Navigating Risk Oversight in the New Administration: Key Considerations for Boards of Directors

May 7, 2025

Agenda

- Landscape Overview
- Certain Key Trends and Areas of Focus for the New Administration
- Board Oversight of Key Risks in Uncertain Times
- Role of General Counsel in Navigating Risk
- Annex A: Limiting Director Liability / Fiduciary Duties

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Landscape Overview

Landscape Overview: First 100 Days

Ripped from the business headlines…

BARRON'S

FEATURE

Trump's First 100 Days Were the Worst for Stocks Since Nixon. What History Says Happens Next.

By Paul R. La Monica Follow

Updated April 29, 2025, 10:37 am EDT / Original April 29, 2025, 1:30 am EDT

CNN Business Markets Tech Media Calculators Videos Watch

The stock market is on pace for its worst first 100 days of any presidential term in more than 50 years

By John Towfighi, CNN

6 minute read · Updated 10:04 AM EDT, Tue April 29, 2025

MarketWatch

WASHINGTON WATCH

Trump's first 100 days in office are worst for stock market in half a century

S&P 500 has fallen an average of 5.5% in years when the first 100 days of a presidency produce subpar returns, data shows

By Isabel Wang Follow

Published: April 29, 2025 at 11:11 a.m. ET

Reuters

Trump's first 100 days: America First president is overturning world order

The New York Times

Trump's 100-Day Report Card

Market chaos and economic uncertainty has been a feature of the president's first few months back in office. DealBook breaks down the milestones, and what to expect next.

Bloomberg

From Stocks to Dollar, Trump's 'Golden Age' Is Off to Ugly Start

Landscape Overview: First 100 Days

- In the first 100 days of his second term, President Trump signed over 140 executive orders – far exceeding any other U.S. president over the same time period
- The executive orders have been broad in scope – primarily covering government administration and restructuring (46), foreign policy and national security (39) and domestic policy and culture (26), while also addressing energy and the environment (13), healthcare and public health (8), education and social policy (8) and technology (2)
- The market impacts of the uncertainty relating to trade policy and imposition of tariffs have been significant
  - The first 100 days have been marked by stock market volatility and increased trade volumes
  - Stock market is down over 8.5%
  - Consumer confidence is down
  - Companies are revising or hedging their guidance and near-term outlook
  - Many global consumers are boycotting U.S. goods in response to the changes in U.S. trade policy

Source: Federal Register.

02

Key Trends and Areas of Focus for the New Administration

Financial Fraud and Materiality Judgments

Materiality Test

There is a substantial likelihood that a reasonable investor would consider the information important in deciding how to vote

- i.e., there must be "a substantial likelihood that the disclosure … would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available"

  - *TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438*

SEC Staff guidance universally accepts and adopts this standard

Facts and Circumstances Assessment of Quantitative and Qualitative Factors

Materiality judgements require consideration of both the numerical size of the misstatement or omission (quantitative factor) as well as the full factual context of the information (qualitative factors)

SAB 99 sets forth a non-exclusive list of qualitative factors that could render material a quantitatively small misstatement, including whether the misstatement:

- Arises from an item capable of precise measurement or whether it arises from an estimate and, if so, the degree of imprecision inherent in the estimate
- Masks a change in earnings or other trends
- Hides a failure to meet analysts' consensus expectations for the enterprise
- Changes a loss into income or vice versa
- Concerns a segment or other significant business
- Affects compliance with regulatory requirements
- Affects compliance with loan covenants/ contractual requirements.
- Involves concealment of an unlawful transaction

Artificial Intelligence (AI)

- As companies navigate the complexities of the risk and opportunities relating to AI, they are confronted with various challenges, including ethical considerations, legal implications, data privacy concerns and the need for transparent decision-making processes
- Boards should maintain focus on overseeing the development and implementation of appropriate systems, processes and procedures to mitigate a range of risks
- Oversight of AI risks and opportunities is a priority for boards as it becomes more essential to their businesses
  - Only 30% of directors believe their organization has the right expertise on the board to advise on generative AI implementation, driving a demand for directors with such experience
  - Although AI is currently overseen at the board-level at a majority of companies, some boards are placing AI oversight in a technology committee or in the audit committee or risk committee – sometimes the same committee overseeing cybersecurity
- There was a marked increase in shareholder proposals focused on AI in 2024
  - Most commonly, the proposals requested reports on the anticipated impact of the use of AI, the amendment of relevant board committee charters to include AI oversight, and the board's oversight role – the proposals were primarily received by entertainment and media companies
- Former SEC Chair Gensler issued public statements warning companies against "AI-washing" in disclosures and emphasizing the importance of controls around AI
- The SEC has since pursued enforcement actions specific to AI-washing when public company filings inaccurately reflect how they use AI or overstated the companies' AI capabilities, uses or impacts
- Companies are outlining AI-related risks in their Form 10-K risk factors

