
Building a Company's Post- Bankruptcy Board

In 2020, the world entered an unprecedented economic era, triggered by a global pandemic and the contemporaneous collapse in commodity prices, demand for certain goods and services, and a breakdown in supply chains. This was further fueled by constraints on productivity and consumerism due to a need to practice social distancing and to shelter in place. The effects of this disruption will be felt for years to come, but we are already seeing a substantial rise in unemployment, mass layoffs and a growing number of corporate bankruptcies and restructurings.

Companies going through restructuring must address several challenges, among them the need to reconstitute their corporate board. This is not an easy task. The normal complexity of director recruitment and onboarding, not to mention the effective implementation of corporate governance practices, is only increased as a result of the company's legal and financial challenges.

Despite those challenges, however, it is possible to build a strong, highly effective corporate board post-restructuring and to populate that board with well-regarded directors.

This paper is intended to provide a road map for companies to do just that. Our guidance is based on significant experience during the Great Recession and afterward, when we served as a court-approved advisor, assisting companies to reestablish themselves, both in the Southern District of New York and elsewhere. We also recently interviewed several highly-experienced board members, investors and legal professionals who have served on post-bankruptcy boards to learn from their experience and gather their recommendations and best practices.

An Urgent but Unusual Task

The interim management of the company emerging from bankruptcy must work with the creditor committee representing the fulcrum security to reestablish the corporate board. Building a post-bankruptcy board is different in many regards from traditional board director searches. Most frequently, the need is to fill the entire board from scratch, including all board leadership roles. This significantly complicates things. When a board is looking for a single director, they simply need to search for someone with a single set of skills and traits; when filling the full board, one needs to evaluate candidates for every single seat, plus consider how well they will work together and whether their combined strengths and weaknesses complement and balance each other out.



Traditional director searches are run by sitting board members, individuals who have gone through the process itself (when selected for the board) or who have led the process before (when searching for new directors). For post-bankruptcy boards, however, many of the individuals involved will have no firsthand experience in director recruitment. It is often helpful at the start to educate all involved parties on the overall process and objectives.

A Roadmap to Success



START EARLY:

While building the post-bankruptcy board is an incredibly important task, it is often relegated to the end of the to-do list along with items such as preparing the disclosure statement or negotiating with other classes of creditors. While that is understandable on some level, the end result is that the selection of prospective directors becomes rushed, because all involved parties are tired and ready to wrap up the restructuring. Involved parties end up taking shortcuts: not fully vetting candidates, not finding the best director possible, relying on who knows whom and not on who is best.

Rather than rush the task, companies should start work reconstituting the board early in the restructuring process. When done thoughtfully and carefully, not only are stakeholders better served, but so too are the future board members. They are granted the time to plan the early work of the board, establish relationships with fellow directors and get a strong understanding of the company and its challenges.



IDENTIFY A CHAIR:

Rebuilding a corporate board starts with identifying a chair who can anchor the board and even help identify and recruit other potential directors. In most cases, the target candidate will be a former CEO who is also an experienced chair or an experienced restructuring professional who has served as board chair during a similar period. This combination of experience enables them to fully advise the CEO and senior leadership team as the company emerges from bankruptcy. Ideally, they are an individual with broad thinking and strong communication skills, enabling them to engage with stakeholders and the market and tell the company story. Lastly, it is critical to ensure they know what they are signing up for when agreeing to take on the chair role. That part is critical, as this role can easily consume 20 to 80 percent of someone's total work time for a significant period. It is not a minor undertaking.



DETERMINE THE OPTIMAL SIZE:

One important question to answer early: How large should the board be? Aim small. Small boards increase the focus, engagement and accountability of each individual director. So long as you pick the right individuals—those who add value and don't simply reiterate previously stated points—a small board can have an outsized impact.



LOOK FOR THE RIGHT MIX OF EXPERIENCES:

The board needs to be filled with strong, capable directors who are comfortable operating in a fishbowl, as public scrutiny of a company is rarely higher than in the year after it emerges from restructuring. A mix of skills and experiences is critical. Former CEOs and CFOs are not only able to give broad, strategic guidance, but can also step in momentarily if the current CEO or CFO resigns or needs to be replaced. Risk management experience, often found in financial services executives, is beneficial too. Board members with backgrounds in restructurings or similar transformations can help if the company needs to rethink its product and service mix as its strength returns. In the current environment, it can be helpful to have one or more board members with experience in government relations.



