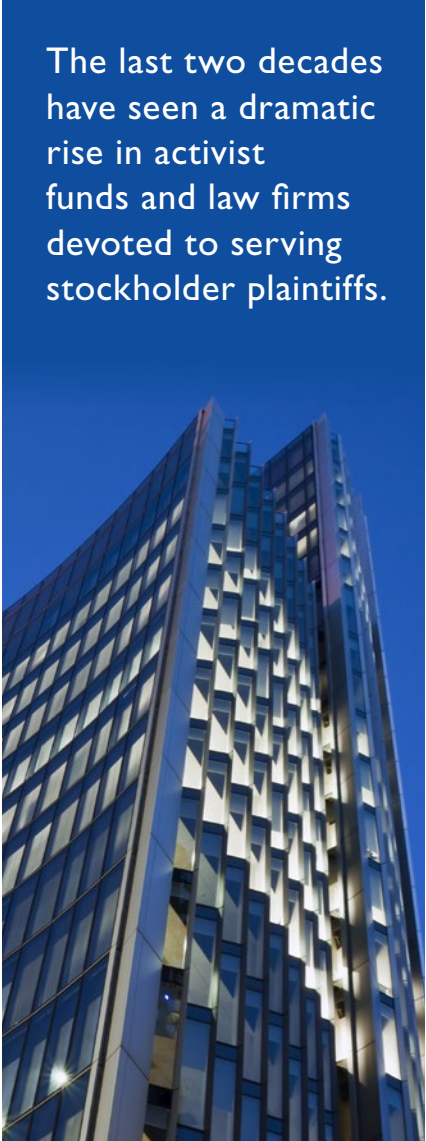




**AVOIDING PERSONAL LIABILITY:
A GUIDE FOR DIRECTORS
AND OFFICERS**





The last two decades have seen a dramatic rise in activist funds and law firms devoted to serving stockholder plaintiffs.

According to the popular media, we are living in an era of corporate crime. Scandals like Enron, HealthSouth and WorldCom stretch so far back they seem like they are not even of this millennium. Among the milestones since those days are the stock option back-dating scandals, followed by the convictions of Conrad Black and other high-profile CEOs. More recent, high-profile corporate scandals are making the news on a regular basis, contributing to the modern environment of cynicism regarding corporate decision-making. The next high-profile scandal could be just around the corner – at least that is what stockholder plaintiffs and their lawyers would have the courts believe.

This cynical phenomenon is reflected in the rising tide of lawsuits seeking to hold directors and officers personally liable – not just for losses due to corporate scandals but also for ordinary business transactions. The last two decades have seen a dramatic rise in activist funds and law firms devoted to serving stockholder plaintiffs. The significance of this problem becomes shockingly clear when one considers the statistics on M&A litigation. Preliminary figures from a 2014 study prepared by Matthew D. Cain (US Securities and Exchange Commission, Division of Economic and Risk Analysis) and Steven Davidoff Solomon (University of California, Berkeley School of Law) on public company M&A deals in 2014 showed:

- 94.9 percent of all transactions resulted in litigation
- Each transaction resulted in an average of 4.3 lawsuits
- 33.8 percent of all transactions experienced multijurisdictional litigation and
- Median attorneys' fee awards per settlement were US\$555,000.

A clear understanding of your legal obligations and rights may help you focus on the right issues, ask the right questions and, along the way, protect both yourself and your company.

The claims made in such lawsuits, if ultimately successful, could easily bankrupt most individuals if left without indemnification from the company or adequate D&O insurance coverage. Even if such a lawsuit is found to be meritless, litigating it can be extremely expensive and, if the costs are not covered by insurance or paid by the company, is a burden that cannot be borne by most individuals. In addition to the rising tide of litigation, recent legislative reforms and regulatory enforcement actions emphasize increased directorial oversight, involvement and accountability, increasing the exposure for a company's directors and officers.

Now, more than ever, it is important for directors and officers of corporations to understand their duties and obligations, the legal safeguards available to them and, perhaps more important, the limits of those safeguards. Legalese and nuances should be left to the lawyers, but even a basic grasp of the fundamentals of corporate law can go a long way. This Guide is intended to provide an easy-to-read and easy-to-understand overview of several of the substantive and procedural protections afforded to directors and officers of Delaware corporations (as well as to directors of corporations in states that follow Delaware law) and the key limitations on those protections. A clear understanding of your legal obligations and rights may help you focus on the right issues, ask the right questions and, along the way, protect both yourself and your company.

WHY THE FOCUS ON DELAWARE?

Delaware has come to be known as the corporate capital of the world and the state's multi-faceted importance to corporate law and governance is well known to corporate and financial America:

- Delaware is the state of incorporation for 66 percent of the Fortune 500 and more than half of all companies whose securities trade on the NYSE, Nasdaq and other large exchanges. Pursuant to what is commonly referred to as the "internal affairs doctrine," Delaware law applies to the governance of a company incorporated in Delaware, regardless of where the company is headquartered and operates, giving critical importance to Delaware law and the courts that interpret it. Delaware's corporate code – the Delaware General Corporation Law – is also consistently evaluated and enhanced.
- The Delaware Court of Chancery, which has statutory jurisdiction over directors and certain officers of Delaware corporations, has become the preeminent forum for resolving corporate governance disputes. Both the Delaware Court of Chancery and the Delaware Supreme Court are nationally and internationally renowned for their significant corporate law decisions concerning challenges to the decisions of boards of directors, claims for breaches of fiduciary duty, mergers and acquisitions litigation, and issues of individual director and officer liability.
- Delaware's judicial system is consistently ranked No. 1 among all 50 states in an assessment conducted by the United States Chamber of Commerce, which notes the fairness, reasonableness,