SEC Focus on AI-Washing

- The SEC has cautioned that “public companies making statements on AI opportunities and risks need to take care to ensure that material disclosures are accurate and don’t deceive investors”
- In March 2024, the SEC concurrently charged two investment advisors for making false and misleading statements about their purported use of AI, cautioning companies to remain vigilant that representations on AI are not false or misleading
- In April 2025, the SEC and DOJ filed parallel actions against the former CEO of Nate, Inc., alleging that he made materially false and misleading statements re. the company’s AI capabilities
  - These cases mark the first AI-washing enforcement actions brought by the SEC and DOJ under the new Trump administration
  - Cases, and accompanying statements by DOJ, imply that the Trump administration views AI washing as a threat to its broader policy goals of promoting development of innovative AI technology companies in the US
- Companies should ensure that claims about AI can be substantiated and are consistent
  - When appropriate, include disclaimers noting that initiatives and standards are not guarantees that all goals will be met and all policies followed

Climate / Sustainability

- Although momentum for climate-related disclosures has stalled in the U.S., climate and climate transition risks remains a topic of interest for board oversight and disclosure
  - The SEC's climate rules are unlikely to become effective as adopted
  - Numerous climate-focused measures have been withdrawn, including those focused on climate change and renewable energy, and withdrawal from the Paris Agreement (including the goal of limiting global temperature increase to well below 2 degrees Celsius, while pursuing efforts to limit the increase to 1.5 degrees Celsius), and other recent directives focus on water resources in California and traditional energy products
  - Heightened scrutiny on groups such as Climate Action 100+ and various net zero alliances have prompted withdrawals by some companies and investors
- It is essential for companies to ensure that any sustainability-related disclosures are up to date and accurate, especially as it relates to targets and goals
- Public companies are continuing to prepare for compliance with other applicable climate-related disclosure requirements as well as be cognizant of key institutional investor expectations
  - New California laws will require certain large companies to disclose greenhouse gas emissions and climate-related financial risks (SB 219, amending SB 253 and SB 261) beginning in 2026, and provide disclosures relating to carbon offsets (among other things) for companies that make carbon neutral or similar claims (AB 1305), which is already in effect; New York and Illinois are considering enacting similar emissions disclosure laws
  - EU Corporate Sustainability Reporting Directive and EU Corporate Sustainability Due Diligence Directive may also apply to US companies with EU subsidiaries and/or significant EU business, and require climate-related disclosures and/or transition plans
  - Many other countries are adopting reporting requirements aligned with the International Sustainability Standards Board's new sustainability disclosure standards
  - Under current proxy voting policies applicable to U.S. companies, the Big 3 (BlackRock, State Street and Vanguard) expect companies to provide disclosures relating to material climate-related risks / opportunities and related oversight

Diversity, Equity and Inclusion (DEI)

- Pressure on corporate DEI programs began to build after the US Supreme Court's June 2023 ruling in *Students for Fair Admissions v. Harvard*, which struck down the use of race-based affirmative action in higher education admissions
- Several recent executive orders focused on DEI, and federal agencies are beginning to act on them – e.g., the FCC has launched investigation into Comcast, with others expected to follow, as the FCC focuses on eliminating "invidious'" DEI programs that they believe to violate the Communications Act; Department of Education attempted to withhold funding institutions with "discriminatory" DEI programs
  - Various state laws also target DEI programs in state agencies, schools and government contractors
  - Nasdaq withdrew its board diversity disclosure and composition rules following a court vacating the rule
  - Investor groups (including the "Big 3" – BlackRock, Vanguard, State Street) revised their voting policies to soften their board diversity requirements and generally remove numerical requirements; Glass Lewis maintained its policy, but will flag when they apply their diversity policy, so that their clients can disregard if they do not consider board diversity when voting
- There has been a chilling effect on corporate DEI initiatives and related disclosures as many companies limit or eliminate the use of the term "DEI" in favor of terms such as "belonging" or "diverse experiences"
- Robby Starbuck, a conservative activist, used social media to target DEI policies at several companies, leading some to revisit or roll back those policies
  - Many consumer-facing companies pressured by Starbuck have made changes to their DEI initiatives (although many of these companies are still disclosing board and employee diversity statistics, EEO-1 reports and pay equity) – e.g., Meta, McDonald's, Walmart, Boeing, Lowe's, Tractor Supply, Ford, Toyota, Nissan, Harley-Davidson, Indian Motorcycle, Polaris, Stanley Black & Decker, DeWalt Tools, Craftsman, Caterpillar, John Deere, Molson Coors
- Anti-DEI activists such as the National Center for Public Policy Research, the National Legal and Policy Center and the Heritage Foundation, continue to target DEI programs (such as hiring targets, inclusion networks, supplier diversity programs)
- Reputational and legal challenges to DEI efforts, especially quantitative targets, are likely to intensify making coordination across legal and communications teams with input from the board critical

