Building and Protecting a Family Business Dynasty

The Role of Good Governance in Family Business Succession and Success

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I. INTRODUCTION: OVERVIEW

A. BENEFITS OF GOOD FAMILY BUSINESS GOVERNANCE SYSTEMS

Good family business governance provides value now . . .

Better governed businesses have higher operating performance, higher valuations, and pay out more cash to their shareholders.

. . . And in future generations

Better governed businesses have longer lives and are more likely to survive leadership transitions and ownership succession events.

B. RISKS OF AD HOC, UNCERTAIN FAMILY BUSINESS GOVERNANCE

Businesses with ad hoc or uncertain governance systems may be too reactive, too dependent on current leaders, and susceptible to litigation among owners during leadership transitions or after ownership succession events.

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C. GOALS OF THIS PRESENTATION:

This presentation explains the importance of good governance systems in a family business and provides 9 specific recommendations about how such systems can be implemented and tailored to family businesses at different stages of leadership and succession. To support these recommendations, this presentation will provide a background explanation of corporate governance concepts and principles, as well as real world examples of families and family businesses that suffered through discord and litigation because they failed to use good governance practices to enhance succession planning.

D. KEYS TO IMPLEMENTATION

Implementing good governance systems requires coordination among:

- ►Governing Documents for each company in the family business;
- ►Contracts for related-party transactions; and
- ►Estate Plans for senior owners and their successors.

II. A CAUTIONARY TALE

The story of Reliance Industries and the Ambani family illustrates the advantage of good governance systems even when succession is left in doubt and family discord would otherwise destroy the family business.

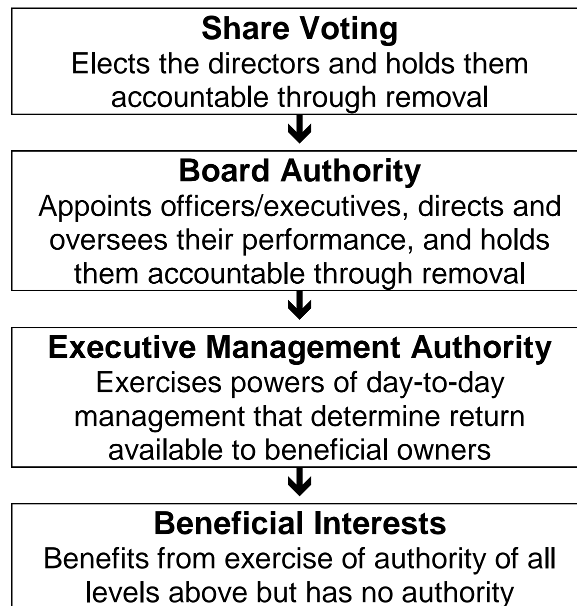
III. DEFINING THE FAMILY BUSINESS

To create a proper family business governance structure and succession plan, first identify all the companies and ventures that compose the family business. Often the family business includes a primary company, plus one or more affiliates that provide goods or services to the primary company, as well as real estate or investment holding companies. It is always helpful to have a graphic organizational chart that identifies each of these entities, their ownership, and their economic relationships with one another. It may be desirable to reorganize these entities, their holdings, and their ownership to improve business governance or create better mechanisms for leadership and ownership succession.

IV. UNDERSTANDING LEVELS OF OWNERSHIP AND CONTROL

To establish an appropriate family business governance structure, it is essential to understand how ownership and control rights are formally allocated in applicable business law. It may be easiest to think of ownership and control in terms of “levels” because each set of rights and authority seems to be conferred by or dependent upon the set of rights and authority that precedes it.

A graphic representation of control:



In the illustration of control, share voting is at the top and beneficial ownership is at the bottom, consistent with the flow of authority. In contrast, an illustration of economic interests might be inverted, consistent with the flow of economic benefit.

