

CONDITIONS OF VACUOUS VOTING IN THE BOARDROOM

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Abstract

The issue of U.S. corporate governance has been approached as a management structure without regard for the non-hierarchical oversight qualities that are embedded in the legal foundation of its birth. This paper reviews the: (1) U.S. federal Model Business Corporation that unifies the individual state corporate enabling statutes; and (2) The Delaware General Corporation Law that applies to over half of the U.S. Fortune 500 companies and posits the structure of U.S. corporate governance is non-hierarchical, though practiced hierarchically. Further, it is not always the *full board* that creates board action, and asymmetrical communication and asymmetrical member action create the conditions for vacuous voting.

Keywords: Corporate Governance, Vacuous voting, All Powers Model, Oversight, Governymity, Governequity

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Introduction

The Sarbanes-Oxley Act of 2002 (SOX) changed the requirements for transparency and financial disclosure for the U.S. CEOs and CFOs (The Act, 2002). However, it remained too silent concerning the obligation for director-to-director transparency and for the transaction of business by the entire board as a remedy to vacuous voting occurring due to excessive delegation to or action by: the Chair, individual director(s), and/or autonomous committees.

Personal research of Fortune 1000 boards indicates that directors clearly appreciate the movement away from a perfunctory role (Andert, 2003). Yet, there will continue to be structural and control/power issues plaguing U.S. and non-U.S. directorship excellence simply due to the absence of commonly-practiced member-inclusive board structure that prescribes how boards exercise their collective power and control over the organization to the best advantage of the shareholders. This paper reviews the U.S. federal unifying Model Business Corporation Act (MBCA) and the state of Delaware's law supporting corporations and posits that the structure of U.S. corporate governance is non-hierarchical and egalitarian in nature. Further, that management science has ignored this reality due to the traditional practice of scalar chains and pyramidal management.

This paper further addresses the need for synergistic excellence, defined as the *whole Board* performing en masse during a meeting or (without a meeting) through a fully-member signed consent decree; and the need for boards to understand the foundation of board work. Referencing the U.S. Model Business Corporation Act (MBCA) (on-line reference offered) and the Delaware General Business Law Acts (on-line reference offered), and reviewed below, actions by individual board members or committees should occur ONLY as the result of specifically and purposefully delegated authority, authenticated by corporate documents (e.g. corporate by-laws) or meeting minutes. Further, individual board member(s) or committee(s) action should not deny or negate the voting rights granted to each board member: or negate the directors' ability to fulfill the fiduciary responsible to the shareholders and the organization as a whole. Delegation that corrupts knowledge symmetry is the catalyst for vacuous voting.

The **egalitarian board structure**, to be fully explored in this paper, provides directors equal voting opportunities on issues that appear before the boardroom. Yet most executives, including members of boards of directors, have risen through the ranks of a *chain of command* management structure that sanctions veto powers by an overseer. It is natural for directors to see the Board Chair as holding veto powers or an imaginary vote-and-a-half. It is equally

likely that members of the boards of directors have risen through the ranks by utilizing proactive delegations to subordinates. The key word is “proactive” delegation, as it is less likely that *passive* delegation supported a rise to the top of any organization by any senior executive. Equally true, is the idea that *passive* delegation of board work to autonomous committees or the chair is NOT the mark of excellent board work.

Review of the Legal Foundations of Governance

Two U.S. documents establish a **one-director one-vote** or an **egalitarian structure** as the basis for board work. The first document is the Model Business Corporation Act (MBCA), which serves as the foundation for most corporate law courses; and provides unifying depth to individually authored state business statutes. The second document is the Delaware General Corporate Law that applies to over half of the U.S. Fortune 500 companies who have elected to be chartered in the state of Delaware.

The Delaware General Corporation Law states:
*A majority of the total number of directors shall constitute a quorum for the transaction of business unless the certificate of incorporation or the bylaws require a greater number. Unless the certificate of incorporation provides otherwise, the bylaws may provide that a number less than a majority shall constitute a quorum which in no case shall be less than 1/3 of the total number of directors except that when a board of 1 director is authorized under this section, then 1 director shall constitute a quorum. **The vote of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors unless the certificate of incorporation or the bylaws shall require a vote of a greater number** (bolding added for emphasis).*

The Delaware General Corporation Law further states, that in the absence of a meeting:

*(f) Unless otherwise restricted by the certificate of incorporation or bylaws, any action required or permitted to be taken at any meeting of the board of directors or of any committee thereof may be taken without a meeting if **all members of the board** or committee, as the case may be, consent thereto in writing, or by electronic transmission and the writing or writings or electronic transmission or transmissions are filed with the minutes of proceedings of the board, or committee. Such filing shall be in paper form if the minutes are maintained in paper form and shall be in electronic form if the minutes are maintained in electronic form (bolding added for emphasis).*

The Model Business Corporation Act (MBCA), subchapter “A” titled “Board of Directors” - §8.01 titled “Requirements of and Duties for the Board of Directors” (b) states:

All corporate powers shall be exercised by or under the authority of, and the business affairs of the corporation managed by or under the direction of, its board of

directors, subject to any limitations set forth in the articles of incorporation or in an agreement authorized under section 7.32 (titled “Shareholder Agreements”) (bolding added for emphasis).

