Board Communications Cheat Sheet – What Every Director Should Know

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Courts are increasingly subjecting board communications to greater scrutiny. As companies demand more of boards, directors must be more focused on documenting their decisions and oversight. Recent cases have also opened windows into discovery of director communications that traditionally have been outside—or on the edges—of the reach of plaintiffs' lawyers. ***Below are some lessons learned and best practices to follow.***

Receiving / Maintaining Board Materials – Use a consistent method, follow document retention / security policies

- Each director should have a *secure* and *confidential* method for receiving board materials
- *Board portals* are a common, respected method
- Directors should follow company policy concerning *data security*
- Directors should follow company policy on *document retention*; while some directors may find it easier to review paper copies, they should consider securely *discarding materials* once they are no longer needed

Document Decisions & Oversight in Minutes – minutes are critical in defending fiduciary duty claims

- *The liability risk*: A purported failure to make a good faith effort to exercise the duty of care may be sufficient to allege a breach of the duty of loyalty; claimed breaches of the duty of loyalty may subject a director to liability even when the company has a provision in its charter exculpating directors from liability for the breach of the duty of care
- *Board minutes* are critical evidence that a board acted in good faith and exercised its business judgment
- *Best practice*: Minutes should reflect *both* considerations for board decisions (discussions with independent advisors, reasonable inquiry, deliberation to evaluate the decision) *and* the board's exercise of its oversight responsibility
- Minutes should document directors' *oversight of risks* facing the company, including that management reported to the board about, and the board spent time discussing, material categories of risk, such as compliance risks
- Without such minutes, a court may conclude, as DE Courts of Chancery did here, here and here, that the board did not regularly discuss risks, indicating a failure of oversight that may amount to a breach of the duty of loyalty

Avoid Non-Company Email Accounts for Board Business – high risk of waiving the privilege

- Each director should have an *expectation of privacy* over any email account or other method of communication used to conduct company business
- Companies are increasingly providing *company email accounts* to directors
- A director may not have an expectation of privacy over *email accounts maintained by non-company entities* (such as the employer of an outside director); here, a DE Court of Chancery concluded that an outside director of Company A could not maintain the attorney-client privilege over Company A-related emails in email accounts of his employer, Company B, where Company B had a policy allowing it to inspect email in Company B's account

Use Informal Communications Carefully – personal texts, chats, and emails are increasingly subject to discovery

- *Informal communication methods*, such as text and chats, are convenient, but more casual communications through these methods may not reflect a director's considered thinking despite creating a permanent record
- Even in the pre-suit context, such as a books-and-records demand, Delaware courts have increasingly allowed *discovery of non-formal communications*, particularly when board meeting minutes or other formal board materials do not contain enough information to satisfy the purpose of the books-and-records demand
- Because *Delaware courts increasingly support shareholder requests to compel production of directors' messages*, e.g., here and here, including individual director-to-director texts and emails, directors should proceed with caution when using informal communication formats