A graphic illustration of economic interests:

Summarized simplistically, a corporation is managed through a tiered system of checks and balances for the economic benefit of the relatively

powerless beneficial owners. Other business entities, such as a limited liability company may use a similar separation of powers in its governance structure.

V. 9 RECOMMENDATIONS FOR EFFECTIVE BUSINESS GOVERNANCE

ONE
Know the Owners' Objectives.

A family business can provide four primary benefits to an owner:

- Cash Flow (e.g., compensation, dividends, rent, interest)
- Wealth Accumulation (through appreciation in value)
- Occupation/Career
- Legacy

Governance systems should be tailored to serve the owners' priorities with respect to these benefits.

TWO
Be Fair, Not Equal; Do What Makes Good Business Sense.

When organizing, re-organizing, and growing a family business, and especially when planning for the succession of ownership from one generation to the next, the owners should be guided by sound business principles. They should adopt mechanisms that:

- Allocate management authority to the best managers;
- Compensate and incentivize managers at market rates;
- Provide a reasonable return for the persons whose capital is at risk in the business (regardless of whether they earned that capital or inherited it);
- Allow owners a reasonable means of holding managers accountable; and
- Provide an exit for the disgruntled or unworthy.

Karl Marx advocated, “From each according to his ability; to each according to his need.” The family-owned company in America is not the place to test that theory, although many senior generation owners feel compelled to give it a try when planning for the succession of their business, and many non-management, next generation owners who otherwise would be staunch economic conservatives become wild-eyed communists when it comes to what they expect to receive from the family enterprise.

On the other hand, to paraphrase 19th century historian and moralist Lord Acton, “Power corrupts; absolute power corrupts absolutely.” Family members who manage the family business may also be prone to an unreasonable sense of entitlement with respect their interest in the business. Their compensation should be transparent and consistent with the market, and they should be held accountable by objective standards.

THREE
Use Checks and Balances

The best model of governance for a family business may be one in which everyone is accountable to someone else—like staircases in an Escher drawing that each lead up to the bottom of another staircase, including the final one which leads up to the bottom of the first one. This may not be a viable suggestion while the founder is active in the company, but may be a mechanism that can be worked into the succession plan. This requires attention to the company’s charter and bylaws/LLC agreement and the senior generation’s estate planning documents.

1. Management Leadership

The executives will run the day-to-day operations of the business. Executive hierarchy and each executive’s authority can be set forth in the bylaws or it can be left to the discretion of the board of directors to be set forth in resolutions the board may issue from time to time. The authority of even the top executive can be limited by the board, which may require some actions of the executives to be specifically approved in advance by the board. The board will also determine compensation of the top executives. Usually the bylaws will provide that the executives serve at the pleasure of the board, and thus can be removed with or without cause. However, the board can approve an employment contract that compensates an executive who is terminated without cause.

Although one advantage of family ownership of a company is that it can provide employment opportunities to family members, executive leadership should be reserved for individuals inside or outside of the family who are best suited to lead the company to success. The directors should be allowed to choose those individuals based on merit and should actively and objectively review their performance. Family members who do serve as executives should be incentivized and rewarded but should not be over-compensated. The directors also should maintain an updated plan to replace the top executive if he has to be replaced due to an unexpected event, such as death, disability, or wrongdoing.

2. Fiduciary Board

Founders and family members who are executives of a family business will often resist the idea of constituting and empowering a board of directors that has objectivity and authority. They do not want a board that will cramp their style or second-guess them. While the founder is serving as CEO and the ownership interests are “all in the family”, the company may be able to succeed with the CEO serving also as sole director or with a rubber-stamp board of family members. However, that model usually does not translate well into the next generation of owners.

Requiring the board of directors to include outside, independent members can have numerous advantages in the family business. With independent directors, the board can provide formal and objective oversight, experienced or expert advice, a means of approving insider transactions, and an internal mechanism for addressing owner concerns or resolving owner discord that family directors might only exacerbate.