Both the Delaware Court of Chancery and the Delaware Supreme Court are nationally and internationally renowned for their significant corporate law decisions ... The Delaware judiciary's motto is that it moves at "the speed of business."

competency and impartiality of the Delaware judiciary as well as its timeliness in resolving disputes. There are five judges on the Delaware Court of Chancery (a chancellor and four vice-chancellors) and five on the Delaware Supreme Court (a chief justice and four justices). Delaware's judges are appointed, not elected, and the Delaware Constitution mandates that the courts be politically balanced. Many states have copied Delaware's corporate code, but they have not been able to replicate its judiciary, which is known for being free of political and other influence as well as for its speed in resolving disputes. The Delaware judiciary's motto is that it moves at "the speed of business."

Although relatively straightforward, the key to understanding and taking advantage of the Business Judgment Rule is understanding its limitations.

As a general rule, Delaware courts consider a director to be “interested” if the director is on both sides of a transaction or stands to receive a personal financial or other benefit from a transaction not shared equally by the company’s stockholders.

THE BUSINESS JUDGMENT RULE

The Business Judgment Rule is the bedrock of corporate governance and the primary substantive protection available to directors under Delaware law. The Business Judgment Rule – which is the standard by which Delaware courts review many, but not all, decisions of directors – is based on the legal premise that decisions made by directors who are fully informed and free from conflicts of interest should not be second-guessed by a court.

To benefit from the Business Judgment Rule, directors must have satisfied their fiduciary duties in the decision-making process. So long as a director is disinterested and independent (*i.e.*,

satisfies the fiduciary duty of loyalty), reviews and considers all pertinent information reasonably available (*i.e.*, satisfies the fiduciary duty of care) and does not act with an improper motive (*i.e.*, performs his or her duties in good faith), a court will neither disrupt nor hold directors liable for the results of those decisions, even if the decisions can fairly be viewed by others as “poor business decisions.” The Business Judgment Rule recognizes that directors, and not stockholders, manage the business and affairs of a corporation, and it reflects an underlying policy of freedom in directors’ decision-making and respect for entrepreneurial risk-taking. The key to proactively ensuring the benefits of the Business Judgment Rule is understanding its limitations.

Independence and disinterestedness:

The Business Judgment Rule is applied by courts in reviewing the actions of directors who are both disinterested and independent. Also known as the duty of loyalty, this qualification to the applicability of the Business Judgment Rule requires that directors act in the best interests of the company and not in their own interest or in the interest of another person or entity to which the directors may be beholden.

As a general rule, Delaware courts consider a director to be “interested” if the director is on both sides of a transaction or stands to receive a personal financial or other benefit from a transaction not shared equally by the company’s stockholders. Non-financial benefits can also create conflicts, the most common of which is entrenchment – *i.e.*, a director’s desire for perpetuation of office. Simply stated, directors are generally considered “interested” when they have

a unique or competing personal interest with respect to a given corporate decision or transaction.

Equally important is director independence. Most typically, directors are considered not to be “independent” where they are beholden to a person or entity that has a personal or financial interest in the action under consideration. A director may be deemed “beholden to” another where, as a result of personal, professional, or financial relationships or dependence, the director cannot reasonably be thought capable of acting in the best interests of the corporation. In most cases, casual social ties or friendship, in the absence of other factors, will not create a lack of independence; however, close familial or financial ties or extensive professional and social ties may.

Where present or even *potentially* present, self-interest or a lack of independence may require that a director abstain from the decision-making process or take other steps aimed at ensuring that the director’s potential conflict does not taint an otherwise valid exercise of directorial discretion. Other steps may include the involvement of a disinterested and independent committee of directors or stockholder ratification.

Adequate information and due diligence:

Inherent in the Business Judgment Rule is the assumption that directors’ decisions are based on adequate information. To be deemed adequately informed regarding a given business decision, the directors must have informed themselves of all information reasonably available to them that is material to the decision before them. This is known as the duty of care. It is essentially a due diligence requirement.

... “sustained or systematic” inattention to significant corporate issues or red flags resulting in harm to the corporation may also be deemed not to be in good faith.

Directors need not follow any particular formula or pattern for informing themselves with respect to a given decision, and the judicial standard by which challenges to the informed nature of directors’ decisions are reviewed is gross negligence – that is, reckless indifference to, or intentional disregard of, material information. Typically, so long as directors make a good-faith effort to undertake an investigation or gather pertinent information, courts will not second-guess the directors’ procedures. Which information is material to a given decision? That question can be answered based only on the specific facts and circumstances of the decision, and it may therefore be prudent for directors to consult with management, attorneys or other advisors in seeking information before making a decision.

Good faith: The duty of good faith is not an independent fiduciary duty, but rather a component of the duty of loyalty, the rationale being that a director cannot act loyally towards the corporation unless she or he acts in the “good faith” belief that the actions being taken are in the “best interests” of the corporation. Although exceptions to the applicability of the Business Judgment Rule traditionally have focused on loyalty issues (i.e., the existence of an improper pecuniary interest), the requirement that a director act in good faith has become a principal source of litigation and potential director liability.

