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Board Governance in Times of Change and Disruption

Proposed Responses to Scenarios

Scenario 1

May an absent director delegate her/his votes to another director?

- Delaware Law:
  - Section 141(b) of the General Corporation Law of the State of Delaware provides, "The vote of the majority of the ***directors present*** at a meeting *at which a quorum is present* shall be the act of the board of directors unless the certificate of incorporation or the bylaws shall require a vote of a greater number." (emphasis added)
  - In 1915 the Delaware Chancery Court stated that "[d]iscretionary powers, questions of policy, business administration, all imply the personal attendance at the meeting, so that each director may have the benefit of not only the vote, but the voice of every other director, or at least of enough other directors to constitute a quorum."[1]
  - "[T]here is a deeper reason [for not permitting directors to act by proxy] based on the association of each director with each of the others, of which association none of the associates can divest himself while remaining a member. In other words, a director cannot authorize any one to act for him, because his associates are entitled to his judgment, experience and business ability, just as his associates cannot deprive him of his rights and powers as director." [2]
  - Section 141(c)(1) provides, "The board may designate 1 or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. The bylaws may provide that in the absence or disqualification of a member of a committee, the member or members present at any meeting and not disqualified from voting, whether or not the member or members present constitute a quorum, may unanimously appoint another member of the board of directors to act at the meeting in the place of any such absent or disqualified member," but no similar provision applies to the Board generally.
  - While, Section 141(i) of the DGCL provides, "Unless otherwise restricted by the certificate of incorporation or bylaws, members of the board of directors of any corporation, or any committee designated by the board, may participate in a meeting of such board, or committee by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this subsection shall constitute ***presence in person at the meeting***." In dicta, the Delaware courts do not appear to distinguish between the phrase "directors present" and "presence in person."[3]

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[1] *Lippman v. Kehoe Stenograph Co.*, 95 A. 895, 11 Del. Ch. 80, 88 (Del. Ch. 1915).
[2] *Lippman v. Kehoe Stenograph Co.*, 95 A. 895, 11 Del. Ch. 80, 85 (Del. Ch. 1915).
[3] *See* Hibbert v. Hollywood Park, Inc., C.A. No. 78C-AP-109, slip op. at 4 n.3 (Del. Super. Ct. Nov. 13, 1980) ("The transcript of the meeting makes it abundantly clear that Mr. McMahon was not herd by all the parties and he did not hear everything said by those in attendance. Thus, he may not be regarded as having been present at the meeting…"

- Model Business Corporation Act
  - Section 8.24(c) provides, "If a quorum is present when a vote is taken, the affirmative vote of a majority of ***directors present*** is the act of the board of directors unless the articles of incorporation or bylaws require the vote of a greater number of directors or unless otherwise expressly provided in this Act." (emphasis added).
  - Section 8.25(e) provides, "The board of directors may appoint one or more directors as alternate members of any board committee to replace any absent or disqualified member during the member's absence or disqualification. If the articles of incorporation, the bylaws, or the resolution creating the board committee so provide, the member or members present at any board committee meeting and not disqualified from voting may, by unanimous action, appoint another director to act in place of an absent or disqualified member during that member's absence or disqualification," but no similar provision applies to the Board generally.
  - Section 8.20(b) provides, "Unless restricted by the articles of incorporation or bylaws, any or all directors may participate in any meeting of the board of directors through the use of any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be ***present in person*** at the meeting."
- Discussion Points:
  - We understand that the general rule is that directors are required to be present in order to vote and count towards a quorum and that proxies will not count for such purposes. Practically, we know that directors are busy people and cannot always attend a full meeting in person. What tools have you used to manage such situations?
    - Providing Board and Committee meeting calendars well in advance and having the Board approve such calendars. While we note that the Board may provide for alternate members of a committee, if the governing documents permit, these alternate procedures are rarely used. Director independence should also be considered with alternative committee members.
    - Ensuring that there is a means of remote participation, either conference call or video conference, so that a director who cannot attend in person for the entirety of the meeting may attend or a director who cannot attend a portion of the meeting may participate. The Delaware General Corporation Law and Model Business Corporation Act permit such participation.
  - What problems have you encountered or expect that you might encounter should a director attempt to grant a proxy to another person?
    - Keeping track of a quorum may be challenging since the director who granted the proxy would not count for purposes of a quorum.
    - Even if a quorum is maintained, occasionally, the Board will have votes that require supermajorities or approvals from certain individuals. Relying on a proxy vote is likely not valid and should the company rely on that vote for approval, the company may need to have the vote ratified under the applicable procedures in the state of incorporation. Further, in the event that stockholders become aware of the practice, they may attempt to bring claims against the company or the Board.
    - Other directors will not get the benefit of hearing that director's views.