The charter or bylaws should set forth the number of independent directors required, their terms, and how they will be elected. It may be advisable to stagger the directors’ terms, to provide stability on the board from year to year. It may be desirable to classify board seats, so that different lines of family members are each represented on the board by at least one independent director, or it may be desirable to adopt cumulative voting so that minority owners can pool their votes to elect at least one director notwithstanding the voting of owners with larger positions.

Even if the founder will not permit a functioning board to serve during his tenure as CEO, the owners should put in place documentation that will immediately install a functioning board in the event of the founder’s exit. Such provisions can be worked into a shareholders’ agreement or operating agreement, or they can be implemented by fiduciaries pursuant to directions in the founder’s estate plan. In such cases, it may be wise for the founder to establish an advisory board of individuals who can be kept apprised of the company’s activity and thus be prepared to serve as the company’s fiduciary board upon the founder’s unexpected exit.

3. Board Election and Oversight

The preceding section mentions some mechanisms that are available to help allocate representation on the board of directors among the owners, such as classification of board seats or cumulative voting. In some cases, however, the family members

who own (or may succeed to) ownership of the company may be too inexperienced, uninformed, or contentious to responsibly exercise a shareholders' rights to vote for directors or hold the board accountable. (Note that in most jurisdictions, minority owners have no fiduciary duty to the company or the other owners with respect to how they exercise their voting rights or the other rights that accompany stock ownership). In such cases, it may be necessary to insulate the company from the beneficial owner by allocating legal ownership to a fiduciary for the beneficial owner.

This issue can be addressed through trust ownership of the company stock or membership interest. A key decision in planning for such trusts is to determine who will have authority to vote the ownership interests and who will have authority to appoint, remove, and replace such persons. Often, corporate fiduciaries may be best at the ministerial duties of a trustee but may be completely inadequate to exercise an owner's rights in a family business. In such cases, a "directed trust" may be the most appropriate approach. Under a "directed trust," the trustee's authority and discretion with respect to ownership in the family business is delegated to a special trustee or board of advisors who exercise all the trust's ownership rights and even decide whether the interests should be held or liquidated.

4. <u>The Voice of Beneficial Owners</u>

The terms of a directed trust (or other mechanism for delegating share voting control) will provide which beneficiaries or other persons can appoint, remove, and replace the agents or fiduciaries who are exercising the ownership rights on behalf of the beneficial owners. These provisions can mark another level of the structure of checks and balances in the company's governance. For example, if the ownership interests are held for a particularly large family group, the trust agreement may provide a means for beneficiaries to elect a family board that will have the right to appoint and oversee the fiduciaries under the trust.

Even if beneficial owners have no authority in the governance structure, it can be helpful to organize a family advisory counsel that occasionally meets with the company's management to receive information about the company's performance and express concerns of family members who otherwise are not involved in the company.

5. Parents, Subsidiaries, and Affiliates

This system of checks and balances in company governance should be adapted to the whole structure of the family business, if it involves multiple companies. It is possible through global owner agreements or trust ownership to ensure that each component company in the business is consistently governed and that owners of component companies are treated fairly in fundamental transactions involving the business.

FOUR
Get It In Writing, including How It Can Be Changed

Family businesses too often tend to neglect documentation of economic rights and understandings among family members and other insiders. The default statutory or common law rules that apply to these relationships rarely satisfy the expectations or intentions of the parties involved. Sometimes these unwritten understandings can be given effect by moral force of the senior generation, but often they become the subject of disputes after company interests pass to the next generation or to parties outside the family.

Therefore, all agreements and contracts affecting the economic rights and legal relationships of family members and other insiders with respect to the company should be documented in a writing that is signed by the parties and contains express and appropriate provisions about how they can be amended or revoked. Examples include the following:

1. Governing Documents

Corporation and LLC charters are always reduced to writing because they must be filed with the appropriate state agency to give the company legal existence, but a charter that meets the bare minimum standards for filing may not include some provisions that must be in the charter to be enforceable. Also, it is more difficult for the board or shareholders to unilaterally change the charter than to change the bylaws under default rules.

