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HOW CORPORATE BOARDS CAN COMBAT SEXUAL HARASSMENT

Recommendations and Resources for Directors and
Investors

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Foreword

Allegations of sexual harassment have profound repercussions for companies and their shareholders. Operations become disrupted when top executives are forced out. The company's reputation suffers and morale slumps. Management and the board may face legal charges, and the financial costs can be severe.

In fiscal years 2010–2016, U.S. employers paid out nearly \$300 million to employees who alleged sex-based harassment through the Equal Employment Opportunity Commission's (EEOC) administrative enforcement pre-litigation process. More recently, the board of 21st Century Fox agreed to a \$90 million settlement with shareholders who alleged in a lawsuit that directors failed to rein in senior executives who sexually harassed female employees.

Allegations of sexual harassment and mishandling those allegations can clearly affect the value of a company. Privately-owned Weinstein Co. is planning to file for bankruptcy as of February 2018, less than six months after *The New York Times* and *The New Yorker* reported multiple allegations of sexual harassment against then co-chairman Harvey Weinstein. Hits to the value of privately-owned Uber in 2017 reflected concerns of sexual harassment and the complicity of human resources (HR) and top executives. The company belatedly set up a hotline for complaints, and tips resulted in the termination of more than 20 employees.

Shares of Wynn Resorts saw a \$3 billion drop in market value in the two days following the *Wall Street Journal's* report of allegations of sexual misconduct by chief executive Steve Wynn, and as of one month later Wynn's share price had not recovered. U.S. retailers Lululemon and Guess saw significant albeit lesser share price falls in February 2018 when they disclosed allegations of misconduct that led to the departure of Lululemon's CEO and the relinquishment of a Guess co-founder's day-to-day responsibilities.

Many ethical failings in business result from individuals making poor choices. But the more extensive and expensive breakdowns usually occur due to failures of company culture, with governance structures either broken or never properly established. Healthy companies have clear and consistent policies, open lines of communication for employees to report bad behavior and established methods of responding.

Expensive & expansive ethical failings occur in the absence of sound governance structures.

Companies of all sizes and industries stand to benefit when the board of directors plays a central role in setting a strong tone at the top and providing leadership on corporate culture, including combatting sexual harassment, empowering employees to bring forward concerns, and treating all employees fairly. Directors should pay attention to these issues, not only because they are responsible for risks that affect their companies' bottom lines, but also because they have an obligation to shareholders to exercise oversight in the company and promote sound governance practices.

CII members are taking note of the risk that sexual harassment presents to their portfolio companies. In a Jan. 6, 2018 op-ed in the *San Francisco Chronicle*, California State Controller Betty Yee recommended that executives at companies that have failed to address sexual harassment have their compensation cut drastically. "Investors must firmly reject the complicit cover-up tactics that recently have come to light," she wrote. "It is in all of our interests that companies understand their long-term viability and sustainability is in danger otherwise—executive compensation should not be immune to this risk."

Companies stand to benefit when the board plays a central role in setting a strong tone at the top.

The California State Teachers' Retirement System (CalSTRS) wrote to Securities and Exchange Commission (SEC) Chairman Jay Clayton on Dec. 4, 2017, asking for rulemaking to improve board disclosures. In the letter, CalSTRS reiterated a request that it made in 2015 with the North Carolina Treasurer's office and other institutional investors for the SEC to require companies to identify, using charts or matrices, each board nominee's gender, race and ethnicity, in addition to his or her skills, experiences and attributes. "Issues of sexual harassment are a component of a company's culture with many companies willing to continue in silence without adequately addressing the underlying cultural issues," the letter said. "CalSTRS believes it is necessary that companies adopt more transformative solutions including addressing the power structures of boards."

Some investors have expressed concerns related to sexual harassment in cyberspace in addition to the workplace. The New York State Comptroller and Arjuna Capital have submitted shareholder proposals at Facebook and Twitter aimed at addressing sexual harassment on social media. Each resolution asks the companies to produce a detailed report on the efficacy of their policies related to content terms of service, including instances of sexual harassment on their platforms. In a statement, New York State Comptroller Thomas DiNapoli said, "Investors have a right to know what steps these

companies are taking to enforce their terms of service and keep abusive content from fake news to sexual harassment off their platforms."