Scenario 2

How much detail is the right amount to include in Board meeting minutes?

- Minutes covering critical issues, such as consideration of material legal compliance risk or evaluation of M&A transactions, should provide the material factors the Board considered in its deliberative process.
- Minutes should refer specifically to written materials, such as advisor presentations or reports by management, that the Board considered in its deliberations. Once finalized, minutes should be promptly approved at the next meeting so that directors may raise objections while their memories are fresh.
- Maintaining thorough and accurate minutes may limit discovery in litigation and the extent of information that would need to be produced in a books and records request.

Should there be a transcript of the meeting (whether created by an AI tool or manually produced)?

- No, if the minutes reflect a transcript of the meeting, or if any litigation survives past the motion to dismiss and enters discovery, stockholders and plaintiffs may be able to obtain the full account of the meeting (along with other discoverable materials). Quotes from such a transcript may be taken out of context and used to criticize the company's internal governance procedures or as evidence in a trial.
- Consider if AI tools are engaged even on a limited basis what the State law considerations may be, such as the right to unilaterally record conversations.

Scenario 3

Why do the minutes refer to the Board Materials?

- References to Board materials provide context for the considerations taken by the Board in reaching their determinations. Minutes that provide such context are less likely to be challenged in court and more likely to result in potential claims being dismissed before discovery.
- In addition, they provide the Board and management with credible memory aids that may help align any narrative provided in connection with any future litigation.

Should the materials be destroyed after the meeting?

- No, the official board record should be preserved. Care should be taken on what notes and other non-official materials are produced. Obviously, should such materials become subject to an investigation, there are significant prohibitions on destroying such materials. Accordingly, best practice is to maintain the official Board record materials indefinitely.
    - Section 802 of Sarbanes-Oxley makes it a crime to alter, destroy, cover-up or falsify any document with the intent to "impede, obstruct or influence" any federal investigation or any bankruptcy case. The new crime carries a maximum sentence of 20 years. The statute broadens criminal liability by extending criminal liability to the destruction of documents relating to any federal investigation – even low level executive or administrative inquiries or any bankruptcy case. Section 802 applies to "contemplated" investigations, imposing potential criminal liability even where corporate officers have no actual notice of the investigation.
    - Section 1102 of the Sarbanes-Oxley Act adds a separate offense, also punishable by up to 20 years, for persons who alter or destroy documents or records with the intent to impair their use for "official proceedings," even before a subpoena has been issued. This statute closed a loophole. Prior to its enactment,

obstruction of justice statutes prohibited individuals from persuading others to destroy documents, but not from acting alone to do so.

- Obviously, there are a myriad of preservation requirements should there be litigation.

Scenario 4

Should minutes for the prior year's Board meetings be reviewed and approved in a delayed, omnibus manner?

- No. Promptly drafting minutes generally reflects more accurate and comprehensive summary of the discussion during Board meetings. In addition, timely reviewing minutes at each subsequent meeting allows the board to consider and reflect on the process as a transaction or other matter evolves.
- Courts have criticized, and been skeptical of, minutes that are not the product of a timely, diligent real-time effort to document the board's deliberations or a large batch of minutes.[4]
- Omnibus approvals of large batches of minutes may raise concerns about the accuracy of the meetings' proceedings.
- Further, waiting until the end of a transaction to craft minutes may introduce bias. For example, in *In re Columbia Pipeline Grp., Merger Litig.*[5], the court noted that "[t]he minutes were not prepared contemporaneously [but] retrospectively after the outcome of the sale process was known. That fact undercuts their evidentiary value."
- Courts may be particularly skeptical where minutes are prepared or approved after litigation has commenced. For example, in *FrontFour Cap. Grp. LLC* v. *Taube*[6], when minutes "were [not] finalized until after [the plaintiff] commenced this litigation," the court denied the minutes "any presumptive weight, but rather use[d] them to summarize [the] [d]efendants' litigation position."

