



## Function, Not Form, Matters Most in Board's Non-executive Leader

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by Ben W. Heineman, Jr.

With 50.34% of shareholders voting "for" a shareholder proposal to have a non-executive chairman of the board, Bank of America's Ken Lewis was ousted last week and replaced as board chair by Walter Massey, 71, a distinguished scientist and educator who has been a B of A director for 18 years. Lewis remained as CEO, with a new title of president.

Although some in the governance community claimed victory, Bank of America did not indicate how relations between the board and management would change from two days before when Temple Sloan, Jr. was "presiding director."

Despite hundreds of shareholder proposals since 2004 seeking separation of CEO and Board chair, only a handful have received a majority vote (seven through the 2008 proxy season). However, many companies have, as B of A did prior to the shareholder vote, adopted a "presiding" or "lead" director approach.

The fundamental question, raised but not answered by last week's ouster of Lewis, is what are the functions of a non-executive leader of the board, whether denominated board chair or presiding director?

I believe that the functions are fundamental, but few in number, clarification will help avoid conflict and confusion with the responsibility of the CEO and top business leaders to manage the company. These functions are:

**Chair the regular meetings of the non-management directors**--raise issues in private conversation which may be hard to air in front of the CEO--and then communicate director concerns to the CEO in a constructive way. Such meetings, which were held rarely if at all in the 90s, are generally and properly considered one of the best and most important post-Enron governance reforms.

**Work with the directors and management to set the agenda of the board.** A best practice, is to engage with the CEO and top business leaders to identify, at the end of one year, the top risks and opportunities facing the corporation in the subsequent year, and then to decide which are priority issues which will constitute the Board's core agenda and be the subject of in-depth board consideration. (The non-executive leader will also help determine which of the myriad emerging issues should be board priorities as the year progresses.) The non-executive board leader can also work with chairs of board committees and management in following a similar process for to set annual committee agendas.

**Work with the directors and management to ensure that board materials are succinct and candid,** fairly representing the essential decision points, trade-offs and risks and not burying the directors in an avalanche of minutiae. Another best practice, which the non-executive leader can facilitate, is to avoid final decision or definitive oversight based on one meeting alone, but to have a continuing discussion at sequential meetings on hard subjects.

**Work with the directors to select outside advisors when necessary.** For example, directors need independent compensation consultants, but of a new sort: ones that understand company operations and how to reward real performance not just what other CEO's make and how to jigger the various comp vehicles. Of course, when there are legal or ethical issues at the top of the company, the board will need independent legal representation. But the last thing a company needs is permanent lawyers for the board who will create a competing bureaucracy.

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**Most importantly, ensure that CEO job spec, CEO selection, CEO compensation, company management development and board oversight are focused on the corporation's most important high performance with high integrity behaviors.**

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A second but far less important question is the form non-executive leadership should take. Proponents of an independent board chair argue, for example, that having the title and the "gavel" increases capacity to shape board dialogue, provides more visibility as representative of shareholders and enhances board effectiveness. (This position was forcefully articulated in a recent report from Yale University's Millstein Center for Corporate Governance and Performance.) Proponents of the "presiding director" model argue, for example, that only the CEO should represent the company (articulating fundamental positions approved by the Board) and a separate board chair creates confusion and a risk of duplication.

Successful performance of the functions of the non-executive board leader is what is critical--and what was lost in the headlines about the Bank of America shareholder vote. That performance of functions is more likely to turn on the personalities, intellect and character of the directors and top management--the "culture of the board" and a shared understanding of key board roles--than on the form.

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