Tariffs and Geopolitical / Geo-economic Risks

- While there remains uncertainty in the current environment regarding where U.S. policy will land, based on the current status and expected impacts on the company, boards can map out potential risks associated with various policy decisions and competitor and supplier behaviors and address potential disruptions to the business
- Companies are currently considering market volatility and performance expectations in light of tariffs and other macroeconomic factors and disclosing how their boards and board committees are overseeing these risks and their impact on the company's business and strategy
- Companies and their boards need to be vigilant and adaptable in the face of global and domestic challenges, keeping an eye on the impact of certain events on the business, the industry and the marketplace overall
  - Rely on "early warning" systems to anticipate, identify and monitor key geopolitical risks and potential impact; conduct vulnerability assessments of such risks
  - Understand the relevance and context of specific geopolitical matters to the company
  - Review history to help forecast future
  - Review scenario plan to play out impacts of likely or potential risks to the company
  - Integrate geopolitical risk into broader risk management strategies
  - Focus on adaptability
- Recent areas of focus for many companies have included:
  - Global security
  - Global conflicts
  - Fragmentation of global markets
  - Short- and long-term impacts of economic policy

FCPA Developments

- Under the priorities of the new administration and newly appointed Attorney General, as of February 5, 2025 memo, FCPA investigations would “shift [in] focus away from investigations and cases” that do not involve a connection to foreign bribery that facilitates the criminal operations of cartels and TCO
- However, since then, President Trump issued an Executive Order pausing the enforcement of the FCPA altogether – specifically the EO directs and authorizes the Attorney General to:
- Cease initiation of any new FCPA investigations or enforcement actions for a period of 180 days unless she determines that an exception should be made
- Review all existing FCPA investigations and enforcement actions, and issue updated guidelines and policies to promote the President’s authority to conduct international affairs and prioritize American competitiveness and the efficient use of law enforcement resources.
- Extend the review period for an additional 180 days if she deems that to be appropriate, and after the pause, any new or continued investigations or enforcement actions must be governed by the new guidelines and policies and specifically authorized by the Attorney General
- Prior to the recent shift in FCPA activity under the new administration, there had been international cooperation among US and foreign anti-corruption law enforcement agencies in investigating trans-border anti-corruption cases

Cybersecurity

- Directors consistently view cybersecurity as a significant risk and a key focus of its risk oversight mandate
  - Audit committees have generally been delegated cybersecurity oversight responsibility (59% of S&P 500 companies, including MGM)
- There are numerous intertwined issues and legal risk and operational considerations that arise from cybersecurity incidents, including investigations, private litigation, state and federal law enforcement actions and data preservation and management requirements
- Following the adoption of the SEC's cybersecurity disclosure rules in July 2023, which require disclosure within 4 business days of the determination that a material cyber breach occurred and annual disclosure of the management, governance and oversight of cyber incidents, the number of Russell 3000 companies that provide regular cybersecurity briefings to the board increased from 25% in February 2024 to 98% in June 2024
- Companies frequently include their Chief Information Security Officer as a member of the Disclosure Committee to help raise issues for review and determine materiality
- The SEC Staff and former Director of the Division of Corporation Finance provided guidance to help companies evaluate materiality – including the qualitative factors, such as reputational harm, impact on customer or vendor relationships, competition, and the possibility of litigation, regulatory investigations or other actions – which are to be considered in addition to the impact of the incident on financial condition or results
- The SEC also announced an enforcement action focused on cyber, emphasizing the need for robust incident detection and escalation procedures of cybersecurity incidents
- While President Trump extended the national emergency concerning malicious cyber activities for another year, the new Trump administration policy aims to shift certain responsibilities to states to improve their infrastructure to address risks while also reducing resources for states to do so
- Boards (including through the audit committee) should review and update disclosure controls and procedures around evaluating materiality of cybersecurity incidents, ensure that there are adequate systems in place to allow them to effectively monitor the company's cybersecurity and receive updates on how new cyber policies are impacting the company's controls and procedures / how the company is adapting to them, as appropriate