Scenario 5

May a Board of Directors or Compensation Committee ratify the hiring of a key executive officer that was hired by the Chief Executive Officer without prior authorization?

- Subject to a company's bylaws, the CEO may have authority to hire certain subordinate executive officers, but such an approach would not be best practice.
- Typically, the Compensation Committee has oversight over executive compensation and may be required to approve certain matters with respect to equity compensation. While management may make recommendations to the Compensation Committee on these matters, it is ultimately the Compensation Committee's responsibility to review and approve such matters and not act as a rubber stamp.
- Further, the Board may need to take additional actions with respect to such executive officers, such as designating the individual as an executive officer for SEC reporting and Section 16 purposes in cases of public companies. These are important steps to avoid missed reporting deadlines and the like.

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[4] *E.g.*, *Forsyth*, 2010 WL 3168407, at *7 (criticizing minutes as being "created a year later by someone who was not even present at the meeting"); *Phillips* v. *Hove*, 2011 WL 4404034, at *11 (Del. Ch. Sept. 22, 2011) (criticizing minutes as being drafted after the date on which they purported to have been created).
[5] 299 A.3d 393, 449 (Del. Ch. June 30, 2023)
[6] 2019 WL 1313408, at *10 n.98 (Del. Ch. Mar. 22, 2019)

Should these matters be discussed in executive session?

- Yes, the Board should take the opportunity to assess its internal governance and oversight of the company's operations. Executive sessions provide the directors the opportunity to discuss without the CEO (other management) being present and report back the feedback.
- If such an approach becomes a habit after the Board has instructed him or her not to hire key executives without the proper review and approvals, the Board should consider additional discussion during a Board meeting and corrective actions as appropriate.

Scenario 6

May Board Observers remain in a Board meeting for conversations with legal counsel subject to attorney-client privilege?

- Generally if a board of directors seeks legal advice from counsel, that portion of the meeting (and the minutes) may be protected by attorney-client privilege.
- Generally, third parties – individuals who are neither directors nor management – should leave the meeting. Should third parties, such as observers remain, one of the conditions of attorney-client privilege could be breached, namely the requirement that legal advice be communicated *between counsel and client in confidence*.
- Accordingly, generally if the advice rendered by counsel is to remain privileged, then observers and other third parties should not remain in the meeting during the time when the advice or related matters are discussed.

Is removing such observer proper corporate governance?

- While there are benefits to including observers in Board and committee meetings, their presence is governed by contract, not corporation laws and related fiduciary obligations applicable to directors. Accordingly, a well-crafted observer rights letter will permit the company (typically by vote of the board of directors or a committee) to exclude an observer from discussions protected by attorney-client privilege.
- Excluding an observer from such a conversation permits the board of directors to advance their fiduciary responsibilities by receiving candid legal advice from counsel and advances the board's obligation to conduct proper corporate governance.

Scenario 7

May a director who is designated to her/his seat by a shareholder share confidential information with such shareholder on a confidential basis?

- It depends, but much caution is warranted here, as generally directors are not permitted to share the company's confidential information with a designating shareholder, subject to two exceptions:
  - when a shareholder has the right to designate a director to the board by contract or its shareholder voting power, in which case it is important to maintain a confidentiality agreement with such designating shareholder; and
  - when a director controls the designating shareholder or is a fiduciary of the controlling stockholder, on the theory that the director has only "one brain" and is a dual fiduciary.

