



Corporate Governance

Board structures and directors' duties
in 34 jurisdictions worldwide

2012



Published by
Getting the Deal Through
in association with:

- Amarchand & Mangaldas & Suresh A Shroff & Company
- Anderson Mōri & Tomotsune
- Arzinger
- Badri and Salim El Meouchi Law Firm
- Bofill Mir & Alvarez Jana
- Bonn & Schmitt
- Davis Polk & Wardwell LLP
- Davies Ward Phillips & Vineberg LLP
- De Brauw Blackstone Westbroek NV
- Duane Morris & Selvam LLP
- Edward Nathan Sonnenbergs Inc
- Hausmaninger Kletter Rechtsanwälte Gesellschaft mbH
- KK Legal
- Kluge Advokatfirma DA
- Mamić Perić Reberski Rimac
- Mehmet Gün & Partners
- METIS Rechtsanwälte LLP
- Migallos & Luna Law Offices
- Nomos Law Firm
- Polenak Law Firm
- Popovici Nițu & Asociații
- Price Sanond Prabhas & Wynne
- S Horowitz & Co
- SA Evangelou & Co LLC
- Sanchez-DeVanny Eseverri, SC
- Schellenberg Wittmer
- Schoenherr
- Šelih & partnerji, o.p., d.o.o.
- Slaughter and May
- SRS Advogados
- Streamsowers & Köhn
- Ughi e Nunziante – Studio Legale
- Vivien & Associés
- Weil, Gotshal & Manges LLP
- Young Conaway Stargatt & Taylor, LLP
- Yukov, Khrenov and Partners



Corporate Governance 2012

Contributing editors

Ira Millstein and Holly Gregory
Weil Gotshal & Manges LLP

Business development managers

Alan Lee
George Ingledew
Robyn Hetherington
Dan White

Marketing managers

Ellie Notley
Alice Hazard

Marketing assistants

William Bentley
Zosia Demkowicz

Admin assistant

Megan Friedman

Marketing manager (subscriptions)

Rachel Nurse
Subscriptions@
GettingTheDealThrough.com

Assistant editor

Adam Myers

Editorial assistant

Lydia Geroges

Senior production editor

Jonathan Cowie

Chief subeditor

Jonathan Allen

Subeditors

Davet Hyland
Caroline Rawson

Editor-in-chief

Callum Campbell

Publisher

Richard Davey

Corporate Governance 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd 2012

No photocopying: copyright licences
do not apply.

ISSN 1476-8127

The information provided in this
publication is general and may not apply
in a specific situation. Legal advice should
always be sought before taking any legal
action based on the information provided.
This information is not intended to
create, nor does receipt of it constitute, a
lawyer-client relationship. The publishers
and authors accept no responsibility for
any acts or omissions contained herein.
Although the information provided is
accurate as of June 2012, be advised
that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

