Should CEOs Speak Out? A Board Framework

By Lawrence A. Cunningham

Top corporate executives—and the boards they answer to—face growing pressure to take public stands on controversial issues. Yet the risks for company reputation and shareholder value can be high, whether CEOs speak out or remain silent. A solid governance framework for judging if, when, and how the company should speak up can help guide your policies.

Today, CEOs are pressured to speak out on controversial topics, and boards can help them handle the pressure. I have written and taught extensively on corporate governance for three decades, and have recently spent much of my time advising CEOs and boards as a corporate lawyer. I am on the boards of three public companies and often serve as an expert witness on corporate governance.

From both professional and personal experience, I can tell you this topic has become more common to boardrooms these days. As with many issues in our polarized era, there is passionate debate between two rival camps. There are those who say CEOs are duty-bound to speak out, against those who say CEOs are duty-bound to stay silent. That puts CEOs, as well as boards, in a bind.

I recommend a principled framework that allows each board and CEO to make informed business judgments on public stands.

My advice to boards and CEOs is to consider each situation individually, assessing its unique circumstances rather than adhering to a rigid doctrine.

I recommend a principled framework that allows each board and CEO to make informed business judgments. These should be tailored to the company's specific context, guiding them in deciding when it is appropriate for a CEO to speak out or stay silent.

☐ ***Data and forces at work.*** In the past few years, there has been a lot of research and polling data on CEOs speaking out, sometimes called CEO activism, a new phenomenon unheard of just a decade ago. As noted, there are divergent views and practices in this area.

First, most Americans believe CEOs have a role to play influencing lawmakers, from tax policy to voting rights, although significant minorities do not. This does not necessarily mean speaking out, as Americans are evenly divided over whether CEOs should do that. Political differences appear, with Democrats likelier to support speaking out and Republicans likelier to support staying silent.

Risk cuts both ways, though it seems higher for speaking out than staying silent. Eighty-nine percent associate speaking out with some risk, while 61 percent associate staying silent with some risk. Almost no one says speaking out is risk-free, while 22 percent think silence is.

These divisions explain why public relations executives increasingly discuss whether the CEO should speak out or not and why general counsels are split on the topic. Some 52 percent of counsel support a company policy of the CEO not speaking out, while 48 percent oppose such a policy. Further, 29 percent of general counsels are unsure whether a CEO speaking out is positive or negative for their company. Amid that division and uncertainty, CEOs themselves appear equally mixed—48 percent are staying silent, and 45 percent are speaking out on at least some issue.

Many forces contribute to the pressure on CEOs to speak out. These include structural changes to the corporate landscape. Index funds now dominate over

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stock pickers and are more concerned about general social matters than specific company issues; the Business Roundtable's statement of corporate purpose was expanded to prioritize employees, customers, and communities; and stakeholders have responded with calls to action.

There is also a decline in trust in government, stoked by snafus in its handling of the pandemic, and a rising trust in corporations, especially CEOs. The drive for civic change calls for CEOs to speak out. We see movements like Black Lives Matter and MeToo, growing climate change awareness, and our era's emphasis on personal values among consumers, workers, and investors. To all that, add social media and the power of its coordinated platforms.

On the other hand, these changes face counter-forces. These include longstanding duties. CEOs and directors owe fiduciary duties to the corporation and its stockholders. They must put these interests above personal beliefs, and they are protected by the business judgment rule, which confers considerable discretion within that framework.

In addition, despite the rising power of stakeholder interests, stockholders elect directors and can sue for breach of duty. Directors are not elected by stakeholders, do not owe them any special duties, and cannot be sued by them. Public companies must assume that official CEO statements are consistent with applicable securities laws and the company's filed disclosures.

The board's role is not to adhere to a specific ideology but to ensure that any company stance is in the best interests of the corporation and its stockholders.

☐ ***The board's role.*** There is divergence on whether CEOs speaking out is a board issue, though a consensus seems to be emerging that it is.

While these are hot-button topics, corporations encounter them all the time in the ordinary course, such as employee benefits (domestic partners, abortion travel expenses) or customer marketing (including branding and spokesperson selections). These are managerial prerogatives, not board issues.

Rather, CEOs speaking out can become a board issue because: its purpose is to draw attention to and support a specific policy position in a public debate and that directly creates (or mitigates) a risk;

- ◻ It takes the CEO's public persona outside the ordinary course of business; and
- ◻ the selection and oversight of the CEO is one of the board's most important jobs.

Despite all that, board approaches to this topic vary and are evolving. Research from a board survey shows that 37 percent of respondents say the company's board has discussed this topic, and another eight percent were about to. Boards are gradually reposing related oversight in various committees, although a significant minority say the CEO is permitted to speak out without board approval. Boards vary in their approach to documenting such oversight, with 31 percent using a company-specific framework and 30 percent operating without documentation,

When considering their role in this complex landscape, directors will appreciate that boards are both legal constructs and social creatures. They must attend to both their legal duties and practical realities.

