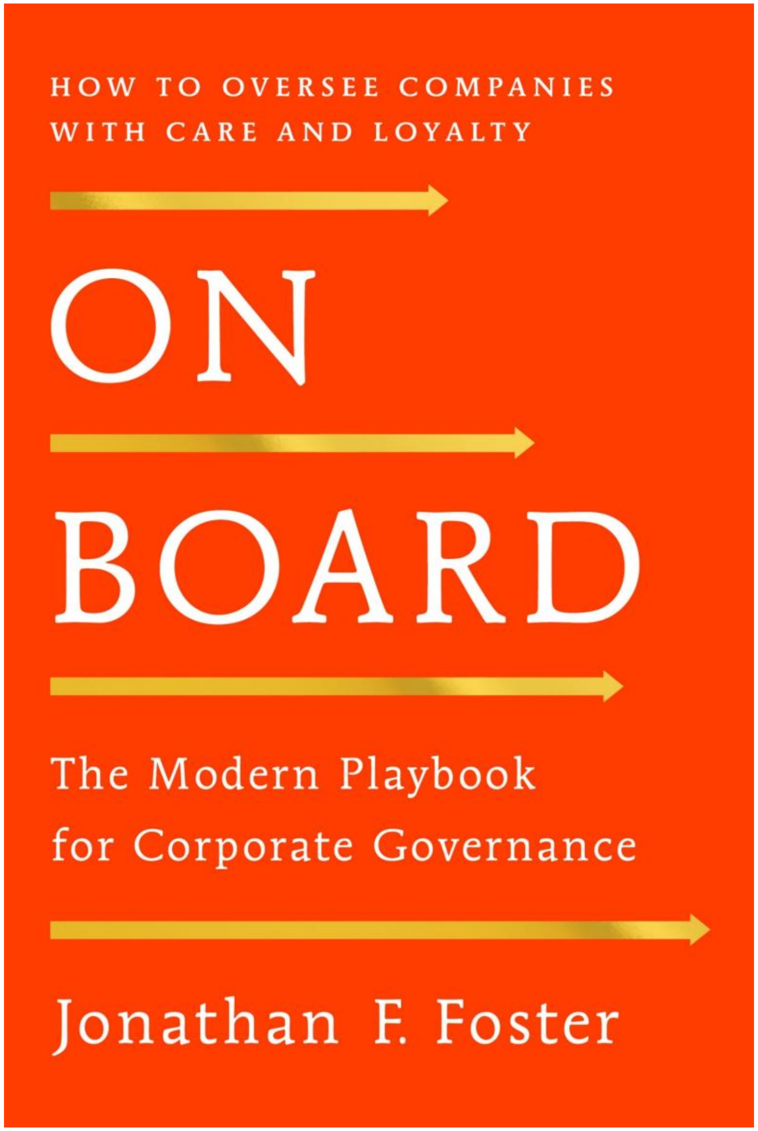

Mayer Brown

The Major Components of Good Governance and Certain Current Issues

October 2025

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CURRENT CAPITAL PARTNERS

Agenda

1. Oversight not Management
2. A Director’s Key Duties
3. The Importance of Board Make-up
4. Board Leadership
5. Communications with the CEO
6. Selected Current Issues: #1 - Institutional Investors
7. Selected Current Issues: #2 - Activism
8. Selected Current Issues: #3 – Restructuring
9. Selected Current Issues: #4 – Environmental, Social and Governance
10. Takeaways

2 Oversight versus Management

Directors Oversee but They Do Not Manage Day-to-Day

- Directors should have “Fingers in, Noses Out” - management manages
- Each director spends maybe 200 hours per year, executives over 2,000
- Violating this can cause real problems, including your board seat
  - Four situations where asked directors to leave

What do Directors Oversee?