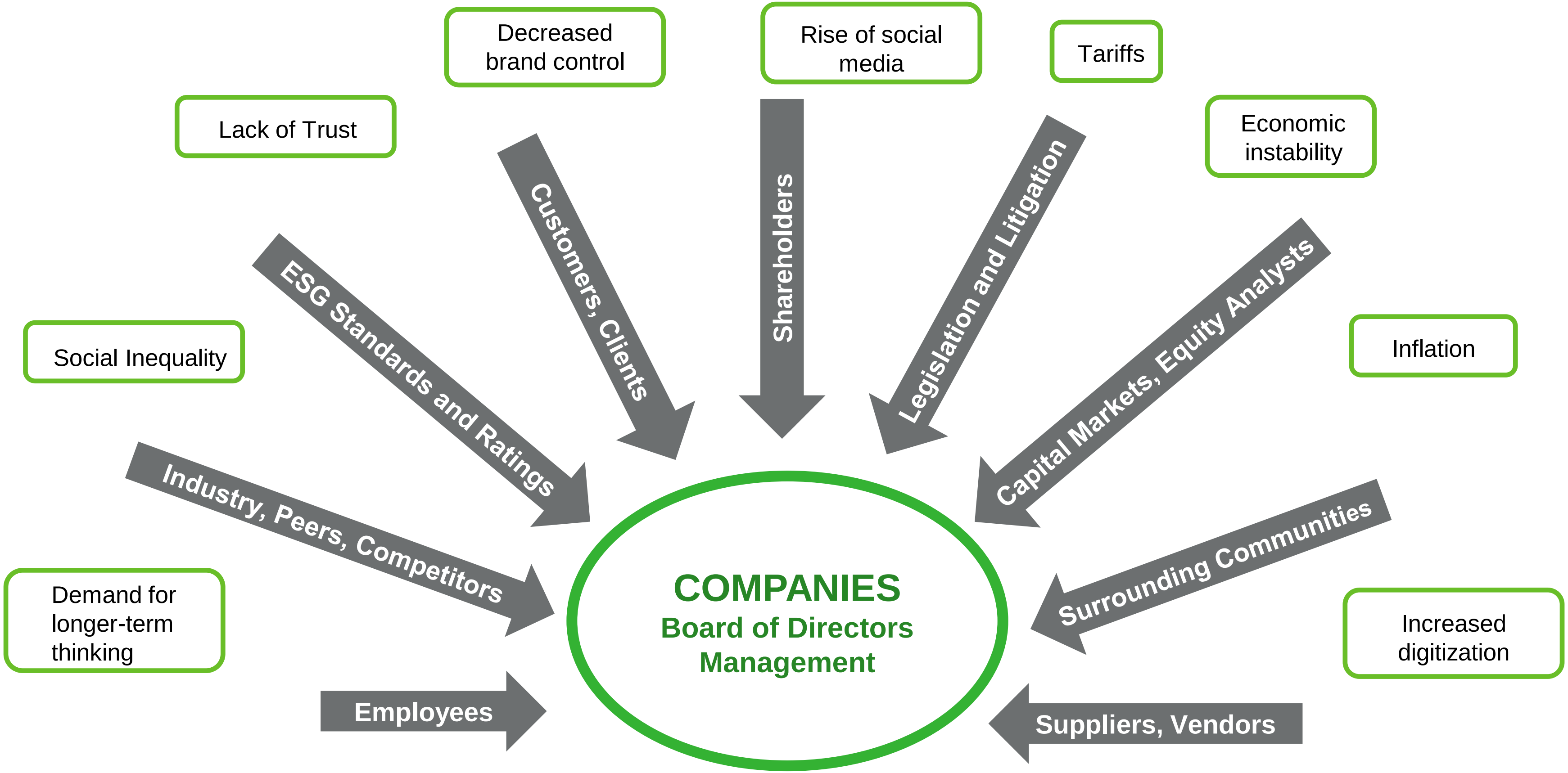
03

Board Oversight of Key Risks in Uncertain Times

Board Risk Oversight

- In today's complex risk environment, stakeholders are focused on how boards oversee the most important risks facing the company – and expect the company to better anticipate, manage and communicate about these risks
- In light of the dynamic and evolving geopolitical environment, stakeholders continue to encourage companies to provide robust disclosures surrounding their risk oversight and management strategies to mitigate shareholder concerns, reduce reputational risk, and protect long-term shareholder value
- In furtherance of their fiduciary duties, the board is responsible for ensuring that management establishes enterprise risk management systems designed to identify and monitor the most important risks facing the company – the "mission critical" risks – and manages such risks within the company's risk appetite in furtherance of achieving company objectives
  - To help identify these risks, companies should:
    - Frequently review operational risks, especially in areas of strategic importance, and consider events that could affect performance
    - Consider the impact of macro trends and key developments (e.g., policy, regulatory, legal, technology)
    - Annually review, benchmark and risks, including by updating disclosed risk factors (as applicable)
    - Review analyst and investor reports for discussion of risks facing the company and the industry
  - See Annex A for more detail on fiduciary duties framework under Delaware corporate law
- The proliferation of the types and complexity of risks affecting companies requires boards to delegate oversight of specific risk areas to committees, but boards remain responsible for the company's overall risk oversight
    - Investors are looking for express delegations of risk oversight responsibilities in committee charters and proxy statement disclosures
    - Committee reports and coordination of overlapping risk areas continue to be essential for board risk oversight processes and controls
- Companies are tailoring communications to stakeholders about the most important risks they face, including through required SEC disclosures (as applicable), which can highlight the quality of the board's oversight practices

Board Pressures in Today’s Environment



Considerations for Establishing a Dynamic Board

Director Education

Assess board-level expertise in key areas.