As a matter of law, directors should remember their fundamental commitment to the corporation and its stockholders. This commitment supersedes personal values or the interests of other stakeholders. The legal framework, highlighted by the Delaware Supreme Court in the *Brehm v. Eisner* and *Caremark* cases, emphasizes that directors must determine what is "good," "desirable," or "beneficial" for the company and its stockholders. This determination is grounded in concepts of "good faith" and "reasonableness," not rigid rules or "best practices."

The risk to directors of legal liability is slight, as the recent Delaware Chancery Court opinion in *Disney* makes clear. Indeed, the rare cases finding personal liability (such as *eBay*) are associated with directors repudiating their duty to the corporation and its stockholders. Even so, directors should note the implications of litigation. The costs of defending even meritless suits can be high, if not in financial terms, then in time, reputation, and electability as a director.

As a practical matter, boards should attempt to align

CEO public positions with corporate objectives. This involves a balance between the CEO's influence and the board's oversight responsibilities. The board's role is not to adhere to a specific ideology but to ensure that any company stance is in the best interests of the corporation and its stockholders.

Dynamics between a CEO and the board vary widely based on numerous factors, including personalities, governance structures, industry, and the company's history of public engagement. A cooperative and collaborative relationship between the CEO and the board is most conducive to effective governance. Ideally, boards should empower CEOs to be the voice of the company, while CEOs should seek and value the board's counsel.

On the topic of a CEO speaking out, a board's key role is to help the CEO establish a framework consistent with its oversight duties and provide guardrails to navigate the issues. Such a framework should be accompanied by regular updates and ongoing dialogue.

A public engagement framework puts the easiest cases at both ends of the spectrum, with the more contextual in between.

☐ ***A board CEO framework.*** One example of such a framework would put the easiest cases at both ends of the spectrum, with the more contextual in between. The CEO would have total discretion concerning public comments on such topics as wages, prices, and earnings. Off-limits would be recommending candidates for public office or endorsing or opposing specific political parties, platforms, or contributions.

The hot topics in between pose contextual challenges that could be classified as to whether they are within the company's business or not and advise discretion or restraint accordingly.

For example, take the public debate over banning books from elementary schools that parents consider inappropriate. That is obviously within the business of publishers, such as Random House, whose board has authorized its CEO to speak out against bans. For most companies, that topic would not be within the company's business.

On thorny issues, directors and executives might consider enlisting business or trade groups with relevant expertise and resources. This option includes withdrawing from them when at odds, as Unilever did from the Chamber of Commerce in 2017 and as many large financial institutions did earlier this year, withdrawing from Climate Action 100.

Such a framework would make clear that a CEO should not have to consult the board on every issue. The framework is a way to set expectations for when consultation is indicated. The approach should be consistent with the standard board model of "nose in, fingers out." Boards should give CEOs ample autonomy, not micromanage, and stick to their roles in oversight, not management.

Another advantage and purpose of the framework is that the board and CEO must have each other's backs and be united. A CEO out in front of the board may soon face termination. Boards out of line with CEOs face reputational risk and adverse stockholder reactions. The most promising route to such alignment is for all to stress that the company's business is paramount.

Each board and CEO must make judgments to flesh out a framework like this. Boards must rely on management to provide relevant data to inform their decisions.

When evaluating an issue's relevance to the company, two factors stand out. First, the greatest risks come with commenting on highly polarized issues, those that divide public opinion nearly evenly. The closer an issue is to a 50-50 split in public sentiment, the higher the risk. Second, there is lower risk on topics closely related to the business, such as employee benefits.

When considering the CEO's role in public commentary, two factors can mitigate risk. First, the CEO's comments should be genuine and true, not seen as a marketing gimmick or strategic ploy. Authenticity resonates positively with stakeholders, even with those who disagree. Second, comments that are consistent with the company's established practices and disclosures tend to carry less risk.

Above all, an understanding of the company's constituents is crucial:

□ Consumers often prefer to spend on products that align with their personal values, so it's important to understand these values and assess whether the CEO's comments will align with or contradict them.

□ Employees generally appreciate it when their CEOs make statements that reflect their own views—and bristle otherwise. Therefore, in organizations with diverse workforces, it is advisable to exercise caution.

□ The relationship between CEO public comments and investor relations or stockholder returns is complex, and research findings are mixed. A good understanding of the stockholder base is essential.

Armed with a framework such as this (and the information it calls for), boards and CEOs will be well-positioned to address pressures for CEOs to speak out or stay silent on controversial topics.

□ ***The debate on corporate purpose.*** Beyond this practical appeal, the framework has the additional advantage of helping directors cope with underlying debates that fuel this topic, such as debates over corporate purpose and constituencies. These debates are more than a century old. Despite being shaped by varying socioeconomic contexts of different eras, at bottom they raise identical recurring issues.

In the 1930s, Professors Adolf Berle and Merrick Dodd clashed over whether corporations are economic or social institutions and whether directors should be accountable to stockholders or pursue social objectives. Both views went mainstream, as companies focused on stockholder economic profits while making substantial social and charitable contributions.

