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What Keeps Boards Up at Night?

The University of Texas School of Law 2017 Corporate Counsel Institute

May 11, 2017

Role of Directors Under Delaware Law

- Delaware law provides that the business and affairs of a corporation shall be managed by or under the direction of a board of directors
- In the current environment, directors are charged with significant responsibility and subject to intense scrutiny

The Board's Primary Responsibilities

- Work with management to establish a strategic plan, monitor implementation of the plan and make modifications when necessary
- Ensure the company has the right leadership team to implement the strategic plan and a succession plan for each important position
- Oversee risk management and compliance
  - Obtain reasonable assurance of compliance with regulatory, legal and ethical rules and guidelines
  - Obtain reasonable assurance that necessary risk control processes are in place

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Primary Fiduciary Duties

- The ***duty of care*** requires a director to perform his or her responsibilities with the care that a reasonably prudent person would exercise under similar circumstances, while acting in an informed manner
- The ***duty of loyalty*** requires a director, affirmatively and in good faith, to protect the interests of the company and its shareholders, and to refrain from doing anything that would injure the company or deprive the company of profit or an advantage that might be properly brought to the company for it to pursue
- The ***duty of candor*** requires a director, when speaking to shareholders or the public, to speak in a manner that is truthful and not misleading

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Judicial Standard of Review of Board Action

- Delaware courts employ different standards of review to evaluate director decision-making, depending on the circumstances:
  - Ordinary transactions: Business judgment rule
    - Legal presumption that in making a business decision, directors 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
  - Certain sale of control contexts: Enhanced scrutiny
  - Certain conflicts of interest: Entire fairness
    - *E.g.*, selling company to a controlling shareholder

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Long-Term Business Strategy

- Sharpening the board's focus on strategic planning requires a comprehensive understanding of the current business strategy and the external factors that affect it, including:
  - Risk management
  - Industry dynamics and business uncertainties
  - Financial management
  - Organizational management strengths and challenges
  - R&D / technology management
  - Communications management

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First appeared as part of the conference materials for the
39th Annual Corporate Counsel Institute session
"What Keeps Boards Up at Night?"