

Chair White Speaks on Director and Shareholder Engagement as Part of What Directors Should Know About the SEC

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Among the usual exhortations regarding directors' responsibilities for setting the correct "tone at the top" and establishing a strong compliance culture in Chair White's [recent speech](#) on what directors should know about the SEC, she also made recommendations pertaining to directors' role in shareholder engagement and shareholder proposals.

The role of directors as "essential gatekeepers upon whom...investors, and frankly, the SEC rely" was emphasized several times by Chair White, given directors' fiduciary responsibilities that require them to oversee the company. She stated that directors need to understand the company's business model, associated risks, financial condition, industry and competitors, and not only listen to what senior managers say but "also listen for the things they are not saying."

Chair White wants directors to talk to shareholders. She encourages directors to have open and constructive dialogue with shareholders, who can be "very helpful in providing perspectives on the challenges a company is facing." Acknowledging the importance of talking to institutional investors because of their unique insights, she nonetheless also stressed the importance of not ignoring "other shareholders." She believes that shareholder views can be obtained through shareholder proposals, and directors should "[L]ook thoughtfully" at the ones being submitted to their companies. She advises directors to ask management about those proposals as well as proposals sent to other companies that may be relevant. Directors should carefully examine the voting results of all proposals for a shareholder meeting, even those proposals that were not approved.

In terms of obtaining additional outside perspectives, Chair White highlights the need for directors to consider the viewpoint of regulators as well, and mentions an audit committee chair who visits all of his company's major regulators once a year, including international ones. But directors should not fear a "game of 'gotcha' is being played by the SEC." She noted that the recent enforcement cases against two audit committee chairs included "massive" red flags that were ignored by those directors, including internal reports on how revenue had been falsified and direct information about ongoing fraud.

In her discussion endorsing self-reporting to the SEC, she declared that the board is responsible for ensuring that management and the legal team are providing appropriate cooperation to the SEC in an investigation, given that "there is, of course, cooperation and then there is cooperation." The SEC expects "sincere and thorough partnering," and not merely compliance with requests for documents and testimony. Relatedly, she counsels directors to take seriously all tips from whistleblowers even when there may be doubts about the individual's credibility because of the weakness or falsity of prior tips or because the person is a disgruntled employee, because "her tenth tip may be right on target."

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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