Facilitate board's education – recruit speakers and subject matter experts to attend board meetings, as well as presentations from management

Board's vs. Mgmt's Role

Establish differing roles for the board and management

Oversight Structure

Appropriate oversight structure:

- Determine whether full board or particular committee or subcommittee is best suited to oversee particular issues.

Board Composition/ Expertise

Board-level expertise:

- NGC should identify candidates with AI-related expertise –
- Consider company-level experience

Inform Board of Critical Risks

Ensure board is aware of critical risks:

- Directors should be made aware of the most critical systems, accompanying risks and mitigation steps to address risks.
- Systems to provide board with info on a regular basis.
- See *Caremark* systems as examples

Info. Reporting/ Elevation Systems

Establish info reporting & compliance systems:

- Effective management-level reporting structures to facilitate board oversight.

Review meeting cadence/ frequency

- May need to adjust in order to keep pace with dynamic circumstances

Bd. Meeting Agenda/ Minutes

Allocate time during board meetings to brief board members on key matters

Document oversight activities and management's compliance efforts in board minutes.

- Documentation of oversight activities and deliberation can help to preserve business judgement presumption

Regulatory and Enforcement Risk

- Navigating regulatory compliance has become increasingly complex and nuanced as companies aim to comply with the sometimes contradictory regulations of an increasingly fragmented global and domestic marketplace
  - With different global regulators addressing similar themes independently, financial firms are increasingly facing the challenge of meeting regulatory compliance across their different operating jurisdictions – each with their own focus
- In the U.S., at the federal level, regulatory rulemaking has slowed significantly and the threat of enforcement looms large for those who are not in compliance or otherwise aligned with the administration's policies as set out in the executive orders
  - The FCC has launched investigation into Comcast, with others expected to follow, as the FCC focuses on eliminating "invidious'" DEI programs that they believe to violate the Communications Act
  - The Department of Education attempted to withhold funding institutions with "discriminatory" DEI programs
- Furthermore, U.S. state regulatory agencies are increasingly regulating areas like privacy, cybersecurity and ESG adding complexity to the regulatory environment
- Actively monitoring state-level legislation, conducting regulatory impact assessments and establishing robust compliance program are essential for companies to navigate compliance and regulatory risk

4

Role of the General Counsel in Navigating Risk

Role of the General Counsel in Navigating Risk

- The General Counsel plays a vital role in advising the company and the board of directors on legal and other related risks
  - Counseling the company, the board and senior management
  - Advising on materiality
  - Safeguarding reputation
  - Liaising among the board, management and stakeholders
  - Liaising with regulatory bodies
  - Advising on stakeholder engagement
  - Establishing controls
  - Implementing a framework and oversight processes to report to the board when appropriate
  - Developing a process for managing and monitoring public statements and commitments
- All forward-looking statements and commitments made should be accompanied by safe harbor statements, including when reporting on company goals and values

Supporting Board Risk Oversight

It is critical for the general counsel to understand that the role is a balance between being part of management team and providing objective judgment and candor to both management and the Board

- Must understand board dynamics and pressures
- Advise on legal and business issues affecting the company, including regulatory compliance and fiduciary duties
- Consider governance trends and best practices and the interests of various constituencies

Supporting Board Risk Oversight: Info. Elevation, Agendas, Minutes, Materials

Information Reporting/ Elevation Systems

Ensure Board is aware of critical *Mission Critical* risks

- Directors should be made aware of the most critical systems, accompanying risks and mitigation steps to address risks.

Establish info reporting & compliance systems:

- Effective management-level reporting structures to facilitate Board oversight
- Systems to provide board with info on a regular basis

Board and Committee Agendas

- Define the board's priorities, working with the board and management to develop an agenda – with majority of time spent on:
  - Corporate strategy and material risks
  - Management performance, including how management is executing the Company's strategy, its operational and financial performance and valuation
  - Material transactions
  - Management evaluation, compensation and succession planning
  - Board discussion
- Establish a framework / expectations for elevating to the board updates or discussions about unplanned events and important matters that arise in between scheduled meetings

Board and Committee Meeting Minutes

- Required by state law, bylaws and U.S. securities laws for every meeting of the board and committees
- Should include basic administrative information (e.g., attendees), agenda items discussed, text of resolutions, outcome of any vote and any abstentions or recusals
- Care should be taken in drafting minutes to protect privileged information
- Minutes are regarded by courts and regulators as prima facie evidence of what occurred at the meeting
- Minutes may be inspected by shareholders for a proper purpose and by directors, and are discoverable in litigation
- Generally, should not be overly detailed or record meeting verbatim