- What do Directors Oversee?
  - Management
    - CEO: hire, evaluate, compensate, succession / replace; “C-Level”
  - Strategy and Capital Allocation
    - Question, challenge, and ultimately approve Strategy
    - Capital Allocation – for acquisitions, debt, dividends, repurchases
  - Financial Controls, Financial Statements, Investor Call Presentations, Risk, and Compliance
    - Review and question; ultimately approve SEC Filings

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A Director's Key Duties

Duty of Care

- From the 1985 Delaware Supreme Court *Van Gorkom* Case
- Requires directors to make informed decisions by reviewing relevant materials, asking questions and reaching an informed decision
- Peter McCausland, former CEO of Airgas: "You have to have the courage to speak up…and not take the next step until we have more information"

Duty of Loyalty

- From the 1939 Delaware Supreme Court *Guth v Loft* Case
- Requires each director to act in the best interests of the company and its shareholders, not oneself

3 The Importance of Board Make-Up

What Attributes Does a Board Need?

- Skills matrix
- “Best athlete”
- All directors have equal votes and responsibilities

But… Where Does the Company Find Itself?

- Fast growing?
- Mature?
- Over leveraged?

And… What is the Nature of the Board?

- Open to all views?
- Have to be assertive to be heard?
- Need a certain stature to be effective?

4 **Board Leadership**

Chairman

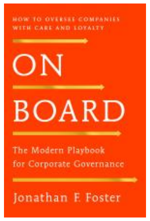
- Should the CEO be the Chair?
- Sends a clear message
- But are different roles; if so, Chair "reports to himself" in some way

Non-Executive Chair

- Increasing trend: ~ 50% of the S&P 500 and prevalent in numerous countries
- Clear differentiation between execution and oversight
- Helps challenge management thinking

Lead Independent Director

- Developed by Harvard Business Professor Lorch and Wachtell's Marty Lipton in 1992
- Many argue helpful to have one leader (CEO / Chair) but some independent board leadership
- Is it substantive and respected?



5 Communications with the CEO

The Role of the CEO

- The CEO is critical to company performance, responsible for setting a clear vision, leading execution, and navigating unexpected challenges with integrity and transparency
- CEO succession is among the board's most important responsibilities, requiring ongoing evaluation, development, and planning to ensure strong leadership continuity
- *A great CEO articulates and drives a thoughtful, long-term strategic vision, leads and motivates a high-performing team, acts with integrity and communicates openly, and works collaboratively with the board, senior leaders, shareholders, and other stakeholders*

The CEO Relationship with the Board

- The board leader (e.g., Chair or Lead Independent Director) is the primary liaison between the CEO and the board
- All directors should maintain regular engagement with the CEO—not just during board meetings but also through one-on-one conversations and strategic discussions
- CEOs should actively draw on directors' expertise
- Best practice: The CEO should touch base individually with each director a few times per year to strengthen relationships and solicit feedback

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Selected Issues: #1 - Institutional Investors

Overview of Institutional Investors

- Institutional investors include banks, credit unions, pension funds, insurance companies, private equity firms, hedge funds, mutual funds, and real estate investment trusts (REITs)
- Active managers (e.g., private equity firms, hedge funds) make selective investment decisions, while index funds invest broadly and passively

Rise in Institutional Ownership and Growth of Indexing

- Institutional ownership of U.S. stocks has grown from 6% in 1950 to over 80% today; in 2022, Vanguard held >15% in 20 S&P 500 companies and was the largest shareholder in 330 of them.
- The rise of indexing, pioneered by Vanguard in 1976 with an $11M fund (now $9T AUM), has been driven by lower transaction costs and generally higher risk-adjusted returns
- Today's equity markets are dominated by the "Big Three" index managers: BlackRock, State Street, and Vanguard – and Fidelity that has passive and active funds

Governance Influence

- The leading proxy or governance advisory firms ISS and Glass Lewis advise institutional investors on shareholder votes
- Public companies should must understand their institutional investors' policies and have dialogue with them

7 Selected Issues: #2 - Activism

Activists as Shareholders

- Activists are simply shareholders – albeit often louder and more assertive
- Likely not an issue if focused on long-term shareholder creation
- Engage constructively, do not dismiss

Board vs. Activist Perspectives

- Activists manage a portfolio and should be evaluated on overall returns. A company's Board and management are focused on just one company. This can lead to a shorter-term focus and willingness to take more risk taking by activists
- Directors should periodically think as an activist would – but not necessarily act in this way

3 Selected Issues: #3 - Restructuring

In Court (Chapter 11 / 7) v Out of Court (Liability Management Exercise)

- Going concern: Chapter 11/ LME – Financial and operational restructuring
- Liquidation: Chapter 7
- Out of court faster, less expensive and less disruptive to employees, suppliers, customers, etc.

