Corporate Advisory Structures: A Comprehensive Guide

This document explores the three primary advisory structures that benefit public and private corporations: boards of directors with their committees, outside advisors, and advisory boards. Each structure serves distinct purposes in corporate governance, offering different levels of authority, responsibility, and expertise. Understanding these differences is crucial for establishing effective corporate advisory mechanisms that balance legal requirements with strategic business needs.

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Categories of Corporate Advisors

Boards of Directors

Legally required entities with fiduciary duties to the corporation and shareholders. Directors serve on standing committees (Audit, Compensation, Nominating) and special committees formed for specific purposes.

Outside Advisors

Professional consultants including legal counsel, management consultants, investment banks, auditors, compensation consultants, and governance experts who provide specialized expertise.

Advisory Boards

Informal groups of subject matter experts who provide business advice without the fiduciary duties or legal liabilities of directors, offering flexibility and specialized knowledge.

While boards of directors are legally mandated for corporations, outside advisors and advisory boards provide supplementary expertise that enhances corporate decision-making and strategic planning. Each category serves distinct functions within the corporate governance ecosystem.

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Boards of Directors: Structure and Responsibilities

Under most state laws, corporations must have a Board of Directors with one or more members who owe fiduciary duties to the corporation and its shareholders. These boards typically establish permanent standing committees to handle specific governance areas:

- Audit Committee
- Compensation Committee
- Nominating Committee
- Executive Committee
- Finance Committee
- Governance Committee
- Risk Committee

Boards may also create special or *ad hoc* committees for specific purposes with limited durations, such as Crisis or Litigation committees. These temporary structures allow boards to focus specialized attention on emerging issues without disrupting the regular committee structure.

Directors have significant legal responsibilities and are protected by the business judgment rule when acting in good faith. Their authority and duties are well-established in corporate law, with extensive legal precedent guiding their actions.

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Outside Advisors: Types and Engagement

Federal securities laws specifically authorize Audit and Compensation committees to retain their own outside advisors. Boards typically engage these professionals through standard consulting agreements executed by the Corporate Secretary on behalf of the corporation.

1. **Outside Counsel**

   Selected by the General Counsel but available to the board. Boards often retain separate legal advisors to address potential conflicts of interest with management.

2. **Management Consultants**

   Hired to assess corporate or business strategy at both board and management levels.

3. **Investment Banks**

   Engaged for strategic purposes such as evaluating mergers, acquisitions, divestitures, and joint ventures.

4. **Accountants/Auditors**

   Review financial statements and audit compliance, internal audit, and risk management functions. Must certify independence from management.

5. **Compensation Consultants**

   Advise on executive compensation and respond to proxy advisor inquiries. Best practice limits management's relationship with these consultants.

6. **Governance Experts**

   Provide advice on governance best practices and conduct board, committee, and director evaluations.

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Advisory Boards: Purpose and Implementation

Advisory Boards institutionalize the collective advice of outside business leaders without the legal obligations of a traditional Board of Directors. While increasingly used by both public and private corporations, they remain relatively rare in public companies due to potential tensions with the governing Board of Directors.

When managers wish to establish an Advisory Board, best practice suggests the Board of Directors should issue a resolution authorizing its creation. This resolution should specify that the Advisory Board serves at the pleasure of the Board of Directors and ensure the Board is included in all communications between management and advisors.

Advisory Boards are particularly common in start-ups, family businesses, and private companies seeking more informal advisory structures. While venture capital and private equity investors sometimes use Advisory Boards for portfolio companies, they typically prefer direct representation on the Board of Directors.

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Advisory Board Structure and Leadership

Organization

Advisory Boards are typically unicameral but may create subject-specific committees with narrowly focused purviews. Like Boards of Directors, they may be led by a Chairperson who coordinates activities and facilitates meetings.

Composition

Members are usually subject matter experts in discrete business disciplines such as marketing, sales, data privacy, cybersecurity, IT, human resources, business process management, and production. They often come from local businesses and may have commercial or social ties to company leadership.

Fiduciary Duties

Unlike directors, Advisory Board members have no fiduciary duties to the corporation or shareholders and are not protected by the business judgment rule. Their function is purely advisory—they neither govern the company nor make tactical decisions. This significantly limits their potential liability.

Size

Best practice suggests three or five advisors—an odd number helps avoid deadlock, though Advisory Boards don't issue formal decisions.

Selection

Identify subject matter experts with relevant industry knowledge

Documentation

Create charter and individual advisor contracts

Implementation

Establish meeting cadence and reporting structure

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Advisory Board Documentation and Retention

Best practices suggest formalizing all aspects of Advisory Board functions and operations through by-law provisions and a comprehensive charter or company policy. These documents should address the number of advisors, meeting frequency, and other operational details.

1. **Contracts**

   Unlike directors, Advisory Board members should be retained under standard consulting agreements that cover meeting attendance requirements and clearly define expected advice. These contracts should specify that advisors serve at the pleasure of the company and can be dismissed at any time.

2. **Term Length**

   Advisory terms are typically longer than the one-year convention for directors. The specific duration should be expressly covered in the charter, policy, or contract to avoid ambiguity.

3. **Compensation**

   Opinions vary on advisor compensation. Options include no payment (service as an honor), cash payments (*per diems* or annual retainers), equity, or a combination. Any equity component should be carefully reviewed by legal and tax professionals.

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Advisory Board Operations and Best Practices

Meeting Formality

While some companies conduct Advisory Board meetings informally, others prefer the same formalities as Board of Directors meetings, including procedural rules, agendas, and minutes. However, legally privileged information should never be openly discussed with advisors to preserve attorney-client privilege.

Meeting Frequency

Advisory Boards may meet irregularly (as requested) or on a regular schedule, typically four to six times per year. The frequency should align with the company's needs and the advisors' availability.

Key Benefits

- Lower cost than Boards of Directors
- Greater operational efficiency
- Specialized expertise without fiduciary obligations
- Flexibility in structure and function
- Reduced legal liability concerns
- Ability to focus on specific business challenges

When properly structured and managed, Advisory Boards provide valuable supplementary expertise that enhances corporate decision-making while avoiding the legal complexities associated with Boards of Directors. Their informal nature allows companies to access specialized knowledge in a cost-effective manner while maintaining clear lines of authority and responsibility.

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