Despite calls to action by large public pension funds, it is not yet clear whether most corporate boards are addressing this issue. According to a survey conducted by Boardlist last summer of almost 400 directors at private and public tech companies of all sizes, 88% of respondents said they had not at that point developed a plan to respond to sexual harassment reports in their companies, 83% said they had not revised their existing sexual harassment policies, and 81% said they had not discussed appropriate boundaries within their company culture. Although the survey was conducted before reports of Harvey Weinstein's alleged sexual improprieties triggered a torrent of further revelations last fall, it followed the widely reported cases of sexual harassment at Fox News and Silicon Valley companies Uber and Social Finance.



The vast majority of boards say they have no plan to respond to sexual harassment.



High-profile allegations of sexual harassment have beset the venture capital community, affecting both VC firm members and executives at the private companies in which they invest (VC firms have also been criticized for lacking diversity). Recently, however, VC firms have sought to get in front of the issue. Boardlist found that since September 2017, 83% of venture capital-backed companies discussed the climate of sexual harassment and 43% diagnosed their company's culture. In addition, 50% are developing a new plan to respond to sexual harassment reports and 45% are reevaluating the plans they have in place.

The National Venture Capital Association (NVCA) convened a workshop on sexual harassment with VC leaders in September 2017. Later that month, NVCA recommended (1) developing industry standard HR policies and best practices for VC firms and startups; and (2) training and educating VC firms and startups.

Takeaways for Boards and Investors

CII examined strategies and best practices for boards to mitigate the risk of sexual harassment and offers steps to consider in five areas. For investors, we provide a list of questions to pose to boards to assess the quality of their oversight of the risk of sexual harassment. Resources for both boards and investors follow.

For Boards

1. Personnel

Sexual harassment may go unreported because employees believe their HR departments lack the capacity or mandate to handle their cases. Breakdowns of trust can also hinder employees from coming forward with concerns. Companies have a responsibility to provide competent personnel to manage and monitor the company culture, and boards have a responsibility to understand how this is done and diagnose where such efforts fall short. While specific approaches may vary, the steps companies can take include any or all of the following:

- Develop responsibilities to add to an existing executive position, or create a dedicated executive position, responsible for day-to-day workplace, social and institutional culture issues. Many companies label this position the chief diversity and inclusion officer.
- Ensure that front-line managers are approachable and know what to do when a concern is raised. When a troubling incident occurs, employees are more likely to turn to someone they trust than a high-level executive or board member.
- Direct management to hire enough HR personnel and talent to be accessible to employees and manage violations of company culture that may occur.
- Encourage effective coordination between the HR and legal teams in developing company policies on sexual harassment as well as diversity and inclusion initiatives.

2. Board Composition and Structure

Strengthening board independence and composition can help cultivate diverse perspectives and hold company insiders accountable when sexual harassment occurs. To better monitor and manage, the board could:

- Take steps to add female and minority directors. Many institutional investors believe a “critical mass” of board diversity means at least 30% women and minorities as the Thirty Percent Coalition advocates.
- Create a committee or subcommittee of the nominating and governance committee devoted to ethics and culture, to work with management to establish and monitor metrics on diversity and inclusion.
- Set a high proportion of independent directors and have independent board leadership.

3. Policies and Procedures

Corporate culture oversight “is by definition a key board responsibility,” said a 2017 National Association of Corporate Directors Blue Ribbon Commission report. Culture, the report advised, merits “regular, routine discussion among corporate leaders.” Culture clearly includes respectful treatment of employees and efforts to promote diversity and make the workplace free of sexual harassment. Culture also involves fostering trust between employees, managers and company leaders so that all personnel feel comfortable speaking up about concerns. It is up to the board to ensure that management upholds an appropriate tone at the top, with executives setting positive examples, and with a sense of ownership and accountability for an ethical corporate culture that promotes treating all employees with dignity and respect.



