



Maintaining Director Confidentiality

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How confidential are your boardroom discussions? Trends that include the appointment of directors affiliated with investment funds, advances in communications technology, and increases in third-party information requests increase the potential for a leak. But companies can take steps to reduce the likelihood of boardroom leaks and limit the damages resulting from them.

Why Director Confidentiality Matters

Leaks of confidential information—whether related to the company's products, strategy, or internal affairs, and whether disclosed to the public or to private parties—may give a company's competitors a leg up and jeopardize relations with customers, suppliers, and investors. Safeguarding confidential information, particularly in the boardroom, is critical to any company's success. Directors have a fiduciary duty to maintain confidentiality, and inappropriate disclosure, whether intended or inadvertent, can violate federal securities laws. Directors rely on confidentiality to facilitate candid deliberations with fellow board members.

How to Ensure Confidentiality

Companies can benefit from comprehensive confidentiality policies that apply to all directors. Where appropriate, these policies define the scope of confidential information and expressly prohibit both intentional and unintentional breaches of confidentiality. Often, the primary purpose of a confidentiality policy is simply to remind directors of their existing duties to the company, although an express policy may also help reduce liability arising from a breach by showing that the board took steps to protect confidential information.

Companies may also require directors to sign confidentiality agreements upon election or as a prerequisite to nomination. These agreements can include an agreement to resign if the director releases confidential information. In practice, written confidentiality agreements are considerably less common than generally applicable confidentiality policies.

Companies can also supplement policies with practices to help foster a culture of confidentiality. Practices can include periodic reminders to directors regarding their confidentiality obligations, tutorials on communicating with news media and investors, regular reviews of the company's confidentiality policy, and prompt action to address all leaks, no matter how insignificant.

Promoting a healthy level of respectful but vigorous discussion which accommodates opposing viewpoints within the board can also help reduce the potential for leaks. Directors who are able to disagree with fellow board members in private may be less inclined to vent their grievances outside the boardroom.

What to Do After a Leak

Companies have a range of options when a director releases confidential information. In extreme circumstances, a company could take legal action against an offending director for violating the duty of loyalty. However, under Delaware law, a director may not be removed by other directors. Suing a director for damages or to obtain an injunction is likely to generate negative publicity and publicly expose internal issues, disputes, and other sensitive information.

Less extreme responses may be preferable. The other directors may refuse to renominate the offending director for reelection. Although a board cannot completely isolate a director, a board can form special committees to oversee sensitive matters.

In addition to isolating the offending director, companies should consider preparing crisis management plans that aim to minimize the damage that could result from a release of confidential information. The plan should provide clear guidance on the steps employees and directors should consider in the event of a breach. Employees and board members should be prepared to notify public relations staff quickly, so the company can proactively address any leaks. Companies should focus on determining the extent of the disclosure and whether further leaks may be forthcoming.

Conclusion

Maintaining director confidentiality is an important task, and the ease and diversity of communications technologies can compound the difficulties in managing an improper disclosure. Nevertheless, confidentiality policies, practices, and crisis management plans can help to significantly reduce the likelihood and consequences of a leak.