The law regarding what type of action or inaction will be considered not in good faith is very fact specific. Good faith has been used as a catchall category, denying the protections of the Business Judgment Rule to directors who, although not financially interested in a decision

or transaction, act or fail to act out of a motive other than the best interests of the company. Conduct may also be deemed to be in bad faith when it is so far outside of the realm of reason that it cannot be explained on any other grounds – as in the stock-option back-dating cases, where clear and unambiguous language in stock-option plans was intentionally violated. Finally, and perhaps most importantly, “sustained or systematic” inattention to significant corporate issues or red flags resulting in harm to the corporation may also be deemed not to be in good faith.

Steps that directors can take to avoid liability for claims based on allegations of bad faith may include establishing internal reporting and control mechanisms to help maintain knowledge of events or issues that may have a significant effect on the company.

WHEN MAY THE BUSINESS JUDGMENT RULE NOT APPLY, AND WHAT ARE THE CONSEQUENCES?

There are special situations, not the subject of this Guide but which are touched on briefly here to put things in context, where heightened scrutiny – rather than Business Judgment Rule protection – will apply to directors’ decisions. These include the sale of the company or the adoption of defensive measures in response to a hostile takeover or similar threat to the current corporate control or business plan chartered by the board:

- **Sale transactions:** When a decision has been made to sell the company, or when market or other conditions make the sale of the company inevitable, the board operates in a so-called Revlon mode (derived from the 1986 case of *Revlon, Inc. v. McAndrews &*

Forbes Holdings, Inc.). Revlon duties obligate the directors to obtain the best price reasonably available for the stockholders. Importantly, however, the Delaware courts have recognized that there is no “one way” to sell a company and the process directors choose to employ will be given deference if “reasonable” and free of conflicts of interest.

- **Defensive measures:** When the company is subject to a hostile takeover, falls under attack from activists or faces similar risk and decides to take defensive action, such as the adoption of a “poison pill,” directors must satisfy what has come to be known as the Unocal standard (derived from the 1985 case of *Unocal Corp. v. Mesa Petroleum Co.*). This standard puts the burden on the board to demonstrate that the defensive action taken was reasonable in relation to the threat to the company and its business objectives. These situations also become fact-intensive inquiries.

While there are additional situations that directors and officers may have to confront, such as dealing with different classes of stock (e.g., common versus preferred holders) or making critical decisions when the company is operating while being balance sheet insolvent, those are governed much more by rigid legal rules than by fiduciary judgments. Aside from those out-of-the-ordinary situations, the heightened “entire fairness” standard may be applied to review decisions made or transactions entered into by directors who cannot invoke the Business Judgment Rule because they failed to satisfy their fiduciary duties of care and loyalty. In such cases, the decision or transaction at issue is not void, but it is voidable.

Directors should strive to act in a way that will trigger the protections of the Business Judgment Rule. That means satisfying their fiduciary duties and utilizing procedural protections ... If the Business Judgment Rule cannot be invoked, the court reviews the substance of the transaction, and the risks and costs rise dramatically.

Importantly, when the entire fairness standard applies, the burden shifts to the directors to prove that, notwithstanding the failure to satisfy the prerequisites to invoke the protections of the Business Judgment Rule, the decision or transaction at issue is nonetheless fair to the company and its stockholders. This standard earned the “entire fairness” label because cases arising out of such situations require directors to establish not only that the price and terms of a particular transaction

are fair, but that the process leading to the transaction was fair as well. Satisfying this burden is extremely difficult for a director and, accordingly, there have been only a few cases in which, following a trial, entire fairness has been demonstrated to the satisfaction of a court. To state the obvious, the preferable path is for directors to understand and to be vigilant in the satisfaction of their fiduciary duties.

Conditioning a conflicted transaction on approval by a properly functioning special committee and, when a stockholder vote is required, on approval by a majority of the minority stockholders is preferable. In some circumstances, that can shift the burden of proof or even allow directors to invoke the Business Judgment Rule. A special committee is generally deemed to be well functioning if its members are truly independent and it is granted full authority to approve, reject, negotiate, seek alternative transactions and hire separate counsel and other necessary advisors.

Directors should strive to act in a way that will trigger the protections of the Business Judgment Rule. That means satisfying their fiduciary duties and utilizing procedural protections when available. The standard of judicial review applicable to a transaction has enormous implications for the litigation – that inevitably follows from the announcement of a public-company deal. The standard of judicial review affects the time within which meritless actions can be dismissed, and this in turn affects such factors as litigation costs and personnel costs (due to such issues as time devoted to discovery) and creates business uncertainty as well as uncertainty about personal liability for the directors involved. If the Business Judgment Rule applies, then

essentially all a court does is conduct a process inquiry – *i.e.*, if the directors are not conflicted and are fully informed, the action will be dismissed and the substance of the transaction will not be reviewed. However, if the Business Judgment Rule cannot be invoked, the court reviews the substance of the transaction and the risks and costs rise dramatically. Endeavoring to satisfy the entire fairness standard requires extensive discovery, a trial on the merits, a timetable that can be more than a year instead of a few months and a legal budget in the millions of dollars instead of a few hundred thousand.

RELIANCE ON REPORTS AND OPINIONS

Another significant substantive protection available to directors of a Delaware corporation is a Delaware statute that protects directors who, in the performance of their duties, rely in good faith on the records of the corporation or on information, opinions, reports or other statements provided to directors by officers, employees or committees of the corporation or by certain outside advisors, such as attorneys and auditors.

This statutory protection, found at Section 144 of the Delaware General Corporation Law, recognizes that directors typically do not run or direct the day-to-day operations and administrative functions of a business and are not experts in all aspects of business. Directors therefore can and should rely on information provided to them by those who do run the day-to-day business or who are experts.