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Given recent revelations of sexual harassment across many industries, all boards should discuss sexual harassment, including an examination of their companies’ policies. To ensure accountability, reports of sexual harassment, especially those against senior officials, must be brought to the board’s attention early, treated seriously and investigated thoroughly. Boards should consider taking the following steps:

- Include sexual harassment in their regular risk assessments.

- Discuss company culture, systematically and on a regular schedule, including:
 - Becoming familiar with the company's history by requesting past sexual harassment reports and records from HR. If the reports identify repeat offenders, a detailed explanation should be provided.
 - Requiring employee surveys that include questions about workplace environment, with meaningful data on employee views flowing to the board.
 - Assessing organizational tolerance for behavior by high performers and other high-value employees or rainmakers that is inconsistent with the company's stated values and code of conduct.
 - Assessing key factors that may make harassment more likely, including whether workplaces have a male-dominated power dynamic and workspaces are decentralized and isolated.
- Ensure that company policies and communications stress zero tolerance for sexual harassment. Experts say it is important that the company explicitly define sexual harassment and provide examples of intolerable behavior.
- Direct management to review the company's technology policies to ensure that harassment policies extend to the use of technology, and advise that the company has the right, but not the obligation, to review any messages transmitted on company systems.
- Have management and HR develop a plan to address harassment by third parties such as vendors and customers, who are not subject to company policies, and assure employees that they will be protected in those situations.
- Verify that the harassment policy has been disseminated and is readily accessible to all employees.
- Consider developing a means for employees to report sexual harassment directly to the board, such as through a designated board member, an online platform or an anonymous hotline. For larger entities where this may be impractical for the company, boards should strongly consider putting some such mechanism in place with reference to complaints about officers.
- Where there are endemic issues, or complaints against officers and senior managers, work with executives, HR and the legal department to determine the scope and timeline of investigations, including the people to be interviewed, the evidence to be weighed and the actions to be considered. In some situations, particularly involving allegations against the CEO and other top officers, a formal or informal committee exclusively composed of independent directors should investigate, drawing on resources including non-conflicted outside law firms.
- Oversee a review and potential revision of other policies affecting company culture, including those on office parties, consumption of alcohol and disclosure of workplace romantic relationships.

- Ensure all payouts to settle harassment cases are reported to the board.
- Review with the legal team when information on incidents of sexual harassment should be reported to shareholders and how much information should be shared.
- Include incidents of sexual harassment as a trigger for recoupment of executive compensation, particularly where senior executives are involved or problems of supervised employees are endemic.
- Ensure that violations of sexual harassment policies constitute a “for cause” termination of executives.



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4. Training

Fostering a culture free of sexual harassment requires awareness throughout the company. Substantive training, not mere check-the-box exercises, can familiarize employees with the boundaries of appropriate workplace behavior and the policies in place. Boards could:

- Mandate instructional, interactive training for all employees, especially middle managers who are often regarded as the first line of defense against inappropriate behavior. It may be important to vary the formats for training over time and at least offer in-person training for anyone in a supervisory role.
- Tailor training to employees’ responsibilities. Training for the board and executives should focus on leadership positions; for middle managers, building trust and open lines of communication with employees; for HR, serving employees and handling reports; and for entry-level employees, introducing them to the workplace culture.
- Promote training that fits the company’s needs and avoid discussions that are out of step with the company’s observable culture or could prove counterproductive by promoting cynicism.
- Have management and HR provide an opportunity for feedback or reflection that might include a survey or quiz about the training. Make a designated member of HR or the executive team available to answer any questions or concerns.

5. Diversity and Inclusion

Ensuring that the steps taken to improve company culture have a lasting impact requires a workforce that reflects diverse backgrounds and perspectives. Many companies are escalating their diversity and inclusion efforts to cultivate female and minority talent. Diversity helps break the insularity that results when the workforce is too homogenous, which can foster harassment. On this front, boards could:

- Clearly define what the terms “diversity” and “inclusion” mean to the company. Diversity generally captures the range of differences between people while inclusion means involving and empowering all employees in a company’s operations.
- Oversee the adoption of hiring practices that promote diversity, such as better outreach and recruiting of women and minorities, blind resume reviewing and using the Rooney Rule—considering at least one woman and one underrepresented minority candidate for each open position.
- Direct management to pursue opportunities to invest in the human capital of the company’s employees, such as through mentorship programs, seminars and training, as well as formal employee groups and programs.
- Review efforts by management and HR to set goals and performance metrics for diversity initiatives, conduct hiring audits for positions at all levels and publish relevant diversity statistics.