- Note, however, that as it relates to attorney-client privilege, the analysis is slightly different: Delaware law treats a corporation and the members of its board of directors as "joint clients for purposes of privileged material created during a director's tenure."[7] Thus, a Delaware corporation "cannot invoke [the attorney-client] privilege against [a current or former] director to withhold information generated during the director's tenure."[8] However, the Court of Chancery has recognized three methods by which a corporation can alter this default rule:
  - (1) "the parties can address the matter by contract, such as through a confidentiality agreement";
  - (2) "the board of directors can form a committee that excludes the director, at which point the committee can retain and consult confidentially with counsel"; and
  - (3) "once a sufficient adversity of interests has arisen and becomes known to the director, the director cannot reasonably rely on corporate counsel as to the matters where the interests of the director and corporation are adverse."[9]
- Even if a director is entitled to share the company's privileged or confidential information with a designating stockholder, that entitlement does not give the director or the designating stockholder the freedom or unfettered right to further disclose or use the information in whatever manner the stockholder sees fit.

Scenario 8

May a Board member seek outside advisors' views of potential plans using the company's confidential information?

- Directors have a fiduciary duty to protect corporate information.[10] However, courts will typically only find a director liable when there is a harm to the company.[11]

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[7] Hyde Park Venture Partners Fund III, L.P. v. FairXchange, LLC, 292 A.3d 178, 184 (Del. Ch. 2023)

[8] Hyde Park, 292 A.3d 178, 184. Likewise, when a director represents an investor on the board, the investor "presumptively joins the director within the circle of confidentiality," and therefore, the corporation cannot invoke the attorney-client privilege against that investor "for materials created during the director's tenure." Id. A director may also be entitled to corporate books and records under section 220(d). However, the Court of Chancery has indicated that section 220(d) case law is inapplicable to discovery disputes involving current or former directors in non-section 220(d) actions. Id. at 199-201.

[9] Hyde Park, 292 A.3d 178, 184 (granting motion to compel documents withheld on privilege grounds and explaining that the company "did not take any of the steps necessary to preserve the privilege" and therefore, "company ha[d] no basis for asserting the [attorney-client] privilege against" funds which were represented by director); see also Cervieri v. Curadel Surgical Innovations, C.A. No. 2020-0926-NAC (Del. Ch. Mar. 24, 2023) (Order) (denying motion to compel production of privileged material to former director when he "knew of adversity").

[10] Shocking Techs., C.A. No. 7164-VCN, slip op. at 25 (Del. Ch. Sept. 28, revised, Oct. 1, 2012); see also Beard Rsch., Inc. v. Kates, 8 A.3d 573, 602-604 (Del. Ch. 2010), aff'd sub nom. ASDI, Inc. v. Beard Rsch., Inc., 11 A.3d 749 (Del. 2010) (holding director's and officer's disclosure and use of confidential information constituted breach of fiduciary duty and explaining that to prove breach of fiduciary duty "claim can be premised on the misuse of a plaintiff's confidential information, even if that information does not rise to the level of a trade secret"); Hollinger Int'l, Inc. v. Black, 844 A.2d 1022, 1061-1062 (Del. Ch. 2004) (holding defendant violated his fiduciary duty of loyalty by (among other things) "improperly using confidential information belonging to [the company] to advance his own personal interests and not those of [the company], without authorization from his fellow directors"), aff'd, 872 A.2d 559 (Del. 2005); Venoco, Inc. v. Eson, C.A. No. 19506-NC, slip op. at 15-17 (Del. Ch. June 6, 2002) (holding breach of duty of loyalty shown where directors provided confidential information to advantage themselves as stockholders). But cf. Benihana of Tokyo, Inc. v. Benihana, Inc., 906 A.2d 114, 121 (Del. 2006) (rejecting claim that director breached his duty of loyalty when he used company's confidential information to negotiate transaction because "[t]he record does not support…contention that [director] used any confidential information against [the company]")

[11] In Kerbawy v. McDonnell, the Court of Chancery determined that the fact that a director provided company information to a stockholder in connection with a consent solicitation was not a basis to set aside the consent solicitation, even while acknowledging that the dissemination of such information "probably [was] negligent, and arguably might have been grossly negligent, in failing to take basic precautions such as requiring the recipients of the information to execute non-disclosure agreements." Kerbawy v. McDonnell, C.A. No. 10769-VCP, slip op. at 53-54 (Del. Ch. Aug. 18, 2015). The Court of Chancery noted that the defendants' proposition that

- Notwithstanding a director's fiduciary duties, there are other considerations, such as Regulation FD for selective disclosure, embarrassment to the company should the recipient of the information trade on such information, and Board management considerations should each director decide to act individually.
- Obviously directors seeking independent legal advice are covered by a lawyers duty of confidentiality and the rules around privilege.