Owners should not use off-the-rack charter forms or bylaws. They should consider carefully which provisions should be in each of these documents and then should be very specific about how these documents can be changed. For example, a provision in the bylaws requiring unanimous consent of shareholders to dissolve the company may be meaningless if a simple majority of shareholders can amend the bylaws, including the liquidation provision.

2. Employment Agreements for Family Members

When family members are employed by the company, a written employment agreement can protect both the employee and the company. The agreement should be specific about their responsibilities, authority, compensation, and rights upon termination. Often, such agreements and any changes to such agreements should require approval of independent board members. A written employment agreement reduces opportunities for abuse by the employee and his proponents, and conversely reduces the risk of challenge or change by coalitions of other family members.

3. Other Insider Contracts

Other contracts for goods or services between the family business and individual family members or companies owned by them also should be in writing, such as leases, consulting arrangements, supply or distributorship agreements. In particular, the terms of loans from family members or guarantees of third party debt by family members should be clearly established in an enforceable written contract. If a family lender has a security interest, that interest should be perfected. If a family member has guaranteed a third-party loan to the company, his right to recover from the company or other guarantors for any loss under the guarantee should be set forth in a written indemnification agreement.

FIVE
Restrict the Ownership Group

In a family business, it is often desirable to keep ownership within the family until a formal decision is made, through appropriate governance mechanisms, to admit outside owners or investors. Buy-sell agreements with transfer restrictions, estate planning documents using trusts to own company interests, and prenuptial agreements for individual owners can all be important elements of maintaining control of the ownership group. It is important to prevent even a small portion of ownership interest from falling into the hands of an owner outside the approved group because of rights that minority owners may have to review books and records of the company, bring derivative lawsuits, veto changes to governing documents, and allege minority oppression—all without a corresponding fiduciary duty to the company or other owners.

With respect to estate planning, the senior generation should be realistic about whether their estate beneficiaries can all co-exist as owners of the company. If they probably cannot, the estate plan should

put some focus on ways to strategically allocate estate assets to exclude company ownership from the shares of the estate passing to beneficiaries who will not be involved in the business. Depending on the proportion of family wealth represented by company interests, this may require aggressive planning to reduce the senior generation's federal estate tax liability, or creative alternatives for payment of that liability, such as through a redemption of estate interests or a loan from the company.[1] These liquidity needs might also be met through strategic use of life insurance.

SIX
Preserve Exit Strategies

Some family members seem to thrive on conflict, but all parties are generally best served if owners can liquidate their interests when they want out, or the company can expel disgruntled owners who refuse to leave.

1. Avoid the Minority Veto

Sometimes, the owners of a family business may be best served to liquidate the company or accept a stock purchase offer from a third party. The company's governing documents and owners' agreements should contain provisions that allow the owners to proceed with such a transaction without concern that a small minority owner will be able to veto it. Provisions such as supermajority share voting for fundamental transactions and drag-along rights for stock or membership interest transfers can allow the family to exit for the full value of their interests.

2. Expel the Hecklers

Some minority owners are determined to find fault in everything the company management does. Their carping is ill-informed or is based on family issues unrelated to business performance. Such malcontents can rattle management, stir up ill will among other owners, and cost the company in unnecessary attorneys' and accountants' fees. For these cases, it is best that the governing documents and owner agreements preserve a right of the majority to expel such owners. To discourage challenge, such provisions should allow the expelled owner to be redeemed at fair market value, determined by specific procedure set forth in the

[1] A unique arrangement, called a "Graegin loan" allows the estate to take an estate tax deduction for the accumulated future interest on a loan to pay estate taxes, even if that interest will be paid to a company owned by some of the estate beneficiaries.

documents. The company should maintain a plan for producing the liquidity that such a redemption might require, for example through a sinking fund, an untapped line of credit, or capital contributions by other owners.

