board of important input and border on failing to meet a fiduciary duty of care. You may need to determine the best way to prompt certain board members for more participation through direct questions, even giving them floor to the explicitly.

These considerations can be very delicate and trying to manage personalities and preferences, especially in groups (and especially when, ultimately, you report in one way or another to that group). Having a good meeting facilitator, whether that be the CEO, a board "chair," or other experienced board member, can be integral in keeping meetings on task, and making sure all parties are heard. Your Gunderson team is always happy to speak with you on strategies for managing board-level dynamics and providing assistance in running board meetings. We can draw on a wealth of experience from participating in board meetings and advising boards of all shapes, sized and experience levels, with all manners of interpersonal dynamics both good and bad.

## Avoid Surprises

Productive board conversation, especially at board meetings, where candor and transparency –on behalf of all board members and anyone participating to present

information to board –are valued and encouraged, is an important part of a well-functioning and trusting board, as well as a factor in the effectiveness of the company's overall corporate governance program.

One simple way to potentially derail the board's productivity is to surprise the board or catch them off guard when they are trying to do the work of overseeing the company. Whether that's in the form of a last minute request for an approval, a change to a proposed budget, holding back certain information relevant to a sensitive discussion until the last minute, or even just changing agenda items without notice, surprises are generally not a great way to run board meetings.

While it won't always be the case that you and your company might know how a board might decide to ultimately land on a particular issue, or what the content of the discussion might be, it can generally be the case that the company and the board members should know the topics to be presented at each meeting in advance and will have conveyed those topics (and any supporting materials) to the full board appropriately. Using an agenda, as described above, can support a practice of making sure the full board is aware of all topics that will be discussed, and gives them each a chance to reach out to the company in advance to ask any questions. One of the easiest ways to fail to get an approval from your board is to ask for an approval that the board wasn't expecting. Even if the approval is for a great idea, board members may object to not having had the time afforded to properly evaluate the request.

In many cases, your company may want to discuss certain planned agenda items, especially big ticket items like financings and budgeting, prior to a board meeting by creating time to speak with each board member in advance. Surprises taking the form of a "no" vote when the company was expecting a "yes" can also derail a board meeting, as time might be spent trying to rework proposals in real time. Having received feedback from directors in advance of asking for their formal approval (including by raising bigger ticket items in a meeting setting prior to the date the company may seek approval) can save the company time and resources by having addressed any issues that might prevent a director from being supportive of the company's plans.

Take care to always treat all of the board members equally, giving each the same opportunity to hear all positions, receive all information, and have similar opportunities to address the board or the company directly. The appearance of favoritism by the company and its executives --especially when conversations are held in advance, say, if "sidebars" are employed by the CEO and one or a small subset of board members – that is observed by board members may often lead to the

other board members feeling slighted, or worse, cut out intentionally, if they feel they've been given unequal access to information or a chance at a discussion. Learning that others have communicated on an issue in advance or had access to information, or a feeling of being "bulldozed" when others have already come to a conclusion, can lead to internal conflicts that can prevent the board from staying focused and completing their work.

## Gunderson Dettmer at your Board Meetings

Board hygiene and effectiveness is an important part of any corporate governance regime, including with venture backed companies –and especially when a venture backed company's board includes members elected by VC Firms. As such, best practices around meetings, approvals, and other board-related matters should be a priority for venture backed companies.

Your Gunderson team is available to assist you in all facets of effectively communicating with and managing your board, including: preparing or reviewing strategy and materials/decks for meetings; drafting surrounding documentation or proposals to be presented to the board; drafting or reviewing meeting minutes; and preparing and managing any follow up documentation, like consents or approval documents. When necessary, we can also answer specific questions from board members on a private basis as well, as we're always available to speak with the board and its members in our role as the company's counsel.

Most importantly, your Gunderson attorneys are available to attend you Board meetings (both in-person and tele- or video- conferences) to assist the company with running meetings, answering legal questions that arise in real time, taking meeting minutes, and handling the process for calling for votes and approvals. Attending these meetings is an excellent way for the company and Gunderson to be on the same page and up to speed with current issues and events surrounding the company. We don't charge you for the attorney time spent attending board calls or board meetings, so you can feel comfortable having us attend without needing to think about cost. We highly recommend taking advantage of this part of our services whenever you're planning your board meetings.

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