Scenario 9

Should the Board address matters that uniquely impact one director as a full Board or through a committee of disinterested directors (which may be a standing committee)?

- It is generally best practice for directors to delegate matters that are material to the business and in which they have a direct or indirect interest that is different from the stockholders generally to the disinterested directors, either as a committee or approval by a majority of the disinterested directors.
- In Scenario 9, assuming that this is a non-employee director, the director presents a mix of facts that could be understood to include board policy generally (e.g., a remote participation policy) and some facts that are specific to him (e.g., commuting from his personal home in Florida to the company's headquarters). If the company adopts a board policy, it should consider prior information it has provided to shareholders with respect to determining Board compensation. If the board analyzes the request for reimbursement specific to the director, it should consider its related party transaction policy, including the process required to approve such matters (e.g., approval by the audit or nominating and corporate governance committee) and the related disclosure in its proxy statement.
- If the director also serves as an employee or officer of the company, the board should delegate the review to the compensation committee for analysis, as this likely implicates perquisite and compensation questions, which may be complicated. Typically the compensation committee will work with its independent compensation consultant on such matters.

Scenario 10

How should directors call a meeting to terminate the employment of an executive officer who is also a Board member?

- The requirements to provide notice and the contents of such notice are set forth in court precedent in Delaware.
    - For regular meetings of the Board of Directors, the courts have determined that directors are not required to be given notice with specificity of the topic to be discussed. Accordingly, at a regular meeting of the Board a CEO/Executive Officer director may not be required to be notified specifically of his or her termination prior to such a regular Board meeting.[12]

"[i]nherent in the duty of loyalty is an obligation to protect the corporation by maintaining the confidentiality of its sensitive information" was "indisputable." *Kerbawy*, C.A. No. 10769-VCP, slip op. at 56 (Del. Ch. Aug. 18, 2015) (quoting J. Travis Laster & John Mark Zeberkiewicz, *The Rights and Duties of Blockholder Directors*, 70 Bus. Law 33, 52 (2015)). However, the court emphasized, no harm to the corporation was shown in that case, noting that this was "not a case in which trade secrets or commercially valuable proprietary information was put at risk, nor [was] it like some of the cases…that involved disloyal disclosure by fiduciaries of business opportunities or other highly sensitive information." K*erbawy*, C.A. No. 10769-VCP, slip op. at 54 (Del. Ch. Aug. 18, 2015).

[12] In Klaassen v. Allegro Development Corp., the Delaware Supreme Court concluded that the director-defendants did not violate any notice requirements in not informing the CEO (who was also a director and the company's founder) of its plan to remove him from office because such termination occurred at a regular board meeting. The Court rejected the CEO's claim that conversations among board members regarding their intention to remove him from office prior to the regular meeting constituted a special meeting and,

- However, for special meetings, directors must generally receive notice as prescribed by the bylaws.[13] While there are no "hard and fast" rules regarding the level of notice required, such notice needs at least to be "sufficient to allow directors 'an adequate opportunity to protect [their] interests.'"[14] The Court of Chancery has invalidated actions taken at a board meeting where there was failure to give notice as required in the bylaws.[15] Accordingly, for special meetings, it is important to review the bylaws to determine the procedural and substantive requirements of the bylaws. While some companies will indicate that the bylaws do not need to contain the purpose of the meeting, excluding the purpose may be subject to review by the courts.

- Section 8.22 of the Model Business Corporation Act provides:
  - Unless the articles of incorporation or bylaws provide otherwise, regular meetings of the board of directors may be held without notice of the date, time, place, or purpose of the meeting.
  - Unless the articles of incorporation or bylaws provide for a longer or shorter period, special meetings of the board of directors shall be preceded by at least two days' notice of the date, time, and place of the meeting. The notice need not describe the purpose of the special meeting unless required by the articles of incorporation or bylaws.