The availability of this protection underscores the utility and prudence of establishing effective and thorough

A board that fails to implement any reporting or information system, or fails to correct a system it “knows” is not working, may face liability for bad faith. Similarly, having implemented such a system, directors can face liability if they consciously fail to monitor or oversee the system, thereby disabling themselves from being informed and being deemed to be “asleep at the switch.”

accountability and reporting systems within the corporation. Indeed, where particular business decisions fall outside a director’s area of expertise, reliance on the reports or opinions of others may be required for a director to satisfy the duty to be adequately informed. This right to rely on advisors can be of particular importance to directors who serve on the company’s audit committee or compensation committee because such directors operate in a climate where accounting issues and executive compensation are constant subjects of criticism. Prudence dictates that directors should retain an expert or consultant to pass on the reasonableness of the compensation of their company’s senior executives.

Directors who serve on boards of highly regulated companies, companies with overseas operations subject to laws such as the Foreign Corrupt Practices Act or companies vulnerable to cybersecurity issues (which captures a wide swath of public companies in the modern computer era) need to pay particular attention to assure that reasonable reporting mechanisms and controls are in place. A board that fails to implement any reporting or information system, or fails to correct a system it “knows” is not working, may face liability for bad faith. Similarly, having implemented such a system, directors can face liability if they consciously fail to monitor or oversee the system, thereby disabling themselves from being informed and being deemed to be “asleep at the switch.”

Here again, the key to receiving the benefits of this reliance-on-experts-and-reports protection is understanding its limitations. The foremost limitation is the requirement that reliance be in

good faith. The good-faith qualification requires that directors not ignore red flags raised in reports or opinions presented to them and that directors ask questions and demand additional information where necessary.

Reports or opinions received by directors must be more than window dressing – they must be pertinent to the decision at hand, and directors must be given adequate materials and time to consider those materials. Directors must exercise at least enough oversight to become reasonably familiar with the reports or opinions presented to them and upon which they rely. If directors are to rely on officers and other advisors, then directors must be deliberate and careful in determining whom to appoint and upon whom to rely.

ELIMINATION OR LIMITATION OF LIABILITY FOR CERTAIN BREACHES OF FIDUCIARY DUTY

Under Section 102(b)(7) of the Delaware General Corporation Law, a corporation may, in its certificate of incorporation, provide for the elimination or limitation of directors’ personal liability to the corporation or to its stockholders for breaches of directors’ fiduciary duties. Such a provision, when included in a company’s charter, shields directors from personal monetary liability for decisions not otherwise protected by the Business Judgment Rule – *i.e.*, gross negligence.

Specifically excepted from the scope of this protection are breaches of fiduciary duty involving improper personal benefits for directors (loyalty issues), bad faith conduct or intentional misconduct, and certain unlawful issuances of dividends, stock purchases, and stock redemptions.

As a result, the claims for which directors are most often able to invoke the protections of a 102(b)(7) provision are those involving alleged waste of corporate assets (conveying corporate property for inadequate consideration), failure to act on adequate information, alleged inadequate disclosure of information to stockholders and other claims relating to decisions about mergers and other corporate combinations.

Circumstances that trigger the exception for breaches of the duty of loyalty are generally easy to identify – and avoid. The law regarding circumstances that trigger the exception for breaches of the duty of good faith is less precise and evolving. The bad faith exception denies directors protection from personal liability for conduct that is so egregious as to fall outside the bounds of reason or for sustained or systematic failures by directors to properly oversee the affairs of the company. Conduct deemed bad faith for purposes of this exception has included a board’s failure to exercise adequate oversight in the employment and termination of high-level officers and a board’s inattention to internal improprieties, violations of law or other problems resulting in significant liability for the company.

INDEMNIFICATION

By statute, Delaware corporations are empowered to provide indemnification to directors for expenses – including settlements and judgments – related to lawsuits and other proceedings to which directors are parties, and which arise from a director’s capacity as such. Under Section 145 of the Delaware General Corporation Law, directors may obtain indemnification for lawsuits or

... a person considering service on a board of directors should obtain and, along with his or her counsel, carefully review the company's charter and bylaws, any indemnification agreements, and other company policies governing indemnification and the advancement of attorneys' fees and other defense costs.

proceedings brought by or against third parties as well as lawsuits or proceedings brought by or on behalf of the company. If a director is successful in the defense of a proceeding, then indemnification is mandatory; however, if a director is not successful on the merits of a proceeding, indemnification becomes permissive and, in certain circumstances, may not be available at all.

When a company's charter or bylaws so provide, a director may be entitled not only to indemnification, but also to

advancement of expenses upon providing the company with an undertaking to repay the defense costs if it is later determined that indemnification is not legally available. The right to advancement of legal expenses is significant because the defense of actions alleging breach of fiduciary duty can cost hundreds of thousands or even millions of dollars, and it often makes a critical difference if a director must pay first only to be reimbursed at the end of the case (most often, years after the case was initiated). Advancement and indemnification generally are available to directors even after they cease to be directors, so long as the lawsuit or proceeding for which indemnification is sought relates back to the director's service on the board.

Indemnification is limited to cases in which directors acted in good faith and in a manner they believed to be in the best interests of the corporation. Thus, where directors are found to have acted in bad faith or to have been motivated by an improper personal interest, indemnification will not be available. With respect to lawsuits brought by or on behalf of the corporation, directors typically are not entitled to indemnification where they are determined to be liable to the corporation, unless a court specifically orders otherwise. In lawsuits by or against third parties, directors may be indemnified both for expenses incurred in connection with the lawsuit and for any amounts paid in judgment or settlement of the suit; however, in lawsuits by or on behalf of the company, directors may be indemnified only for expenses.