Investor Questions for Boards

- How does the board set the tone at the top of the company, and how does that filter through the organization? More generally, how does the board seek to understand corporate culture?
- Does the full board discuss corporate culture annually or on some other regular basis? Is there a committee of the board that has special responsibilities in this area?
- How does the board learn about morale and attitudes, including employee comfort with avenues to raise complaints of sexual harassment and other workplace incidents? For example, does the board see results of employee surveys that deal with these matters?
- Would you describe the mechanisms through which the board learns about employee complaints generally, and allegations of sexual harassment in particular? Does the board receive any direct reports on employee complaints of

- sexual harassment? Has the board or a board committee discussed possible causes for any sexual misconduct, or ways to eliminate sexual harassment?
- Is there a mechanism in place for the board to learn about sexual harassment complaints against officers? If so, please describe how it functions.
 - How does the company handle sexual harassment complaints? For example, in what situations would an individual accused of harassment be put on administrative leave? How is confidentiality of the complainant protected? How do you gain comfort that there is not retaliation against complainants?
 - How does the board understand employee attitudes with regard to equal employment and diversity? Are there parts of the company or job categories of particular concern for promoting gender diversity?
 - Does the board receive reports with statistics on employee turnover? Does the company conduct robust exit interviews, and does useful information filter to the board from such interviews or other sources to understand reasons for employee departure?
 - Are employees required to use arbitration to pursue sexual harassment complaints?
 - Does the board or a board committee meet regularly with the head of HR and other senior officials responsible for workplace conditions and equal employment?
 - How do you judge the adequacy of staffing for HR functions related to potential worker concerns on equal employment and sexual harassment?
 - Please describe hot lines and whistleblowing mechanisms that would help surface complaints about sexual harassment, including those against senior officers.
 - There is mixed evidence on the effectiveness of training about harassment. Is the board provided with clear explanations of training around harassment within the company, and does the board have sufficient information on effectiveness of such training?

Resources for Boards and Investors

Templates, samples, and suggestions for sexual harassment policies:

- Sexual harassment policy template from the Society of Human Resource Management: https://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/cms_000554.aspx
- Sexual harassment policy template and suggestions from the United Nations International Labor Organization: http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-suva/documents/policy/wcms_407364.pdf
- HP harassment-free work environment policy sample: <http://www.hp.com/hpinfo/abouthp/diversity/harassfree.html>
- Facebook U.S. harassment policy sample: <https://peoplepractices.fb.com/harassment-policy/>

Recent recommendations to boards for addressing sexual harassment:

- U.S. Equal Employment Opportunity Commission Select Task Force on the Study of Harassment in the Workplace report: https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf
- Covington & Burling report to Uber following sexual harassment allegations: <https://drive.google.com/file/d/0B1s08BdVqCgrUVM4UHBpTGROLXM/view>
- Me Too, But Now What? What Board Members Need to Know About Workplace Sexual Harassment <https://www.foley.com/me-too-but-now-what-what-board-members-need-to-know-about-workplace-sexual-harassment-11-09-2017/>
- National Venture Capital Association sample HR policies and human capital survey: <https://nvca.org/pressreleases/nvca-unveils-sample-h-r-policies-build-inclusive-cultures-venture-firms/>
- Change the Culture to Beat Sex Pest Colleagues <https://www.ft.com/content/2b97937a-e49d-11e7-a685-5634466a6915>

For a broad set of recommendations on corporate and board culture, and board oversight of culture, see National Association of Corporate Directors, *Report of the NACD Blue Ribbon Commission on Culture as a Corporate Asset (2017)*, at <https://www.nacdonline.org/Store/ProductDetail.cfm?ItemNumber=48252>.