Major Issues for Directors

- Very similar role as with non distressed companies but court involved with a Chapter 11 / 7
- Seek to maximize value to stakeholders, and that value distributed per the waterfall of priorities
- Owe fiduciary duties solely to the corporation and its stockholders

Independent Directors

- Bring specialized experience
- Help avoid conflicts of interest – maintain business judgment
- Often investigate whether estate has potential claim(s) against one or more parties

8 Selected Issues: #4 - ESG

The ESG Backlash and Evolving Terminology

- Thought leader consultant John Elkington first coined "triple bottom line" in 1994, and a 2004 United Nations report signed onto by leading global financial institutions first called for the use of "environmental, social and governance principles and policies"
- Of course, ESG has faced increasing pushback over the past few years
- Many companies and investors remain committed to ESG goals, even as they move away from the ESG label

Reframing ESG: Value Creation, Not Value Reallocation

- ESG is not necessarily a zero-sum shift from shareholders to stakeholders.
- Daniel Slifkin, a Cravath partner, illustrates with Paul O'Neill, former CEO of Alcoa:
  - "O'Neill's safety-first focus improved workforce morale and productivity" – creating value, not redistributing it

Quieting the ESG Conversation, Not the Effort

- Some companies are scaling back public ESG initiatives
  - Yet many recognize ESG creates long-term shareholder value
  - Green-hushing*:* Less public messaging but continued focus on ESG issues

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Take Aways

- Governance is very important for any organization
- Boards oversee but senior executives manage:
    - Oversee management; corporate strategy and capital allocation; and financial statements, controls, compliance and risk
- The duties of care and loyalty are paramount for directors
- Board leadership is critical
- The maximization of long-term shareholder value is the objective for most boards

For more, go to www.jonathanffoster.com

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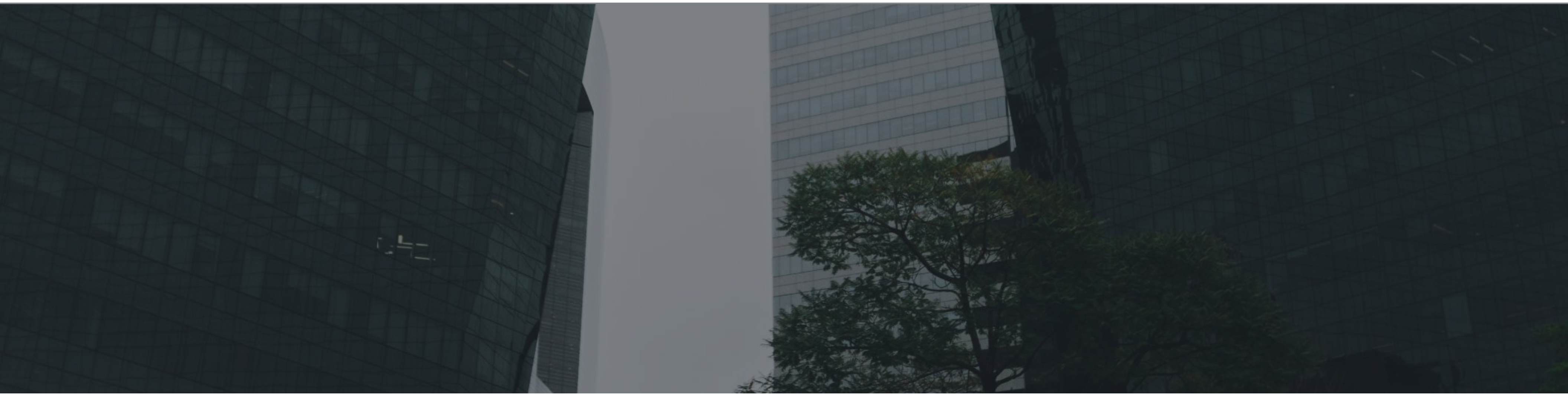

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