Because the scope of indemnification, and the corresponding availability to advancement, may differ in many

respects from company to company, a person considering service on a board of directors should obtain and, along with his or her counsel, carefully review the company's charter and bylaws, any indemnification agreements, and other company policies governing indemnification and the advancement of attorneys' fees and other defense costs.

INSURANCE

Under Delaware law, a company may, but is not required to, provide insurance for directors at the company's expense against any liability that may arise as a result of directors' conduct. The company may provide such insurance to directors whether or not the company could indemnify the director, thus making insurance a potentially broader protection against personal liability than indemnification.

The primary limitations on insurance are found within the policies themselves. So-called D&O policies differ from corporation to corporation in scope, coverage limits and deductibles, among other things. Some companies do not provide any D&O insurance. Just as with indemnification provisions, a person should obtain and, along with his or her counsel, carefully review a corporation's insurance policy, if any, before agreeing to serve on a board. A serving director should also ask for at least an annual update on D&O coverage and policy inclusions and exclusions, particularly in anticipation of a policy renewal.

PREVENTIVE MEASURES

In the current corporate environment, directors must be especially zealous about understanding the protections

Selecting the right attorneys is critical. ... Taking appropriate steps and creating a defensible record are things that cannot be fixed after the fact. If a director cannot avoid being sued, he or she should at least make sure to be well positioned to win. To that end, directors should bring as much due diligence to the selection of counsel as they do with any other critical business decision.

available to them in the execution of their duties and the limitations on those protections. Having a basic understanding of these topics may help directors avoid personal liability and may help prospective directors make more informed choices about whether to serve in such a capacity. It may also help directors understand when outside counsel or advice is needed and, if so, what questions to ask.

Selecting the right attorneys is critical. Directors who serve on boards of companies engaged in battles for control, companies with activist stockholders, companies engaged in or about to be engaged in major transactions or companies with hostile or divided boards of directors should especially consider receiving advice from an experienced attorney as to significant decisions and the fulfillment of duties owed to the company and its stockholders. In so doing, directors must carefully consider whether to seek advice from an attorney other than one retained or employed by the corporation. Taking appropriate steps and creating a defensible record are things that cannot be fixed after the fact. If a director cannot avoid being sued, he or she should at least make sure to be well positioned to win. To that end, directors should bring as much due diligence to the selection of counsel as they do with any other critical business decision.

There is no single, clearly defined blueprint for taking preventive measures to avoid being sued in the first instance or to avoid personal liability if one is sued. However, adherence to well established "best practices" can help to significantly reduce the likelihood of liability. Such practices include, but are not limited to, the following (some of which are already mandated for public companies

by the Sarbanes-Oxley Act or stock exchange rules):

- Establishing well-defined and conservative standards of director independence
 - Setting a required number or percentage of independent directors, such as a majority
 - Establishing term limits for directors
 - Establishing a lead independent director
 - Considering the establishment of a chief governance officer position
 - Maintaining separate CEO and chairman positions
 - Developing and initiating active compliance monitoring systems, including the creation of a chief compliance officer who reports directly to the board
 - Encouraging, if not requiring, directors and Section 16-level officers to implement SEC Rule 10b5-1 trading plans if they intend to purchase or sell company stock, and ensuring appropriate limits on when and how frequently such plans may be altered
 - Ensuring that the minimum expectations of director conduct standards, such as Sarbanes-Oxley, NYSE or Nasdaq rules, are met
 - Hiring and training directors with diverse sets of skills and backgrounds
 - Evaluating the quality and effectiveness of board meetings, including the use of agendas, the preparation and distribution of materials, and the timing and length of meetings
- Keeping apprised of corporate governance trends and legislation
 - Developing and implementing appropriately authorized committees and subcommittees to oversee and monitor areas of potential liability, such as executive compensation, director nomination, financial audits, and regulatory compliance
 - Ensuring that key committees and subcommittees are composed solely of independent directors
 - Prohibiting related-party transactions or requiring independent review of such transactions
 - Creating and maintaining effective internal reporting systems for malfeasance or wrongdoing, including a whistleblower policy
 - Developing and adhering to a code of ethics
 - Taking an active role in corporate disclosures
 - Maintaining open and active stockholder relations

WHAT TO DO IF YOU ARE SUED

If you are sued in your capacity as a director or officer, there are a number of steps you can take to protect your rights and help work toward the best possible outcome. These include the following:

Immediately retain counsel to assist you:

The time to respond to a lawsuit varies from jurisdiction to jurisdiction, but you may have fewer than 20 days to act. It is therefore critical that you quickly retain counsel who can assist you in determining when and how to respond to the lawsuit,

The facts and legal analyses confronting directors are usually complex and the knowledge of experienced DLA Piper lawyers can provide the guidance that boards or individual directors need.

whether you have been properly served with legal process and what the best course of action will be.

Retain independent and experienced counsel: Because the interests of the various defendants in corporate lawsuits can and often do diverge to some extent, it is important to determine, with the assistance of independent counsel, whether your defense counsel should be independent from the counsel retained or employed by the corporation. In some instances, it may be practical for groups of director defendants to retain common counsel, though a director may still be well-advised to have his or her own so-called shadow counsel to monitor proceedings. However, that is a decision you should make after first consulting with independent counsel.