Board and Committee Meeting Materials

- Provided to directors to assist in their consideration of agenda items
- Typically prepared by the GC/Secretary with management and with input from the chair
- Should be provided sufficiently in advance of the meeting to enable detailed review and consideration
- Should be as succinct as possible (avoid overloading), but adequately inform Board of the information necessary to fulfill their duties to the Company
- Reserve substantial time for discussion of materials, rather than walking through presentations
- Copies of materials provided to directors should be maintained by the Company (along with minutes)
- Director portals should be maintained with care

Being Prepared for a Crisis

An effective response to a crisis involves a solid foundation and an established plan

- Have a plan and be ready to act on it
- Prepare and discuss with the board the company's framework for dealing with crises when they arise
- Tailor the plan to the company's culture and organizational needs – i.e., determine who should be part of the plan and the level of detail required
- Establish a crisis team, which may include board members, a management working group, outside advisors (e.g., attorneys, PR firm, forensic firm)
- Manage potential litigation (breach of fiduciary duties, books and records requests), enforcement and regulatory risks
- Remediate issues effectively and efficiently; make changes to prevent the same crisis in the future

Safeguarding Reputation

Develop clear communication policy designating authorized spokespersons and consider key stakeholder audiences

- Investors
- Regulators
- Current and future directors
- Employees
- Customers and business partners

ANNEX A

Understanding and Mitigating Director Liability

Litigation Affecting Directors

Among the most common types of litigation / investigations face by directors include:

- Derivative claims for breach of fiduciary duties
- Claims for failure of oversight ("*Caremark* claims")
- Claims for violations of federal securities laws
- Government investigations relating to certain activities

Litigation risks can be mitigated through:

- Fostering a culture of compliance and ethical business conduct
- Oversee management's reporting and risk management structures – especially for "mission critical" risks
- Receive regular reports from management; review minutes and materials
- Consulting with counsel or other subject matter experts, as appropriate

Fiduciary Duties of Directors

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Directors owe fiduciary duties to the company and all of its stockholders

- In practice, the directors’ powers and authority are prescribed by:
    - Bylaws and certificate/articles of incorporation
    - Delaware General Corporation Law (DGCL) – or other applicable state law
    - Stock exchange listing rules, as applicable
- Directors must act honestly and in good faith with a view to the best interests of the company
    - A director will be found not to be acting honestly if he or she fails to disclose material conflicts
    - Directors must not to put themselves in a position where their personal interests may conflict with their duties to the company
- Fiduciary duties cannot be delegated to others
- Directors can be held personally liable for breaches of fiduciary duties
- Directors must exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances

Fiduciary Duties of Directors (cont.)

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Duty of Care

- The duty of care does not prescribe specific actions that the Board must take
- Generally, to fulfill the duty of care directors must:
  - Exercise an appropriate degree of care and prudence in making decisions and carrying out their responsibilities
  - Be informed of all material information reasonably available to them when making decisions
    - Decisions should not be made – or appear to be made – with unnecessary haste, based on inadequate deliberation or with an incomplete understanding of a proposed transaction and its consequences
    - Devote sufficient time and attention to board matters (attend meetings, review reports, consider information, ask questions, seek information where needed)
  - Act with the care that a person in a like position would reasonably believe appropriate under similar circumstances
    - Investigate potential problems when alerted to them and require reasonable systems to be in place to detect, report and correct wrongdoing
- Directors may rely on management and experts (e.g., financial advisors, outside legal counsel, consultants)
  - Such reliance must be in good faith and reasonable under the circumstances
  - Directors should not be passive recipients of advice, but should consider the information and recommendations provided and ask questions
- Directors should actively monitor corporate affairs and monitor those delegated authority; apply constructive skepticism

Fiduciary Duties of Directors (cont.)

Duty of Loyalty

- Directors must act in good faith as they reasonably believe to be in the best interests of the company and all of its stockholders
  - Directors may be deemed to act in bad faith where they intentionally fail to act in the face of a known duty to act
- The duty of loyalty is implicated when directors are interested in the outcome of a transaction or lack independence to consider objectively whether the transaction is in the best interests of the company and its stockholders
  - Act honestly
  - Analyze rationally
  - Avoid self-dealing or other use of board position for advantage of self or others
- Fully disclose to the board potential, actual or apparent conflicts, so that the Board may take appropriate action
- Directors must avoid self-dealing and misappropriation of corporate assets (including confidential information) or other use of board position for advantage of self or others
- Directors are obligated to fully disclose to the board potential, actual or apparent conflicts, so that the board may take appropriate action

Fiduciary Duties of Directors (cont.)

