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Information-Sharing Between Activists and Their Director Nominees

Recently, the Delaware Court of Chancery held in *Icahn* v. *Illumina* that a director was not permitted to share confidential and privileged information he received in connection with his board service with the activist stockholders that nominated him for election.

The case involved a derivative lawsuit brought against Illumina by funds controlled by activist investor Carl Icahn in connection with Illumina's decision to close its acquisition of GRAIL, Inc. despite antitrust regulatory opposition. Prior to filing the complaint, the Icahn funds, which collectively owned less than 2% of Illumina's stock, had launched a proxy contest for three seats on Illumina's board and one of their nominees, an employee of a different Icahn-controlled entity (the "Icahn Director"), was ultimately elected by stockholders. After his election, the Icahn Director shared confidential and privileged information he received about Illumina in his capacity as a director with the Icahn funds.

The court began by acknowledging that the Icahn Director, like all directors, possessed a broad right to information about Illumina while serving on its board, including the right to access privileged information as well as information predating the director's tenure on the board if there is a present fiduciary need for it. This broad right to information can be limited only in certain recognized ways, including by *ex ante* agreement, through the use of a special committee or in the event "sufficient adversity" exists between the director and the company. The Illumina defendants did not dispute that the Icahn Director was entitled to access the privileged information that was contained in the complaint, so the issue before the court was whether the Icahn Director was permitted to subsequently share that information with the Icahn funds that nominated and employed him.

The court noted that it "has not developed a bright-line rule" regarding a director's ability to share company information with a stockholder that designated them, but that a line of Delaware cases supported the principle that directors may share a company's confidential or privileged information with their designating

stockholder (without destroying privilege) in "certain limited situations," such as when the director (i) is designated to the board by the stockholder pursuant to a contractual right or as a result of the stockholder's exercise of voting power or (ii) serves as a controller or fiduciary of the stockholder such that the director's brain is unable to be divided between serving as a director of the company and serving as a controller or fiduciary of the stockholder seeking the information. Neither of these circumstances were present in this case.

Moreover, given the fact that the Icahn Director expressly agreed to abide by Illumina's code of conduct, which prohibited the sharing of confidential information with third parties, the court found that it was reasonable for Illumina to expect that the Icahn Director would not share the information it provided him with the Icahn funds despite his known association with them. As a result, the court held that the Icahn funds had not established that they were within the "circle of confidentiality" that would grant them the right to receive the same confidential and privileged information the Icahn Director received.

Implicit in the court's *Icahn* decision and review of prior Delaware precedents is the fact that, unlike a stockholder that merely nominates a director for election by other stockholders, a stockholder that has a contractual right to designate a director may, by default, have a right or practical ability to receive confidential or privileged company information from its designated director. It is not clear whether such right would continue after the stockholder's designation right lapses or would apply in cases where a stockholder has a contractual right to select a director for nomination by the board and election by stockholders (as typically provided in activist settlement agreements). If so, different default information-sharing rights could apply in cases where a director is elected by proxy contest versus settlement agreement.

In the absence of additional clarity on these issues, companies facing a stockholder nomination will want to consider reviewing their corporate policies (including their codes of conduct, corporate governance guidelines, conflict of interest policies and D&O questionnaires) as well as any disclaimers contained in their board materials to ensure they impose appropriate confidentiality restrictions on directors. Additionally, companies considering entering into a settlement or other agreement with a stockholder that contains a designation right will want to negotiate parameters on such designated directors' ability to receive and/or share information. Once a designated director has been appointed to the board, the board will want to carefully assess potential conflicts of interest to determine whether certain information should be withheld from the director on the basis that the director has a conflict with respect to such matter.

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