Understand the rights and protections available to you:

As set forth above, a director may be entitled to indemnification and advancement of attorneys' fees and expenses in connection with the lawsuit. However, you may be required to first take certain steps to secure those rights. Your attorney can assist you in determining whether the corporation has applicable D&O insurance and the extent to which the insurer will be involved. Your attorney can also help you evaluate defenses available to you – some that may be exclusively available to just you – including the availability of an exculpatory charter provision.

Preserve documents: As soon as you are aware that a lawsuit has been or likely will be filed against you, it is important that you take all necessary steps to preserve documents and other evidence that in any way relate to the lawsuit. Documents you should preserve include meeting minutes, personal notes, e-mails and other electronic data as well as other correspondence or materials, without regard to any company document destruction policy. You should consult with your attorney before disposing of or destroying any document that could be related in any way to the lawsuit.

FINAL THOUGHTS

Better understanding the protections available to directors of Delaware corporations and the limitations of those protections is profoundly important in this increasingly litigious environment. As a director, you can and should take a progressive, proactive approach to the

current corporate climate by educating yourself as to both the duties owed by and rights given to directors under the company's governance documents and under the law, and by establishing a strong, continuing relationship with independent counsel who can help steer you through any obstacles you may encounter.

It is also important to understand that the Delaware courts are neither stockholder nor management biased. Delaware's guiding principles remain strict adherence to fiduciary duties, prompt enforcement of articles of incorporation, bylaws, and merger agreements, and the maximization of stockholder value. The Business Judgment Rule is alive and well for directors who reasonably inform themselves of important information, are free of economic or other disabling conflicts of interest, and whose only agenda is that of advancing the best interests of the corporation.

The facts and legal analyses confronting directors are usually complex and the knowledge of experienced DLA Piper lawyers can provide the guidance that boards or individual directors need. So long as independent directors can articulate why, in their best judgment, they acted as they did and why they believe those actions were in the best interest of the corporation, Delaware courts typically will respect their decisions.



ABOUT DLA PIPER IN DELAWARE

DLA Piper's Wilmington, Delaware office is an integral part of the firm's national and international practice and significantly enhances the firm's capacity to provide full-service solutions to our clients in all significant areas of business law. DLA Piper's Delaware lawyers are established trial and transactional lawyers recognized by *Chambers USA*, with substantial experience in handling matters in multiple venues focusing on the core areas for which Delaware is nationally and internationally renowned.

The corporate lawyers in DLA Piper's Delaware office represent corporations, boards of directors, individual officers and directors, special board committees and large investors. In addition to counseling on corporate and governance issues, this practice involves advising on deal structure and compliance with fiduciary duties as well as representation in the Delaware courts.

The litigation aspect of the corporate practice covers class actions and derivative breach of fiduciary claims, corporate control disputes, merger and acquisition litigation, actions involving the interpretation of charter provisions and bylaws, actions by directors and/or officers seeking advancement and/or indemnification, stockholder appraisal actions, stockholder requests for books and records, internal corporate investigations, litigation arising out of transactions involving subsidiaries, tender offers, asset sales, capital restructurings, stockholder meetings and votes, dissolutions, corporate reporting and compliance programs and other matters involving corporate governance and the Delaware General Corporation Law.

Also resident in DLA Piper's Wilmington office is a former Delaware Supreme Court Justice, Henry duPont Ridgely, and a former two-term governor and nine-term congressman of Delaware, Michael N. Castle, whose extensive state and federal experience provides understanding of a wide array of issues faced by businesses that are either incorporated in Delaware or deal with Delaware entities.

OUR CORPORATE LITIGATION PRACTICE

DLA Piper has vast experience in US corporate litigation, including stockholder class actions and derivative claims, disputes concerning the governance of limited liability companies, contests for corporate control and the handling of board committee matters and investigations.

DLA Piper has a successful track record in stockholder and corporate litigation in jurisdictions throughout the US, including Delaware, where emerging business law issues that impact many of the world's largest companies often are resolved. DLA Piper is one of the few international law firms with a Delaware office staffed by recognized Delaware lawyers. Our corporate litigation team also includes lawyers who focus on the corporate and limited liability company laws of California, Maryland (where many REITs are incorporated) and New York, among other jurisdictions.

Our practice covers virtually any matter arising under state corporation law or otherwise concerning internal corporate affairs. We represent and counsel public and private companies, boards of directors, officers, directors and managers, special board committees and large investors in matters concerning:

- breach of fiduciary duty claims
- transactions involving controlling stockholders
- sensitive internal investigations
- oversight and duty of good faith claims
- actions concerning corporate charters and bylaws
- disputes arising under limited liability company agreements
- stockholder appraisal actions
- M&A disputes
- proxy contests and other stockholder meeting disputes
- tender offers, both hostile and friendly
- stockholder books and records demands
- actions for advancement and indemnification
- stock issuance and capital restructurings
- reporting and compliance programs
- dissolutions

OUR PRIVATE EQUITY PRACTICE

DLA Piper's integrated, experienced teams represent private equity funds as well as their principals, management teams, institutional investors, financing sources and portfolio companies in all types of transactions and industries. Our clients range from emerging managers to "unfunded" sponsors, to traditional sponsors managing billions of dollars in committed capital. Along with providing legal services, we introduce clients to the opportunities, relationships and insights afforded by our global platform. We are proud to have been ranked #1 globally for total private equity and venture capital deal volume in 2011 and again in 2012 by Dow Jones *Private Equity Analyst*. The strength and depth of our private equity practice is acknowledged with consistent top tier rankings in the key legal directories and M&A league tables as well as numerous industry awards. Our 2013 rankings in deal volume by *mergermarket* and Thomson Reuters include placing us #1 globally in overall deal volume and mid-market deal volume. In 2014, *Pitchbook* recognized DLA Piper as the fourth most active global law firm, Europe law firm and US law firm in completed private equity deals and in the category of Most Active Buyouts in 2013.