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Duty to Monitor (*CareMark*)

- *Caremark* and progeny stand for the proposition that:
  - Directors have a duty to implement adequate information and reporting systems to provide the board with the timely and relevant information needed to properly carry out its oversight duties
    - The absence of such measures could indicate a breach of the duty of loyalty
  - Systems must be at the Board level in order to satisfy *Caremark* – i.e., system must funnel information up to the board for its consideration
  - Identification and monitoring of critical risks is key
- Directors must not only ensure that board-level information and reporting protocols are in place, but also that the board is actively monitoring the reported developments – i.e., actually using the system to keep apprised of critical issues
  - Duty of care cases often involve claims that directors knew or should have known of a critical failure or concern – e.g., ignoring red flags
  - Directors' responsibility is to know that the reporting/ compliance function is robust and then lean on it
    - Resist the urge to supplant the system by getting into the weeds of management
  - With a functioning reporting system implemented, and utilized by the board, directors can preserve their business judgment protections decisions made in the context of executing its oversight function

Fiduciary Duties of Directors (cont.)

Business Judgment Rule

- Delaware courts presume "that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company"
  - Provides protection from liability when directors act diligently, in good faith, and without self-interest
  - Directors are not liable for mere errors or mistakes of judgment
    - Courts do not like to second-guess business decisions
    - Courts will generally presume that directors and officers acted on an informed basis, in good faith, and in the best interests of the company
    - Where there is a conflict, it is important to be able to show that the decision was made by disinterested, independent directors
- Directors must inform themselves of all material information reasonably available to them and may rely on information from consultants and management so long as the directors reasonably believe the information provided is within the scope of the provider's professional or expert competence, and the person has been selected with care
  - In good faith – Do not rubber stamp management's actions
  - In the honest belief that the action was taken in the best interest of the company
    - The directors must reasonably believe this to be the case

Presenter Biographies

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MARKET RECOGNITION

Recognized among "the most influential people in the boardroom"
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Recognized as a "Leading" Lawyer for Securities: Regulation: Advisory, where clients note he is "an expert" who is "plugged in and has broad experience."
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Legal 500 US

Recognized for M&A and Corporate Governance
Who's Who Legal

Named a "Best Lawyer" for Securities Regulation in Washington, D.C.
Best Lawyers in America

EXPERTISE

Adé Heyliger is a partner in Weil's Public Company Advisory Group, the private equity governance practice, and the Sustainability and ESG Practice, based in Washington, D.C. Kaitlin regularly advises public and private companies and not-for-profit corporations, as well as their boards of directors, on a wide range of governance, disclosure and compliance matters, including fiduciary duties, director independence, board leadership and committee structures, governance structures, executive and director compensation, risk oversight, conflicts of interest and related party transactions, cybersecurity, shareholder proposals, stakeholder governance, ESG and related matters. Kaitlin also counsels clients on a breadth of corporate governance and compliance matters in M&A, capital markets and corporate restructuring transactions and regularly advises on SEC regulations and governance issues faced by newly-listed public companies and private companies (and their sponsors) preparing to go public, as well as seasoned public companies engaging in strategic transactions. Kaitlin frequently advises on highly sensitive matters, including shareholder activism, leadership transitions, related party transactions and conflicts of interest, board and corporate culture, climate transition and cybersecurity.

Kaitlin frequently writes and speaks on legal developments affecting public companies and boards of directors and is a regular contributor to Weil's Governance & Securities Watch (blog). Kaitlin is recognized for Corporate Governance and Compliance Law by Best Lawyers: Ones to Watch 2024. Kaitlin is also experienced in not-for-profit corporate governance. She was a recipient of the Lawyers Alliance for New York's 2021 Individual Cornerstone Award in recognition of her exceptional pro bono legal services to the nonprofit sector. Kaitlin is also co-head of Weil's Washington DC Women@Weil affinity group and is a Co-Chair of the Firm's Professional Development Committee.

Kaitlin was previously a member of Weil's Private Equity and Mergers & Acquisitions practice and worked on a variety of public and private transactions, as well as with private equity funds, in connection with acquisitions and divestitures. Prior to joining Weil, Kaitlin was a corporate public and media relations manager at Weber Shandwick where she managed media relations strategies for a broad range of companies and special situations, including leadership transitions and general media visibility for CEOs and other senior leaders.

Kaitlin is recognized for Corporate Governance and Compliance Law by Best Lawyers: Ones to Watch 2024.

Kaitlin received her J.D. from New York Law School, cum laude, where she served as the Editor in Chief of the New York Law School Law Review, and her B.A. from Dartmouth College.

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Named a "Leading Lawyer" for Corporate Governance and Shareholder Activism
Legal 500 US

Recognized for M&A and Corporate Governance
Who's Who Legal

Named a "Best Lawyer" for Securities Regulation in Washington, D.C.
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EXPERTISE

Adé Heyliger is a partner in Weil's Public Company Advisory Group, the private equity governance practice, and the Sustainability and ESG Advisory Group, based in Washington, D.C. Adé routinely advises boards of directors, board committees and C-suite executive officers on various governance matters, including internal investigations, leadership transitions and succession planning, self-assessments, independence determinations, executive compensation, and ESG and sustainability matters. He provides counsel on sensitive matters, including crisis management, internal controls, accounting irregularities and financial restatements, shareholder activism and engagement. Adé advises companies on compliance matters in M&A, private equity, and capital markets transactions, and bankruptcy/restructuring matters.

