

A Big Book on Governance for Directors of All Stripes

Non-academic reading from Canada's leading governance academic.

By Howard Brod Brownstein

Edited by York University Associate Professor of Law, Governance and Ethics Richard Leblanc, *The Handbook of Governance: A Comprehensive Guide for Public, Private and Not-For-Profit Board Members* is an extremely useful and accessible resource for long-serving board members, newly appointed directors, and those aspiring to a board role.

Leblanc, who is also a contributing author, assembled an all-star team of experts, including leading academicians, board advisors, board members, and chairs to write each of the book's 39 chapters.

For example, Wharton Professor Michael Useem and his coauthors of the chapter "Boards That Lead" present a model of collaborative leadership that may render the age-old caveat of "noses in, fingers out" as overly simplistic. Stanford Professor David F. Larcker and Researcher Brian Tayan provide specific practical advice in how a board should carry out its responsibilities for succession planning. Holly J. Gregory, co-chair of Sidley Austin's global corporate governance and executive compensation practice, contributes a succinct yet very complete discussion of director misconduct—an area which many boards find among the most intractable.

Other chapters discuss topics such as governance of parent and subsidiary companies, risk management oversight, director and officer insurance, shareholder engagement and activism, executive compensation, cybersecurity, sustainability, ethics and compliance, and governance in nonprofits, startups, small-cap and family-owned companies.

With a cast of governance experts writing on such a wide array of subjects, the book handily fulfills the promise of its ambitious title.

The Handbook of Governance took almost two years to produce and was designed to be a one-stop-

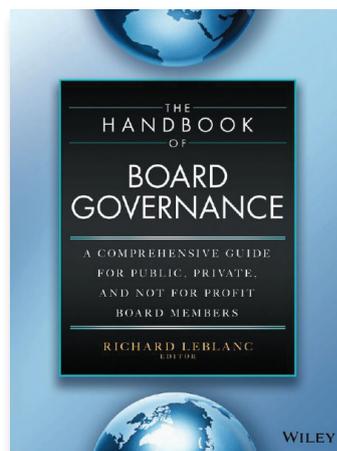
shop for board members, covering almost any topic in which they might be interested, and yet remain accessible to the average lay reader. (Some chapters have their own glossaries of terms with definitions.) What's more, this milestone volume covers these topics by way of a range of diverse viewpoints, including board members, board chairs, CEOs, and academic experts.

I recently visited one of Leblanc's classes at York as a guest lecturer and had the opportunity to sit down with him to discuss several of the governance themes that his new book explores. Leblanc also teaches at U.S. universities, including Harvard, and I was curious about his insights on how the corporate governance environment here differs from Canada.

In comparing corporate governance law, regulation, and practice, he noted that the U.S. has a better-developed plaintiff bar, creating a more litigious environment that has produced more case decisions as reference points.

"In Canada, the fiduciary duties of board members are focused more on the corporation, whereas in the U.S., fiduciary duties are owed to the corporation as well as to shareholders. In Canada, we see more non-executive board chairs, and fewer chair/CEO combinations," he said. "Perhaps most importantly, SEC-type federal regulations are not as well-developed in Canada since there's no national securities regulator, and instead regulation is on a provincial basis. Canadian authorities therefore tend to look to the U.S. for guidance, and try to be aligned due to the volume of trade and companies with listings on both U.S. and Canadian stock exchanges."

On the subject of shareholder activism in the United States, Leblanc observed that large institutional shareholders are more willing to at least give



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an audience to shareholder activists, and will sometimes side with them. “The major growth of activism in past few years emanated from the economic downturn, as well as regulatory assertiveness, and the search by funds for new avenues of investment,” he observed. “Activism is likely to continue to grow in years to come, with demands for improved corporate governance being one of its main tools. The number of underperforming companies will continue to provide plenty of targets for activists, and the growth of proxy access will be a factor.”

Automatic defensiveness as a response to activists is decreasing, and Leblanc believes that a good deal of activism wouldn’t exist if directors and management were doing their jobs better. He agrees that, in some cases, activists may in fact have a different agenda, e.g., short-term profits, but automatically portraying all activists as short-termers is inaccurate. He cites studies by Harvard Law Professor Lucian Bebchuk and others which indicate otherwise. Leblanc said that boards should be proactive in seeking out what activists want the company to do and why, and engage in regular dialogue with them, and observes that activists are on the cutting edge of governance progress.

There’s still too much reluctance by boards to engage with shareholders, Leblanc said, and too much drama when they do. Shareholder engagement should be an ongoing activity. The current trends will continue, and in Canada there might be across-the-board change for proxy access at the 5 percent ownership threshold. In the U.S., he notes that the Securities and Exchange Commission (SEC) has stepped down its activity in this area, but might resume in the future. One interesting model from Germany is *mitbestimmung* (co-determination) whereby even labor has a seat at the table. He doubts that this will be adopted anytime soon in the U.S. or Canada,

but it reflects a global trend in boards for more openness and inclusion.

Regarding nonprofits, Leblanc said that, while the basic rules regarding the fiduciary duties of directors of nonprofits are virtually the same as for-profit companies, nonprofit board members are too often far less engaged and tend to treat volunteer work as a community service and not a legal duty. Depending upon their activities, nonprofit organizations can have real risks, strategies, and potential liabilities. “While there is a

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healthy trend towards compensating nonprofit directors properly in certain situations, nonprofits often have the least staff and the most exposed beneficiaries. According to Leblanc, “Nonprofit governance is in need of a major transformation.”

Leblanc also reflected on the general lack of boardroom diversity and the slowness of improvement in this area. While sexism and racism undoubtedly play a role, it’s also likely that board members don’t want to be challenged, so they look for replacements who closely resemble the directors already sitting on their boards. This, according to Leblanc, is mental laziness since recruiting people you don’t know is

more work and presents new risks. Creating diverse boards requires real intention and effort, and it’s possible that regulators may get involved. Currently, 49 countries have regulations governing gender balance; U.S. company boards could be similarly required to report on their diversity in the future.

A strong proponent of director education and board education budgets, Leblanc said that NACD has been a major contributor in this area. He believes there might even be future requirements for measurement and reporting of the number of hours directors invested in pertinent educational programs over the course of the year.

Finally, we discussed what the CEO and senior management team should look for from their board. “Management needs the board to understand the businesses that the company is in, the strategies that are being pursued, and that the board has a role in the process through which strategy is formulated.”

Too often board members are reluctant to expose their ignorance and focus too much on compliance rather than strategy, which then provides an opening for activists,” Leblanc said. “This is why the director onboarding process is so important, as well as ongoing board education. Most notably, the board needs to have credibility with management.”

And because directors are operating under complex business conditions, the insights offered by Leblanc and his contributors in *The Handbook of Governance* offer every director a welcome assist in navigating these situations.

Howard Brod Brownstein is an NACD Board Leadership Fellow and president of the NACD Philadelphia Chapter. He is also president of The Brownstein Corp and serves on the boards of A.M. Castle & Co., PICO Holdings, and P&F Industries.