In the 1960s and 1970s, the debate reignited. Economists like Milton Friedman favored economic profits while critics, led by Ralph Nader, urged "taming" corporations to respond to "public needs." The Naderites won many legislative milestones, from protecting consumers to the environment. Their assaults on corporate America went too far, however, and an era leaning toward "stockholder value" followed.

In the 1980s, the takeover fights laid bare the tension between stockholder value and other constituencies, such as employees and communities. Directors lobbied to promote the latter, but the law only allowed them to do so if they were rationally related to stockholder interests, which held priority.

In the 1990s, critics again assailed such stockholder primacy as "irresponsible." They advocated diverting corporate assets from stockholders to others and thus also overshot their mark. Meanwhile, researchers began finding correlations between practices seen as "socially responsible" and corporate financial performance in categories from employee relations and pollution control to product quality and community involvement.

These dynamics set the stage for environmental, social, and governance (ESG) principles in 2005 when the United Nations issued them at the New York Stock Exchange, the citadel of stockholder primacy. Unlike predecessors, these ESG principles stress factors that enhance long-term stockholder value, an approach that concurs with history, law, and practicalities. As a result, ESG went mainstream and has influenced investor and corporate behavior.

In the debate over CEOs speaking out, proponents take a social-stakeholder view of corporate purpose, while opponents seek an economic-stockholder conception.

Still, ESG faces significant challenges, especially amid increasing politicization of views on corporate purpose. These challenges are:

- *Definitional,* such as what each element stands for. What are the boundaries or aims of environmental or social or governance principles?
- *Technical,* such as how to measure, report, and verify ESG performance.
- *Ethical,* such as how to balance the interests of different constituents.
- *Political,* such as how to respond to the varying pressures and expectations of different interest groups.

In the polar debate over CEOs speaking out, proponents contend for a social-stakeholder view of corporate purpose, while opponents seek an economic-stockholder conception. As such, debates have raged for more than a century; however, the truth has always resided somewhere in between. Boards

would do better to transcend such debates than to take sides in them.

To illustrate this, consider a related debate that periodically flares up—corporate chartering and corporate law leadership.

Let me frame this topic based on an exchange I had late last year in *The Wall Street Journal* with former Attorney General William Barr and Washington lawyer Jonathan Berry. Barr and Berry wrote a column lamenting that Delaware's preeminence in corporate law is under threat. They credit Delaware's leadership to its sensible, pro-stockholder jurisprudence. However, they caution that Delaware risks that leadership by "falling in line with ESG to reject shareholder value as corporate law's lodestar."

I wrote a response to Barr and Berry, acknowledging the theoretical risk of such a lopsided jurisprudence but explaining that Delaware remains a stockholder primacy state and that its leadership position is not in jeopardy.

In turn, Barr and Berry wrote a reply to me. They agreed with my characterization of Delaware corporate law as "the gold standard" but expressed concern that it could be devalued by "cloaking stakeholder politics in the garb of long-term shareholder value."

Why do I think Delaware will continue to be the gold standard in corporate law? Two reasons.

First, Delaware's preeminence in corporate law is partly due to its deliberate pursuit of moderation. The state's approach is built to withstand prevailing political trends in favor of stable corporate principles.

In the legislative realm, the Delaware General Corporation Law (DGCL) is crafted by the Delaware State Bar Association, not the General Assembly. This entrusts the creation of corporate law not to politicians but to a body of experts who dedicate their professional lives to applying, discussing, and advising on those laws.

In the judiciary, the Delaware Constitution requires Delaware's major courts to have a partisan balance. Whatever drawbacks that might have, it promotes a nonpartisan bench focused on business law, not political ideology.

In the executive realm, even as political leadership changes, participants value the state's reputation for efficient handling of corporate affairs. The infrastructure is a permanent asset, not a partisan one.

These features percolate throughout the legal profession and leadership in Delaware, acting as a buffer against the impacts of political and societal turmoil that afflict other institutions and individuals.

The second reason for my confidence is that we have been here before. Throughout all the movements above, proponents achieved gains, followed by setbacks and a return to a more centrist position.

Recall the takeover fights of the 1980s, many of which played out in Delaware. Raiders stressed "stockholder value," while embattled targets lobbied to promote "other constituencies." The constituencies movement became powerful nationwide. Many states passed "constituency statutes" (although not Delaware). By ultimately trying to put the interests of such constituents ahead of the rights of stockholders, advocates overplayed their hand and lost the cause.

Amid those battles, Delaware remained a stockholder primacy state, permitting directors to consider such other interests, but only if those are "rationally related to stockholder interests."

That test was memorably stated and applied by the Delaware Supreme Court in its landmark *Revlon* opinion, a good illustration of Delaware's pursuit of moderation against extremes. That same test was stated and applied by the Chancery Court last year in its opinion in the *Disney* case involving CEOs speaking out. Based on Delaware's structure and history, therefore, I believe it will remain the gold standard in corporate law.

Returning to the framework discussed, it dovetails with Delaware corporate jurisprudence. The framework takes a fact-specific case-by-case approach centered on a company's business while calling attention to the probable responses not only of stockholders but employees and customers. It lets the board and CEO put certain topics off-limits altogether. ■

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