

Portfolio Company Director Role & Duties in the COVID-19 Era

In this latest edition of our *PErspectives* newsflash series, we examine the role and duties of portfolio company board members and suggest some best practices.

Portfolio Company Director Role & Duties

Sponsors often designate representatives to the boards of public or private portfolio companies. Board designees and sponsors alike should be attuned to the designee's fiduciary duties and continuously monitor and address potential conflicts of interest.

- **Fiduciary Duties:** In Delaware, unless expressly waived in an LLC agreement, board members owe two core fiduciary duties to the company: (1) duty of care; and (2) duty of loyalty. Board members also owe a duty of confidentiality to the company, which is part of the duty of loyalty. It is important to be mindful of these fiduciary duties when the company is facing liquidity or solvency issues, especially in the current COVID-19 environment.
- **Personal Liability:** Company charters, indemnification provisions, and D&O insurance generally exculpate and protect board members from personal monetary liability for certain conduct, including by providing coverage and/or advancement for the cost of certain claims. It is important to understand what claims are and are not covered by the company's policies.
- **Antitrust Concerns:** Clayton Act § 8 prohibits board members from simultaneously serving on the boards of two competing companies in certain circumstances; this prohibition may also apply to a sponsor that has two different designees on competing boards. Sponsors should exercise caution when they have access to board-level information at competing companies.
- **Dual Hat Liability:** Board designees wear two hats when playing dual roles as sponsor representative and board member. Board designees may generally share board-level information with the sponsor unless a conflict between the company and sponsor exists (e.g., the sponsor is considering an investment in a competitor or the portfolio company has insolvency or liquidity issues).
- **Resolving Conflicts:** Sponsors may choose from a spectrum of options to address potential conflicts between the sponsor and portfolio company, including (1) disclosure to the board; (2) recusal from relevant discussions; (3) board resignation; and (4) exit from investment.
- **Managing Confidentiality:** Sponsors may take a number of different steps to manage the confidentiality of portfolio company information and mitigate conflicts created by competing investments, including (1) limiting the information that may be shared internally at the sponsor; (2) establishing information barriers; (3) scrubbing board materials to prevent the receipt of information that could create a conflict; and (4) creating separate deal teams.

Download our presentation on:

- [Portfolio Company Board Member Role & Duties](#)

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