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Corporate Governance

## Observations on the Current Corporate Governance Environment

**Legal Update**

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By John H. Stout

Corporate governance remains a key topic for corporations and their boards of directors, with board composition, shareholder activism and director accountability topping the list of issues.

A few observations about the current governance environment:

- *Board Composition.* Board composition remains the #1 governance subject. Everything starts with who's on the Board: the company's culture; the leadership of the Board and its committees; the selection, evaluation, compensation and sometimes change of the CEO, etc.
- *Increasing Shareholder Activism.* Board composition is also related to increasing shareholder activism—I don't mean that negatively—but there's no question shareholders want more engagement with directors—it's incumbent on directors and the CEO to team on a strategy of productive shareholder engagement—and this is not just a public company issue—it's very much a subject for the private companies, particularly with respect to companies where private equity funds comprise a significant part of the shareholders base.
- *Director Accountability.* Director accountability has always been an issue but we're seeing more examples of director misconduct in the boardroom—directors pursuing their own agendas—sometimes interfering with the Board's ability to perform its fiduciary duties; sometimes breaching Board and company policies. I have created an ABA Corporate Governance Committee Task Force to address this issue and identify tools boards may consider using when this issue arises.
- *The Rise of Benefit Corporations.* We don't yet offer this type of corporation in Minnesota, but 24 states do and many are in the process of introducing them—we'll have B corps in Minnesota within a year or so—and these will offer new challenges for directors.

B corps are part of a broader movement in America which reflects the sentiment that corporations are not just in business to maximize shareholder value—there are broader stakeholder and social concerns that also need to be on the for profit

corporate agenda.

- *Political Dysfunction.* Lastly, we have serious political dysfunction that is affecting how corporations plan and conduct their business:
- We'll leave out the issue of increasingly burdensome regulation.
- Today it's about an executive and legislative branch of the national government that sees compromise as weakness and a negative in the next election—it's about parties obsessed with positioning for the next election and requiring that the candidates they support vote the party line regardless of whether the party's position is in the best interests of the country, it's about individual representatives who place their own agendas and the interests of those who funded their campaigns above the best interests of the country—in the private sector we know that the duties of loyalty require that directors set aside their personal agendas and the agendas of those who appointed or elected them, and place the interests of the company first—it should be the same with the elected representatives who are the directors of USA Inc.
- We have a national political environment that compromises the economic recovery, and the recovery of other economies in the world, the credibility as a world leader, and the country's credit rating, resulting in uncertainty among consumers and business leaders alike, domestically and internationally. We need businesses and business leaders to get involved and help effect a course correction—and we the people must go to the polls to elect representatives who place the interests of the United States of America above all of their other interests.