Further, the MBCA further addresses “Actions without Meetings” in §8.21 and states:

(a) Except to the extent that the articles of incorporation or bylaws require the action be taken by the board of directors at a meeting, action required or permitted by this Act to be taken by the board of directors may be taken without a meeting if each director signs a consent describing the action to be taken and delivers it to the corporation.

*(b) Action taken under this section is the act of the board of directors when one or more consents **signed by all directors** (bolding added for emphasis) are delivered to the corporation. The consent may specify the time at which the action taken is to be effective. A director’s consent may be withdrawn by revocation signed by the director and delivered to the corporation prior to delivery to the corporation of unrevoked written consents signed by all directors.*

(c) A consent signed under this section has the effect of action of the board of directors and may be described as such in any document (bolding added for emphasis).

Vacuous Voting

Monthly or even quarterly meeting schedules challenge board activity timetables and may even cause agendas to become cumbersome. The response can be for boards of directors to delegate work to committees or rely on autonomous chairs to manage the decisions of the board. Yet, the MBCA and Delaware General Corporation Law give rise to the easy and logical conclusion that *all powers* rest with the *full board* whose basic structure is egalitarian granting directors’ equal opportunity to express individual voting rights. All board members’ votes are protected (e.g. meeting notice) and cannot be officiously denied.

Board members should be anxious if the chair or autonomous committees exercise veto power over the board or takes any action that unwittingly or obligatorily decays the authority of the board or limits full-board debate on voting issues. If the corporate bylaws indicate the utilization of Roberts Rules (on-line reference offered) as the meeting process protocol that further places restrictions on the Chair to remain a neutral organizer of the Board’s debate-based meetings. Yet, this egalitarian concept is foreign to standard board structures and processes and thus directors may not experience its full implications and application to the balance for board actions. The simple reality is that passive delegation by the board and the resultant information asymmetry results in **vacuous voting** in the boardroom, which is the precursor to what I will call **governymity** (Andert, 2006) when actions offered in the boardroom are free of origination identification, lack

the instinctive features of the full-board intent and blend into the agenda with a level of secrecy, obscurity, concealment, inconspicuousness and facelessness. These agenda items drive board members to votes that lack attention, concentrated research or serious thought, ignoring the standards of “due care.” These agenda items may lack content or substance and the speed to decision-making may be the only redeeming quality – passing only due to vacuous voting.

Early studies indicate that vacuous voting is the problematic phenomena of group work. In 1972, Janis addressed the failed Bay of Pigs event during the Kennedy administration and coined the term “group think” to describe the impact of peer loyalty overriding basic instincts towards sound decision-making. Hambrick and Mason (1994) state, “Janis (1972) argued that homogeneity ... manifested in cohesiveness and insularity, leads to inferior decision making” (p. 17). Cook, Salas, Cannon-Bowers and Stout (2000) offer that “the growing complexity of tasks frequently surpass the cognitive capabilities of individuals and thus, necessitate a team approach”, supporting the need for full-board involvement to enlighten board voting (p. 3). Another side-benefit of debate-based and rigorous communication symmetry is that “peer effects work in the direction of making the least productive individuals work harder, thereby increasing overall productivity” (Falk, Armin and Ichino, Andrea, 2003, p. 1). Full board communication and knowledge asymmetry combats vacuous voting and strengthens the knowledge base of ALL board members bringing the less-knowledgeable member to a higher voting standard. This synergy is valuable to all members of the board.

Boards are closed systems yet powerful. Adherence to an egalitarian board structure balances information symmetry and locates power and control to the collective whole. Individual director’s vacuous

votes occur then by self-infliction of poor preparation, which can be remedied by peer pressure norms of excellence. In this new paradigm, boards eliminate the use of hierarchical structures leveling power and control to the full table, not autonomous committees or chairs. What also obfuscates the practice of solid corporate governance is the absence of transparency between board members in the exercise of ALL POWERS BY THE FULL BOARD. It is equally important for directors to openly communicate about matters before the board and to avoid burying the real work of the board in autonomous committees. Prudent Boards embrace rigorous boardroom debate and these boards also omit the public domain as a forum for redress. Directors can and do impact the marketplace. Opposing views of potential or completed board action are best reserved for active boardroom debate. When offered externally, such comments may devalue the organization, deplete market goodwill and lessen shareholders’ value and confidence, or generate the imbroglgio recently experienced by Hewlett-Packard.