OUR M&A PRACTICE

Our Mergers and Acquisitions group acts each year as counsel on a large number of mergers and acquisitions transactions. We are consistently ranked among the top US firms in number of announced and completed deals. In 2015, for the fifth consecutive year, DLA Piper retained its number one ranking globally for overall deal volume, according to *mergermarket's* league tables for legal advisors. Since January 2005, we have acted on more global M&A deals than any other law firm.

BOARD COMMITTEE INVESTIGATIONS

When significant allegations of wrongdoing surface, we assist board committees by conducting thorough but discreet internal investigations. Our criminal and regulatory experience, coupled with the firm's strengths in class action litigation and corporate governance, enables us to conduct these investigations quickly, efficiently and thoroughly, with appropriate regard for how the investigations will affect subsequent civil, criminal or regulatory litigation. Once the investigation is completed, we help businesses develop strategies for the use and disclosure of any information that is learned as a result. We also help develop programs to comply with criminal laws and prepare compliance manuals to minimize the risk of future exposure.

We regularly handle investigations in response to allegations of:

- Financial restatements and alleged accounting irregularities
- Inadequate financial practices and controls
- Investigations relating to allegations of violation of the FCPA and other laws
- Mismanagement
- Failure of oversight or breach of professional responsibility
- Improper compensation or benefits issues
- Improper personnel decisions

DLA PIPER AT A GLANCE

OVERVIEW

Building strong and substantial client relationships is the compass for DLA Piper's business strategy and future development. Today, we have 4,200 lawyers in nearly 80 offices in the Americas, Asia Pacific, Europe and the Middle East. With a direct presence in more than 30 countries, we represent more clients in a broader range of geographies and practice areas than virtually any other law firm in the world. In jurisdictions where we do not have our own offices, we have close relationships with local law firms, strengthening our global network.

OUR CLIENTS

Our clients range from multinational, Global 1000 and Fortune 500 enterprises to emerging companies developing industry-leading technologies. They include more than half of the Fortune 250 and nearly half of the FTSE 350 or their subsidiaries.

OUR SERVICES

Our core practice areas include:

- Litigation and Arbitration
- Corporate and Finance (with particular strength in the Technology, Venture Capital and Private Equity sectors)
- Real Estate and Real Estate Capital Markets
- Regulatory and Government Affairs
- Intellectual Property and Technology
- Tax (including International Tax)

We also have leading practices in the following areas:

- Franchise and Distribution
- Employment, Pensions and Benefits

KEY FACTS AND FIGURES

- In 2014, our global lawyers and paralegals donated 202,500 hours to legal pro bono work and averaged 45 hours per lawyer and paralegal. Our pro bono program is consistently ranked among the best by *The American Lawyer*, and we were the first law firm to be listed in *The Sunday Times* "Top 100 Companies that Count" for our ranking in Business in the Community's Corporate Responsibility Index.
- Our work on the sustainability agenda sees DLA Piper as one of the first in the legal sector to achieve global accreditation to ISO:14001, the internationally recognized environmental management system that enables us to accurately measure and manage our carbon reduction strategies.

