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In-House Corner: What Are “Best Practices,” Anyway?



In this blog feature, our in-house readers share tips, anecdotes, and thoughts about topics that arise in their daily practice. This particular batch of thoughts is about "best practices" – the following are some of the reactions I received to [a blog on this topic](#) that I penned recently:

1. "To me, 'best practices' means doing (or trying to do) what's right and not the bare minimum permitted. A former colleague of mine used as her mantra, 'Show me the rule where that disclosure is specifically required.' I always found that a terrible way to conduct a governance practice. As with anything, there are nuances to putting best practices in place, but it should start from a place of wanting to do the right thing."
2. "I agree that 'best practices' seems to be all over the map. First, what is it? Is it uber-conservative advice? Doing something in an abundance of caution? Or is it really a platinum standard? I often don't know."
3. "I really prefer not to use the term 'best practices,' but unfortunately it is thrown around often. I like to think it means the best of practices, but then what would it mean in the governance space to fail to comply with 'best practices,' especially if you are trying to be at—or reach—the top rung of the ESG ladder?"
4. "At my company, we try to use the phrase 'best fit' rather than 'best practice.' Although 'most common practice' is acceptable too."
5. "I agree that 'best practices' for some companies may actually be staying in the 'middle of the lane'—particularly if the 'gold standard' isn't well accepted yet and may be subject to some further refinement. Good examples I can think of are those who were early adopters of pay ratio and pay-versus-performance (PVP) disclosure. But I can't think of anyone giving those companies credit for what may now be a noncompliant approach and they may have just created internal inefficiencies when they had to retool those processes."

6. "My first General Counsel hated the term 'best practices' and we knew better than to use the phrase around him. I think the term aroused the same feelings as those that all of us have felt when lawyers say, 'this is market' or 'that is not market.' That sort of terminology assumes that there is one market term for a deal despite the underlying dynamics and that there is one way of doing something that is always best regardless of the underlying corporate/industry/fill-in-the-blank dynamics."
7. "Generally, I really like seeing 'best practices' and use it as an opportunity to directionally get a sense of whether there is anything new, unique, or different I need to delve into. It seems like recently, however, there are a lot of repeat best practices in the same space so that's not all that helpful. Perhaps I'm just getting older, but sometimes those words are followed by a small dose of skepticism, including thoughts like, 'what angle is trying to be pushed here?'"
8. "I really don't like the term 'best practices,' particularly when it's used—as it frequently is—in the singular (i.e., best practice). One size does not fit all; in fact, it sometimes doesn't fit one. The most I'll offer is 'leading practices,' but even that has its pitfalls."

I'd like to give a shoutout to Doug Chia of Soundboard Governance for correcting the reference in that [previous blog](#) that mentioned the virtual annual meetings guidelines that were established in 2020. Doug notes that the working group for those guidelines intentionally did not tag them with the "best practices" label (which had been used by predecessor virtual meeting reports) because they wanted it to be seen more as "commonly accepted practices," "accepted practices," or something similar.

Doug shared this excerpt capturing the concept of "best practices" and how they come into play in the real world of board-shareholder dynamics (through the perspective of the corporate secretary) from the chapter he wrote for *The Handbook of Board Governance, 2nd Edition*, edited by Richard LeBlanc (Chapter 43, "Riding Between Cars: The Position of the Corporate Secretary," in pages 987-1003:

"As companies adopted the new legal and regulatory requirements, the related corporate public disclosures gave shareholders and peer companies a much clearer view of the range of corporate governance and public disclosure practices in the marketplace, from companies implementing the bare minimum to comply with the law, to the prevailing market practices, to what were held out as "best practices." Not surprisingly, shareholders started to put pressure on all companies to adopt best practices, which were oftentimes defined by aggressive activists armed with shareholder proposals and bolstered by increasingly influential proxy advisory firms. Corporate secretaries quickly became the natural liaisons to these actors.

As shareholders increasingly called for more regulation and applied pressure for best practices—a moving target that only ratcheted up—boards felt they were being overburdened with "check the box" compliance items that were more form over substance. A common phrase used in boardrooms for best practices was "solutions in search of problems." Why not adopt them anyway? "We don't want to 'lead with our chins'" or "be on the 'bleeding edge'" were common responses from board members.

Longer-tenured directors had seen the same shareholders come back year after year demanding new, well-meaning corporate governance reforms regardless of whether the company had adopted the last ones or had any "problematic" practices. In fact, some observers noticed the phenomenon of companies that were quick to adopt new, shareholder-suggested best practices becoming magnets for shareholder proponents looking for willing participants to adopt the latest and greatest. Those directors were largely correct. Any credit received for setting gold standards ended up being worth very little when things went south in other areas. "No good deed goes

unpunished" was the go-to phrase.

Unfortunately for the corporate secretary, he or she had the job of reporting to the board the best practices demanded by the company's shareholders and then reporting back to those shareholders that the board did not want to adopt them. How many ways can you politely say, "Go pound sand?"

The new legal and regulatory requirements all fell under the monitoring responsibilities of the director's job. Boards became frustrated that more of their bandwidth was being used for monitoring than strategy, which is where board members feel they add the most value. The most frustrated of all were members of the audit committees, whose agendas and meetings kept getting longer as many of the new compliance items naturally fit within that board committee's remit.

While policymakers were the creators and enforcers of the new requirements, boards saw the proxy advisory firms as the creators and enforcers of "best practices," whispering them in shareholders' ears. "What is ISS going to say?" and "What do we have to do to make ISS happy?" were common questions in the boardroom, particularly in compensation committee meetings, demonstrating the growing influence of the proxy advisory industry. For the corporate secretary, this meant spending more time with the proxy advisory firms' proxy voting guidelines, following the amendments and new policies released each year (sometimes providing formal feedback on them), talking to peers about different approaches to avoiding or handling adverse voting recommendations and, for some, engaging directly with the policy heads of the proxy advisory firms."

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