A Model for Corporate Governance

Personal research (Andert, 2003) findings indicate that the average U.S. Board of directors has 11.6 members. Though research varies on what constitutes the appropriate working group size, researchers offer seven to twelve as the best size for a working collective (...). The conclusion is that most U.S. boards are appropriately sized for the purpose of conducting work. However, according to the MBCA and the Delaware General Corporation Law board size is not the issue, it is board structure. A universal structural model for corporate governance is offered below (Andert, 2003):

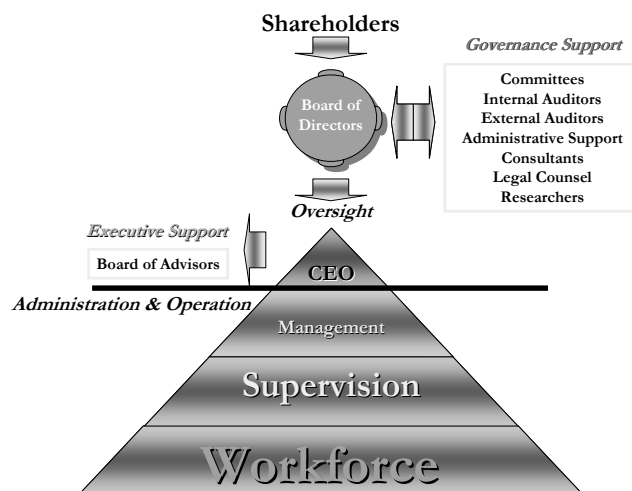


Figure 1. Andert Model for Information Symmetry and Member Autonomy

(Andert, 2006)

The prescriptive structural model for U.S. corporate governance (Andert, 2003) offers the following structural elements:

- Locus of power and control vested in the **full board** as a separate entity from the CEO or operational side of the organization
- Diminished committee utilization for topic research due to full and direct Boards access to an internal auditor, administrative support (with Shareholders Services as one possible location), consultants (in a variety of fields), legal advice representing the board, researchers and research information, compliance officer and the internal and external auditors.
- A **CEO Board of Advisors** to address interlocking and operational requirements of the firm and to support CEO succession for the Board of Directors. Board members receiving remuneration as a needed consultant to the firm may find that repositioning on the Advisory Board lessens that conflict of interest while allowing these external consultants to exclusively serve the organization. The Advisory Board also provides for: (1) external talent to support CEO and corporate development, (2) interlocking related corporations and operational requirements, and (3) a comprehensive training and development platform for director succession.

Conclusion

The ALL POWERS model acknowledges that *the action of one director impacts the actions of the whole*. Ignorance, willfulness, personal agendas and ego do not serve the shareholders and distort the ultimate value of board work. Lack of transparency between directors and incomplete debate is also not destined to serve shareholders well. Excessive delegation weakens the quality and completeness of board action.

Individual board member differences should create the foundation for solid fact-finding and the corresponding rigorous debate that informs the decisions of the board. The new paradigm of corporate governance embraces the collective power of the **whole board** to enact action that expands the expertise and knowledge of any one director. The ALL POWERS- DUE PROCESS model for the

practice of *Governequity* corporate governance better serves directors' needs, shareholders needs and the markets as a whole. *Governymity*, defined as governance free from identification, conducted by the unnamed few, lacks the transparency and vehemence demanded by the new paradigm of corporate governance professionalism – *Governequity* is the new paradigm.

References

1. Andert, D. (2003). An analysis of the changing roles of corporate governance regarding the awareness, valuing, and utilization of human resource development trends at the board of directors' level of an organization: A descriptive, exploratory analysis. UMI Dissertation.
2. Andert, D. M. (2006). The 2006 Andert Governance Digest: Focus on US Corporate Governance. Unpublished report. Retrieved on 12/15/2006. From www.andertgovernance.com.
3. Charan, R. (2005). Boards that Deliver: Advancing Corporate Governance from Compliance to Competitive Advantage. San Francisco, Ca. Jossey-Bass.
4. Cooke, N. J., Salas, E., Cannon-Bowers, J. A., & Stout, R. (2000). Measuring team knowledge. *Human Factors*, 42, 151-173.
5. Delaware General Corporation Law. Retrieved on September 20, 2006. From: <http://www.delcode.state.de.us/title8/c001/sc04/index.htm#TopOfPage>
7. Falk, A. and Ichino, A., (2003). Clean Evidence on Peer Pressure, IZA Discussion Papers 732, Institute for the Study of Labor (IZA). Retrieved on January 19, 2007, from <http://www.iew.unizh.ch/wp/iewwp144.pdf>
8. Hambrick, D.C. and Mason, P.A. (1984). Upper Echelons: The Organization as a Reflection of its Top Managers. *Academy of Management Review* 9: 195-206.
9. Masters, B. (12/27/2006). Spitzer hits out at any roll-back of reforms. *Financial Times*.
10. Model Business Corporation Act. Retrieved on September 20, 2006. From: <http://www.abanet.org/buslaw/library/onlinepublications/mbca2002.pdf#search=%22the%20model%20business%20corporation%20act%22>