3. Special Exit Planning

The company and its owners should plan for exits under other special circumstances as well, such as retirement, death, or disability of an owner. In such cases, the exiting owner (or his estate) may need the liquidity more than other owners. Having liquidity available in such circumstances through insurance, non-qualified retirement plans, structured redemptions, or buy-outs by insiders (including, if appropriate, an employee stock ownership plan) can avoid the difficulty of having an owner who is financially compromised.

SEVEN
Always Know the Value

Many management and ownership decisions are dependent on the value of the business and its stock or other units of ownership. Because the business is not publicly-traded, however, the managers and owners will not know the value unless management retains valuation professionals to determine the value. The advantage of having a realistic estimate of value for purposes of succession planning, retirement planning, purchase options, put options, buyouts, compensation, performance evaluation, dividends, business planning, and many other business decisions and transactions far outweighs the cost of obtaining a valuation and keep it current.

EIGHT
Discourage Litigation

The threat of litigation, including derivative claims, can be a potent way for minority owners to harass management into compliance with unreasonable demands. However, company owners can adopt a number of strategies to neutralize this threat.

1. Exculpate, Indemnify, and Insure Managers

The company's governing documents can expressly exculpate managers, directors, and officers for claims that do not involve breaches of loyalty or willful misconduct. Under the company's governing documents, the company also may indemnify managers, directors, and officers against losses, including attorneys' fees, that they incur as a result of such claims. Such provisions can set forth procedures by which the company can be

required to advance indemnification and/or insure against such losses through directors and officers ("D&O") policies. Sometimes the governing documents will provide general enabling language, and then more detailed provisions will be set out in employment agreements with executives and indemnification agreements with board members. D&O policies should be reviewed from time to time to make sure their terms are completely consistent with their purposes.

2. Control the Derivative Power

Sometimes, the legal owner of stock or membership interests may have the right to bring a lawsuit derivatively (i.e., on behalf of the company) if the board of directors refuses. Often the board itself and the officers are the target of such derivative litigation. Senior generation owners can control who will have this right in the next generation by controlling how ownership will be held. If stock or membership interests are held in a trust, then the trust fiduciary, not the beneficiary, holds any power to pursue derivative claims. Although a trust beneficiary might pressure the trust fiduciary to pursue derivative claims, the trust can be drafted to reduce the beneficiary's leverage in such matters, for example by directing the trustee not to pursue derivative claims absent direction by a court or even by penalizing a beneficiary who commences litigation against the trustees.

NINE
Require Alternative Dispute Resolution

In some cases, owners of a family business may have legitimate disputes that cannot be resolved internally. However, it is possible to require the disputants to pursue an adjudicated resolution through private binding arbitration, to hold down the expense of the dispute and prevent it from being dragged into a public venue. To be thoroughly effective, binding arbitration provisions should be included in virtually all agreements signed by family members with respect to the company, including stock subscription agreements, shareholders' agreements, LLC agreements, employment agreements, and other insider contracts. (It may even be possible to require binding arbitration in a trust agreement by use of a penalty clause for beneficiaries who do not comply.) Such provisions may require a good faith effort at mediation before the parties resort to arbitration. In any case, ADR provisions should not be treated as boilerplate. They should be carefully drafted to apply in all situations anticipated and to be enforceable without court construction. Such agreements can make protracted proceedings especially unattractive by allowing (or requiring) the arbitrator to award attorneys' fees to the prevailing party.

VI. CONCLUSION

Family businesses are especially susceptible to the adverse effects of owner discord because the owners are engaged with one another on a strong emotional level, unrelated to the business. However, a tailored, systematic approach to company governance, insider transactions, and owner succession that includes the company's governing documents, transaction contracts, and owners' estate plans can reduce the impact that owner dysfunction can have on the operations and success of the business.