Adé also provides day-to-day guidance on a variety of regulatory and rulemaking developments, lectures extensively on corporate governance, SEC disclosure requirements, regulatory and rulemaking developments, and is a regular contributor to Weil's Governance & Securities Watch (blog).

At Weil, Adé also has an active not-for-profit practice governance practice and has worked with many of the Firm's pro bono clients, including the Innocence Project.

Prior to joining Weil, Adé served in the SEC's Division of Corporation Finance, providing interpretive advice on domestic and cross-border M&A transactions, going-private transactions, proxy contests and shareholder proposals, and disclosure guidance concerning various SEC filings. Before the SEC, Adé worked in the investment banking division at Merrill Lynch, focusing on transactions in the Telecom, Media and Technology sectors.

Adé is an active member of the NACD General Counsel Forum, as well as The Conference Board's Human Capital Management Committee. He has served as an Adjunct Professor at Georgetown University Law Center, where more than 100 members of the SEC Staff via the SEC University Program attended his class. Adé is a former Chair of the Federal Regulation of Securities: Proxy Statements and Business Combinations Subcommittee of the American Bar Association and a former Co-Chair of the DC Bar Association Mergers & Acquisitions Committee.

Adé is named among "the most influential people in the boardroom" by the National Association of Corporate Directors (NACD) as part of its Directorship 100, and has ben elected as a fellow of the American College of Governance Counsel. Adé is widely recognized for his work, including as a "leading lawyer" for Securities: Regulation: Advisory by *Chambers USA*, where clients note he is "an expert" who is "plugged in and has broad experience"; a "Leading Lawyer" for Corporate Governance and Shareholder Activism: Advice to Boards by *Legal 500 US*, where he is described as a "standout practitioner"; for M&A and Governance by *Who's Who Legal*; and as a "Best Lawyer" for Securities Regulation in Washington, D.C. by *Best Lawyers in America*.

Adé holds a J.D., cum laude, from Harvard Law School, and a M.B.A. in Finance from The Wharton School, University of Pennsylvania. He received his B.S. in Finance, cum laude, from the University of Maryland.

Ray Sczudlo

EXPERTISE

Mr. Sczudlo is currently General Counsel to b.well Connected Health, Inc.

Executive Vice President and Chief Legal Officer of Children's National Medical Center (now called Children's National Hospital), a leading U.S. pediatric medical institution based in Washington, D.C. with an annual operating budget of over $1 billion in revenue. (2001 to 2015).

At Children's National, he led the legal affairs of the organization, including compliance, internal audit, contracts, joint ventures, leases, operating agreements, insurance, corporate governance, and safety and risk management, reporting directly to the Chief Executive Officer.

Led patient safety program that resulted in decrease in serious adverse events by over 70%.
Executive responsibility for managing operations of captive insurance company.
Acting CFO during 2008 financial crises—during that time converted $150m auction rate bonds to fixed rate and issued $250m fixed rate insured bonds. Executed financial transaction allowing company to avoid covenant default and increase cash on hand.
Negotiated creation of pediatric specialty practice joint venture in the Northern Virginia market.
Negotiated with the attorneys for the Crown Prince/Health Authority of Abu Dhabi for a gift agreement for $150 million to Children's National and led an internal work group to launch and manage the Sheikh Zayed Institute.

Partner in the international law firm of Weil, Gotshal & Manges LLP, (1987 to 2000) where he practiced in the areas of banking, finance, corporate, commercial, technology law, and international transactions. During that time, he was a member of the adjunct faculty at the George Washington University Law Center, where he taught banking and finance.

From 1984 to 2001, while in private practice, Mr. Sczudlo served on the Board of Directors of the Children's National Medical Center and several of its affiliates, chairing a number of committees.

From 1993 to 1995, he served as Chairman of the Board of the institution, and subsequently served as Chairman of Children's Hospital Foundation and Chairman of SafeKids Worldwide.

He has also served on the boards of a number of charitable, technology and financial companies, including Visual Telecommunications Network, Inc. (ViTel Net—a software company with telemedicine and other applications) , ReveraGen BioPharma, Inc.)a start-up company developing a non-steroidal anti-inflammatory compound for the treatment of Duchenne's Muscular Dystrophy), and Bearacuda Re, Ltd. (a captive reinsurance company). He has served on the board of Bell Multicultural Internship Program, (a support organization for Bell Multicultural High School in Columbia Heights, Washington, D.C.), Children's School Services in Washington, D.C. (a school nurse program), He currently serves as a Trustee of Arena Stage, and is a member of the Finance and Investment committees, and a member of the Economic Club of Washington.