Do the directors need to notify management of the (true) purpose of the meeting in advance of the meeting?

- No, generally directors are not required to notify management of the true purpose of the meeting unless required by the bylaws or other governance document, however, directors should consider how to address any action items that would result from a change in management, including:
  - Communication to management and staff to avoid disruption to operations;
  - Disclosure obligations to the SEC or securities exchange; and
  - Naming an interim replacement and conducting a search for a permanent replacement.

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therefore, advance notice should have been given. The Court explained that although the directors "may have discussed and prepared to terminate" the CEO prior to the regular meeting, they did not take any "official Board action until they voted on the termination resolution at that [regular] meeting." Klaassen v. Allegro Dev. Corp., 106 A.3d 1035, 1045 (Del. 2014).

[13] Fogel v. U.S. Energy Sys., Inc., C.A. No. 3271-CC, slip op. at 7 (Del. Ch. Dec. 13, 2007) ("Before a corporation may hold a special meeting of its board of directors, each director must receive notice as prescribed by the bylaws; to the extent such a meeting is held without notice, the meeting and 'all acts done at such a meeting are void.'").

[14] Fogel, C.A. No. 3271-CC, slip op. at 7-8 (Del. Ch. Dec. 13, 2007); cf. Kalisman v. Friedman, C.A. No. 8447-VCL, trans. at 5, 33 (Del. Ch. May 14, 2013) (explaining that where bylaws imposed reasonable notice, this required at minimum that "directors be given enough advance notice to satisfy their fundamental fiduciary duty to act with due care, taking into account the circumstances of the transaction" which was not satisfied in that case).

[15] See Russell v. Morris, C.A. No. 10009, slip op. at 9-12 (Del. Ch. Feb. 14, 1990) (invalidating sale of assets due to failure to comply with bylaw's five-day notice requirement for special board meetings); see also Barbey v. Cerego, Inc., C.A. No. 2022-0107-PAF, slip op. at 2 (Del. Ch. Sept. 29, 2023) (holding that actions taken at special meeting of directors were "void" because notice of meeting was not provided as required by bylaws"); Kalisman, C.A. No. 8447-VCL, trans. at 5, 33 (Del. Ch. May 14, 2013) (enjoining defendants from implementing any of resolutions taken by board because of inadequate notice and other process failures, where company' bylaws imposed "reasonable notice standard" and improperly given only one days' notice); Perlegos v. Atmel Corp., C.A. Nos. 2320-N, 2321-N & slip op. at 33 (Del. Ch. Feb. 8, 2007) (finding notice of special meeting sufficient under bylaws and explaining that while director "certainly would not have been given substantial notice of the opportunity to participate in the Special Meeting…he would have nonetheless been sufficiently notified under [bylaws]"); cf. Klaassen, 106 A.3d 1035, 1044 (explaining that director defendants violated no default rule of Delaware law, or any provision of bylaws, by not giving CEO advance notice of their plan to terminate him at regular board meeting).

Scenario 11

How should a Board address a director who traded outside the prescribed open trading window for a public company?

- The Insider Trading Sanctions Act of 1984 and the Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA) required regulated entities to adopt, maintain and enforce policies & procedures designed to prevent insider trading; added Exchange Act Section 20(a), which provided that companies could be liable for insider trading violations by persons they controlled; and expanded the definition of "controlling person." With this Act, as well as the influence of federal sentencing guidelines and DOJ positions that encouraged companies to adopt effective compliance programs, the notion of having detailed insider trading policies & procedures took hold.
- In light of the ISFEA and related actions, a company, as a controlling person, must determine whether it should do anything to "sanction" the director for violating the insider trading policy. That determination depends on a lot of factors, such as how the mistake was made and whether the director got a better price by jumping the gun. But it's important for US Sentencing Guidelines' purposes and for demonstrating compliance to the SEC that a company have an "effective" compliance program, which generally means the insider trading policy needs to be enforced. It's conceivable—depending on the facts and circumstances—that additional training for insiders is warranted or a mild reprimand (or at least a reminder) to the director might be warranted.
- Particularly when a director is culpable, it's hard to impose a sanction as a director can't be threatened with adverse employment action, however, pervasive trading should be considered as part of the nomination process.