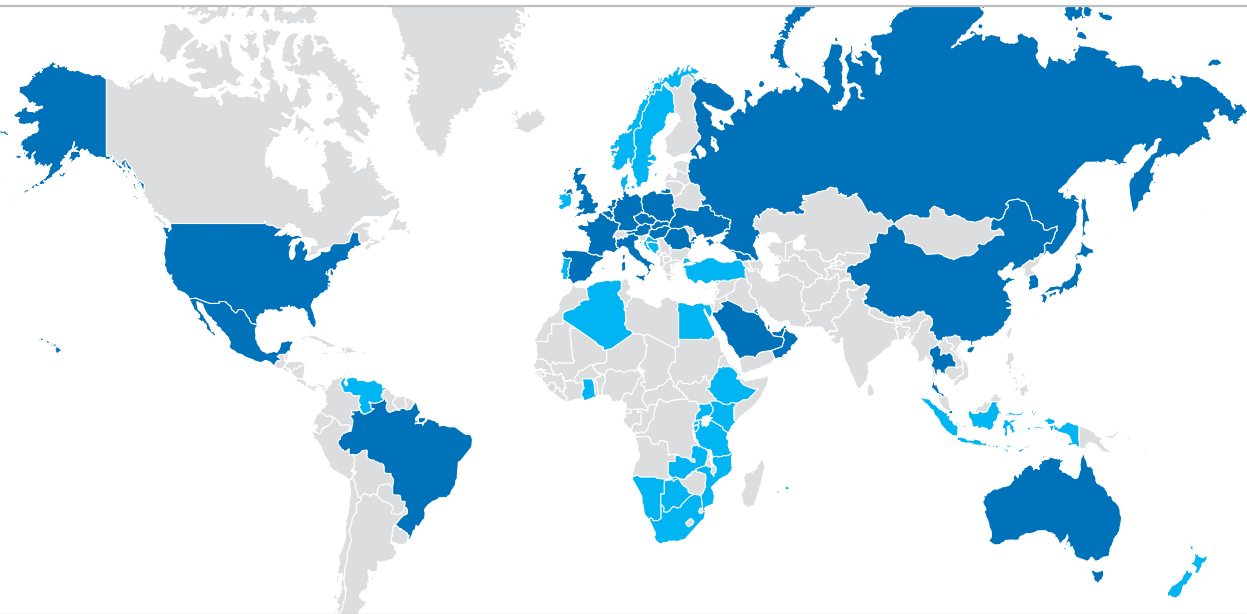
RANKINGS

- #1 in overall M&A deal volume and mid-market deal volume globally during 2014 (mergermarket and Thomson Reuters)
- #1 law firm by revenue and headcount (*The Am Law 100* 2014)
- #1 Litigation practice by number of lawyers (*The American Lawyer* 2013)
- #1 in global private equity deal volume and #2 for combined global private equity and venture capital deal volume (Dow Jones *Private Equity Analyst* 2013)
- More than 900 DLA Piper lawyers ranked as leaders in their fields (*Chambers and Partners* 2013)
- #1 Antitrust Litigation practice in the US, by total number of antitrust cases in which we have represented clients in US federal district courts during the prior two years (*Martindale Hubbell* 2014)
- Named a "standout" firm for securities and finance litigation (*BTI Litigation Outlook Report* 2013)
- Ranked #1 in Securities and White Collar by number of partners (*Law360* 2014)
- More litigators based outside the US than any other firm on the *AmLaw 100* List
- Leading firm for international arbitration (*Global Arbitration Review's* 2013 GAR 30 rankings of the world's most active arbitration practices)

AWARDS AND ACCOLADES

- Listed among the FT 40 and named one of the most innovative North American law firms (*Financial Times* 2014). Within that recognition, the firm was considered a "Standout" for its Litigation practice because it "leveled the playing field by stamping out the practice of vulture funds targeting indebted African countries."
- Law Firm of the Year (*Legal Business* 2014)
- Global Real Estate Firm of the Year (*The International Who's Who of Business Lawyers* 2005 – 2014)
- Franchise Law Firm of the Year (*The International Who's Who of Business Lawyers* 2005 – 2014)
- International Law Firm of the Americas (*International Tax Review* 2009 – 2014)
- One of the top Product Liability Groups of the Year (*Law360* 2013)
- Ranked #2 in the US for commercial law and contracts litigation, based on a review of public filings from Fortune 250 companies (*Corporate Counsel*)
- Dispute Resolution Team of the Year (Legal Business Awards)

OUR GLOBAL PRESENCE



DLA PIPER

AUSTRALIA

Brisbane
Canberra
Melbourne
Perth
Sydney

AUSTRIA

Vienna

BAHRAIN

Manama

BELGIUM

Antwerp
Brussels

BRAZIL

São Paulo

CHINA

Beijing
Hong Kong
Shanghai

CZECH REPUBLIC

Prague

FRANCE

Paris

GEORGIA

Tbilisi

GERMANY

Berlin
Cologne
Frankfurt
Hamburg
Munich

HUNGARY

Budapest

ITALY

Milan
Rome

JAPAN

Tokyo

KUWAIT

Kuwait City

LUXEMBOURG

Luxembourg

MEXICO

Mexico City

NETHERLANDS

Amsterdam

OMAN

Muscat

POLAND

Warsaw

QATAR

Doha

ROMANIA

Bucharest

RUSSIA

Moscow
St. Petersburg

SAUDI ARABIA

Riyadh

SINGAPORE

Singapore

SLOVAK REPUBLIC

Bratislava

SOUTH KOREA

Seoul

SPAIN

Madrid

THAILAND

Bangkok

UKRAINE

Kyiv

UNITED ARAB EMIRATES

Abu Dhabi
Dubai

UNITED KINGDOM

Birmingham
Edinburgh
Leeds
Liverpool
London
Manchester
Sheffield

UNITED STATES

Albany
Atlanta
Atlantic City
Austin
Baltimore
Boston
Chicago
Dallas
Houston
Los Angeles
Miami
Minneapolis
New York
Northern Virginia
Philadelphia
Phoenix
Raleigh
Sacramento
San Diego
San Francisco
Short Hills
Seattle
Silicon Valley
Tampa
Washington, DC
Wilmington

RELATIONSHIP FIRMS

ALGERIA

Algiers

BOSNIA-HERZEGOVINA

Sarajevo

BOTSWANA

Gaborone

BURUNDI

Bujumbura

CROATIA

Zagreb

DENMARK

Copenhagen

EGYPT

Cairo

ETHIOPIA

Addis Ababa

GHANA

Accra

INDONESIA

Jakarta

IRELAND

Dublin

KENYA

Nairobi

MAURITIUS

Port Louis

MOZAMBIQUE

Maputo

NAMIBIA

Windhoek

NEW ZEALAND

Auckland
Wellington

NORWAY

Oslo

PORTUGAL

Lisbon

RWANDA

Kigali

SOUTH AFRICA

Cape Town
Johannesburg

SWEDEN

Stockholm

TANZANIA

Dar es Salaam
Mwanza

TURKEY

Ankara
Istanbul

UGANDA

Kampala

VENEZUELA

Caracas

ZAMBIA

Lusaka

ABOUT US

DLA Piper is a global law firm with 4,200 lawyers in the Americas, Asia Pacific, Europe and the Middle East, positioning us to help companies with their legal needs around the world.

DLA Piper's corporate governance team is a trusted advisor to leading and emerging companies and government entities on corporate governance matters, providing strategic advice and guidance. Learn more at www.dlapiper.com.

FOR MORE INFORMATION

To find out more about the topics covered in this guide, please contact:



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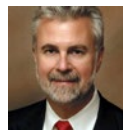
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