ROBERT MUIR

The right path

Directors of emerging businesses will benefit from a protocol providing a roadmap to reasonableness.

CORPORATIONS LAW IS DRY AT BEST and tedious at worst. More often than not, it takes a broad-brush approach to complex issues.

For example, one of the principal duties of directors is "to act with all the care and diligence that a reasonable person might be expected to show in the role of director".

This so-called business-judgment rule is supposed to provide a "safe harbour" for a director who makes a judgment in good faith, in the best interests of the company and without having any seemingly perceived material or conflict of interests.

This is all subject to interpretation, resulting in a large body of case law to interpret the statutes while further encouraging "creative law" – and lawsuits against those with deeper pockets.

Board members at large will benefit from having a protocol providing a roadmap to reasonableness. Directors at the small end of town, particularly those on "working boards" have the most to gain. These are boards that roll up their metaphorical sleeves, build a management team and strategy, and help the founders to expand the company.

Now there is the argument that one can't naively re-legislate "one-size-fits-all" corporation laws. So in the best interests of not trying to eat the elephant, there should be at least a bite-size directors' guide to serve the national interests of fostering economic growth by attracting experienced talent and early-stage investment capital to "gazelles", the next generation of emerging businesses. Where might we start our search for a guide?

There exists a large body of global knowledge on how to suss out an "investable deal". Guy Kawasaki, the former Apple evangelist and founder of Garage.com (now Garage Technology Ventures), has written a book called *The Art of the Start* (published by Portfolio Hardcover) that provides a simple checklist.

Bill Payne, entrepreneur-in-residence at the Kauffmann Foundation in Kansas City, has developed a similar checklist aimed at what he calls the true test: "What will it take to ensure the dogs will eat the dog food?"

Payne's checklist includes: market need and business model; industry and market overview; product or service overview; technology (current and future); competitive advantages; management team; benchmarks for growth or additional funding; and financial projections.

Once over these investment hurdles, which typically knock out 99 in 100 opportunities, the early-stage investor usually invests on a milestone basis to promote growth and ensure the management team focuses on critical issues and risks.

Ultimately, a board of directors has to answer three questions: where are we where are we going and how will we know when we get there.

Traditionally the checklists have been used to answer parts of the "Where are we?" and 'Where are we going?" questions. Part of the basic leadership role of the director is to fill in the viable destination(s) of the "Where are we going?" question, while starting to address the bigger growth/exit questions of "How will we know when we get there?"

Imagine a simple approach in which more weight is given at first to strategic items earlier in the checklist, yet with the eyes fixed firmly on the destination.

In the case of a director of a start-up, a relevant protocol component under the checklist item "industry and market overview" will include how the company has quantified the size of its market and what steps it will take to build a large-scale business.

Similarly, under "competitive advantages", what are the company's competitive advantages today, how will that change (particularly when competitors enter the market), and how will it respond?

Moving to the mezzanine stage, or "benchmarks for growth or additional funding", how will the company continue to measure the success of its business each quarter, one year and three years out?

Just prior to moving to the big end of town, the conventional accounting and audit approaches (the "existing rules") in financial projections will apply.

Irrespective of any future legislation, such a simple approach may put some flesh on the bones "to act with all the care and diligence that a reasonable person might expect" and hence provide a little more certainty for the early-stage director.

In any event, it may offer an initial defence when confronted by an irate stakeholder. •

Ultimately, a board of directors has to answer three questions: where are we, where are we going, and how will we know when we get there