Scenario 12

How should the Board manage a director who is routinely unprepared and whose attendance is irregular?

- A director generally cannot be threatened with removal during his or her term, particularly if the Board of Directors is classified. However, the chairperson or CEO can attempt to promote preparedness and attendance through positive reinforcement and reminders that disclosure of poor attendance by certain directors will be reported to stockholders in the company's proxy statement for its annual meeting for public companies. Ultimately, the Nominating and Corporate Governance committee may decide not to renominate the director.

Scenario 13

How should legal counsel advise a Board with respect to disagreements with respect to the outcome of votes?

- Generally, disagreement among directors can be a healthy part of leading a corporation in the management of its businesses. However, it is important to avoid such disagreements developing into factions of directors who are working against each other rather than toward common goals of promoting the best interests of the corporation.
- Managing disagreements in the first instance is about relationship management, not necessarily legal issues. Over time, however, questions of directors rights to access information can arise. In one reported case[16] a faction retained counsel for its purposes, but the majority of the board of directors voted to waive privilege with respect to such counsel in a separate matter. Therefore, it is important for counsel to understand its client and who may waive rights vis-à-vis its representation.

[16] *Pearl City Elevator, Inc. v. Gieseke, et al.* C.A. No. 2020-0419-JRS letter opinion (Del. Ch. Sept. 21, 2020).

Do the minutes need to reflect dissenting votes? If so, what is the impact of such dissent being recorded?

- Yes, if a resolution is not unanimously approved, the minutes should indicate which directors voted against the resolution.
- As noted in response to Scenario 2, maintaining thorough and accurate minutes may limit discovery in litigation and the extent of information that would need to be produced in a books and records request. Therefore, a sufficiently detailed summary of the Board's considerations and materials reviewed to reach its conclusion should be summarized.
- Of course, the minutes cannot resolve substantive or procedural deficiencies. If the Board did not follow the "right" steps in reaching its determination and overrode dissenting voices in doing so, the reflection of that fact in the minutes (or lack thereof), will not resolve this issue. The question for prepares of meeting minutes is whether they are "part of the problem" or an impartial recordkeeper.

How should legal counsel advise a Board with respect to disagreements with respect to Board leadership?

- If there is a serious disagreement about Board leadership (rather than a momentary display of disappointment), counsel should refer the matter to the appropriate committee to consider in the first instance.
- One director or a faction of directors may not necessarily be able to change leadership and the Board would benefit from deliberative processes rather than creation of separate camps of directors. Again, these generally tend to become relationship matters and matters that are resolved through both in-board and external board communications.

Scenario 14

Should legal counsel (or another executive officer) advise the Board of Directors with respect to a cyber attack?

- Yes, cyber attacks have increased in frequency and significance over the past several years as most companies rely on processes that can be vulnerable to such attacks.
- As part of the SEC's 2023 final rules regarding cybersecurity risk management, strategy, governance and incident disclosure, the SEC made clear that the Board was responsible for overseeing risk management with respect to cybersecurity.

If so, when should such information be disclosed and what action plan should be followed?

- As a result of such rules and generally as a matter of good governance, many companies implemented an incident response plan so that the Board (or a committee) is aware of incidents that arise and can manage the associated risks accordingly.
- Typically, the incident response plan will designate a team of internal and external people resources to consider, respond to and manage a cyber attack.
- The team will assess the attack and address any breach, including identifying and classifying potential cyberattack scenarios, following the company's established crisis communication plan, notifying relevant insurers, engaging designated outside advisors and experts, securing systems, networks and other infrastructure after identification of the breach and creating a database and notifying breach victims.

- Depending on the nature of the attack, the company should consider whether an investigation is warranted and whether to report to law enforcement. Such steps should include notice to the directors or a committee of directors so that they can oversee the process if necessary.
- Finally, the team needs to consider whether disclosure and reporting is required under applicable rules.

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