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Considerations on the Use of Electronic Board Portals

Portals Can Provide Increased Efficiency and Security, but Companies Should Be Mindful of Potential Practical and Legal Risks

Board portals and other mechanisms for the electronic dissemination of information to directors of public companies, non-profits and other organizations are in widespread use. Many companies have found that these portals can offer significant benefits, including improved document security, speed and ease of distribution and, for many directors, improved efficiency and ease of access to board materials.

Boards and management should be aware, however, that there is increasing discussion, including among Delaware jurists and practitioners on both the plaintiff and defense sides, concerning possible negatives associated with board portals and other electronic communications, if not properly managed. There are two areas in particular that merit thoughtful attention.

First, there is some concern, including among Delaware jurists, that the provision of important board information only by electronic delivery, without an option for receiving printed copies, can hinder the ability of some directors to effectively absorb, reflect upon and annotate or otherwise comment on complex documents. This concern may emanate from the personal preferences of individuals who themselves prefer to review complex documents in paper, rather than electronically, but it nevertheless exists.

Second, there is increasing interest among plaintiff lawyers in seeking discovery of electronic information that might reflect upon the level of time and attention devoted to board materials and board meetings. Plaintiffs may seek discovery of data concerning *both* director engagement (through seeking information demonstrating the amount of time spent reviewing electronic board materials) and director distraction (through evidence of director use of e-mail, text messages, phone calls and other activity during board

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meetings, especially telephonic board meetings). A danger exists that such evidence could receive excessive attention in litigation and obscure other evidence of director engagement on board issues.

Accordingly, we suggest portal users consider the following, recognizing that every company, board and user is different and there is no “one size fits all” approach that is advisable:

- Consider providing hard copies of the information, in addition to making it available on the portal, for directors who may prefer to also receive paper materials.
- Consider, if printing of board materials from the portal is not permitted, whether directors might benefit from having the choice to print at least some of the more important or complex information.
- While board portals offer the possibility of immediate dissemination of materials, care should be taken to avoid this leading to last-minute distributions of voluminous materials in a manner that does not provide sufficient time for board review.
- Consider whether directors have received (and taken advantage of) training on the use and features of the board portal, including on annotating and note-taking online (or on iPad). Companies may want to evaluate the annotation and data storage aspects of their board portal (and consult with appropriate technology personnel) to confirm that these functions are consistent with broader board policies or practices on note-taking and document retention.
- Whether or not the company uses a board portal, consider whether it is advisable to provide directors with additional counseling as to the importance of undivided focus during in-person and telephonic board meetings, and avoiding the use of personal electronic devices during board meetings.

Board portals often are viewed as only improving director access to information and information security. Companies should be aware that some important constituencies are focusing on potential downsides to the use of these portals. To the extent that some of these downsides can be mitigated without fundamentally compromising the important benefits of board portals, the benefits of these mitigation actions should be considered.

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