BE CLEAR ON THE OPPORTUNITIES—AND THE RISKS:

The upside of serving on a post-bankruptcy board is that the company will be operating with significantly reduced liabilities, a nimbler organizational structure and a fresh perspective on its strategy and relationship with stakeholders. One potential drawback is that compensation packages can be light on cash. Typically, post-bankruptcy board directors' compensation consists of a much higher proportion of equity than it would in other circumstances and the equity vests over multiple years. Ensure these terms are a good match for director candidates.

Once the board is selected, it is important that they come together to meet and create a shared understanding of their objectives and end goals. This is also a good opportunity to meet with and assess the CEO and senior executive team—a critical task that the board must undertake quickly, in case leadership changes need to be made.

The Behaviors that Matter Most

Selecting directors with the right skills and backgrounds is critical.

On the whole, the board needs to be comprised of experienced leaders who are comfortable making tough calls in challenging situations. Early on, one of their biggest decisions will be to assess and decide on the management team and ensure they are up to the task.

Directors serving on a post-bankruptcy board will work through countless challenges, which demands a considerable time investment. It is critical they be open in their thinking, candid and push back in productive ways against what they consider to be bad ideas or faulty logic. The chair plays an especially important role here, as they must bring everyone together and get the best out of them.

Building a positive, engaging board culture takes work and is the combination of numerous director behaviors. Our research and experience reveal that it does not just happen spontaneously, but rather results from a group of directors intentionally focusing on building a positive culture. Directors on boards with strong cultures work to build—and demonstrate—trust with their peers. They are more open-minded but focused, staying on the matter at hand and eliminating tangents. And they are open to new ideas and ways of doing things.

SPECIFIC BEHAVIORS FOR BOARD CHAIRS



Focuses the board's attention on relevant matters



Encourages independence



Fosters and facilitates high-quality debates



Actively seeks out different points of view



Draws out the relevant experiences of directors



Gives directors constructive feedback

SPECIFIC BEHAVIORS FOR BOARD DIRECTORS



Is open to new ideas and ways of doing things



Is willing to constructively challenge management when it is appropriate



Keeps the discussion focused on the matter at hand and work to eliminate tangents



Builds - and demonstrates - trust among fellow directors



Acts carefully to avoid crossing the line from oversight into operations and management

On boards with strong cultures, directors are deliberate and thoughtful, and they are more likely to constructively challenge executives when appropriate.

Not surprisingly, the board chair plays a vital role in establishing and maintaining a strong board culture, leading the board and facilitating debates. These chairs work to draw out the relevant expertise of every individual director and ensure that the board is conducting robust self-evaluations.

Making an Impact

Our research on boards that do the best job focusing on long-term value creation highlighted the importance of understanding director candidate motivations during the recruitment process. Director candidates will ideally express an interest in joining a post-restructuring board out of a desire to make a positive impact. They provide specific skills and experiences to help the company succeed, take a personal interest in the company or the industry and believe in the purpose or mission of the specific organization.

They will also be comfortable with the equity-heavy compensation package and a multi-year vesting schedule. This equity should be tied to long-term value creation, nurturing a shared motivation for directors as well as keeping them focused on a longer-term time horizon.



Moving Forward

Assembling a post-bankruptcy board is often left to the last minute, but it shouldn't be. By starting early, thinking clearly about the structure and composition of the board, and thoughtfully compensating and onboarding directors, companies have an opportunity to build a high-performing board that creates strong positive results for the company and its stakeholders.

AUTHORS

HEATHER HAMMOND is a senior member of the Financial Services and Private Equity sectors at Russell Reynolds, as well as the firm's Board and CEO Advisory Partners. She is based in New York.

CURT ROSS is a senior member of Russell Reynolds Industrial and Natural Resources Sector and the firm's Board and CEO Advisory Partners. He is based in Houston.

RUSTY O'KELLEY III is co-leader of Board and CEO Advisory Partners for the Americas and Global Leader of the Board Advisory and Effectiveness Practice at Russell Reynolds Associates. He is based in New York.

STEPHEN MORSE co-leads Russell Reynolds' global Industrial and Natural Resources Sector and is a senior member of the firm's Board and CEO Advisory Partners. He is based in Houston.

PJ NEAL leads the Center for Leadership Insight at Russell Reynolds Associates. He is based in Boston.

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