**Law
Business
Research**



Global Overview Arthur Golden, Thomas Reid and Sapna Dutta <i>Davis Polk & Wardwell LLP</i>	3
Austria Robert Bachner and Mark Kletter <i>Schoenherr</i> and <i>Hausmaninger Kletter Rechtsanwälte Gesellschaft mbH</i>	9
Canada Carol Hansell <i>Davies Ward Phillips & Vineberg LLP</i>	17
Chile Rony Zimerman and Nicolás Espina <i>Bofill Mir & Alvarez Jana</i>	24
Croatia Natalija Perić <i>Mamić Perić Reberski Rimac</i>	30
Cyprus Spyros Evangelou and Michael Tsikouris <i>SA Evangelou & Co LLC</i>	35
France Bernard Laurent-Bellue and Emmanuel Chauvet <i>Vivien & Associés</i>	43
Germany Lars Friske, Bernhard Maluch and Andreas Rasner <i>METIS Rechtsanwälte LLP</i>	52
Greece George Chatzigiannakis and Maria Vastaroucha <i>Nomos Law Firm</i>	61
Hungary Zoltán Kató and Gyula Kőrösy <i>KK Legal</i>	68
India Vineet Bansal <i>Amarchand & Mangaldas & Suresh A Shroff & Company</i>	74
Israel Amit Steinman and Guy Firer <i>S Horowitz & Co</i>	84
Italy Fiorella Federica Alvino <i>Ughi e Nunziante – Studio Legale</i>	91
Japan Takeshi Watanabe <i>Anderson Mōri & Tomotsune</i>	98
Lebanon Chadia El Meouchi and Samia El Meouchi <i>Badri and Salim El Meouchi Law Firm</i>	104
Luxembourg Alex Schmitt and Phillip Moessner <i>Bonn & Schmitt</i>	116
Macedonia Kristijan Polenak and Tatjana Siskovska <i>Polenak Law Firm</i>	121
Mexico Cristina Sanchez Vebber, Daniel Maldonado Alcantara and Cecilia Curiel Piña <i>Sanchez-DeVanny Eseverri, SC</i>	131
Netherlands Bernard Roelvink and Michael Schouten <i>De Brauw Blackstone Westbroek NV</i>	137
Nigeria Tamuno Atekebo, Otome Okolo and Omolayo Longe <i>Streamsowers & Köhn</i>	145
Norway Atle Degré, Naja Dannow and Linn Hoel Ringvoll <i>Kluge Advokatfirma DA</i>	153
Philippines Barbara Anne C Migallos <i>Migallos & Luna Law Offices</i>	162
Portugal Paulo Bandeira <i>SRS Advogados</i>	169
Romania Florian Nițu and Alexandru Ambrozie <i>Popovici Nițu & Asociații</i>	176
Russia Alexander Khrenov and Zinaida Zaharova <i>Yukov, Khrenov and Partners</i>	183
Singapore Leon Yee <i>Duane Morris & Selvam LLP</i>	190
Slovenia Nina Šelih, Mia Kalaš and Tjaša Lahovnik <i>Šelih & partnerji, o.p., d.o.o.</i>	198
South Africa Mohamed Sajid Darsot and Anli Dowling <i>Edward Nathan Sonnenbergs Inc</i>	205
Switzerland Lorenzo Olgiati <i>Schellenberg Wittmer</i>	214
Thailand Andrew Wynne and Poosit Luengruengtup <i>Price Sanond Prabhas & Wynne</i>	222
Turkey Serra Başoğlu Gürkaynak, Begüm Yavuzdoğan and Selcen Yalçın <i>Mehmet Gün & Partners</i>	229
Ukraine Maksym Cherkasenko and Lada Zhurbelyuk <i>Arzinger</i>	237
United Kingdom Simon Robinson <i>Slaughter and May</i>	245
United States Holly J Gregory and Rebecca C Grapsas <i>Weil, Gotshal & Manges LLP</i>	269
United States, Delaware Rolin P Bissell and Elena C Norman <i>Young Conaway Stargatt & Taylor, LLP</i>	282

United States, Delaware

Rolin P Bissell and Elena C Norman

Young Conaway Stargatt & Taylor, LLP

Sources of corporate governance rules and practices

1 Primary sources of law, regulation and practice

What are the primary sources of law, regulation and practice relating to corporate governance?

The primary sources of Delaware law concerning corporate governance are the Delaware General Corporation Law (DGCL) and the large judge-made body of law relating to the fiduciary duties of directors of corporations and the rights of shareholders that has been promulgated by the Delaware Court of Chancery (a court that specialises in business disputes) and the Delaware Supreme Court (Delaware's appellate court of last resort). Delaware corporation law is also influenced by US federal securities laws (chiefly the Securities Act of 1933 and the Securities Exchange Act of 1934), particularly the proxy rules concerning the information a corporation must provide to shareholders in connection with the election of directors or a shareholder vote on a transaction, such as a merger. In addition, exchange listing standards are not a part of Delaware law, but are influential on issues such as requirements concerning director independence and board composition.

The government agencies responsible for formulating and enforcing corporate governance law in Delaware are the Delaware Court of Chancery and the Delaware Supreme Court. In addition, the DGCL is promulgated by the Delaware State Legislature and signed by the Governor of Delaware. The DGCL is reviewed periodically by the Corporate Council of the Delaware State Bar Association, which makes annual recommendations to the Delaware State Legislature concerning amendments to the DGCL. In making these recommendations, the Corporate Council receives input from the corporate bar (both in and outside of Delaware), shareholder activist groups, proxy advisory firms, and academics. Notably, since 2010, the Division of Corporate Finance of the Securities Exchange Commission (the SEC) has retained a Delaware-based law professor to serve as senior special counsel of the Office of Chief Counsel, to advise the SEC on areas where federal securities law and Delaware corporation law intersect. In addition, Delaware has established a protocol by which the SEC can certify questions of Delaware corporation law to the Delaware Supreme Court for review.

2 Responsible entities

What are the primary government agencies or other entities responsible for making such rules and enforcing them? Are there any well-known shareholder activist groups or proxy advisory firms whose views are often considered?

For a typical publicly traded Delaware corporation, the by-laws of the corporation will provide that a nominating committee of the board of directors nominates directors for annual election by the shareholders. In addition, shareholders have a common law right to nominate directors, but that right may be subject to reasonable

procedural limitations as to timing and information that must be provided concerning a nominee's qualifications to serve as a director. Procedural limitations on the shareholders' right to nominate directors are typically set forth in 'advance notice by-laws' that require the nominating shareholder to make the nomination and provide information about the nominee several months in advance of a corporation's annual meeting to elect directors. Section 112 of the DGCL permits a corporation to adopt a by-law that requires the corporation to include information concerning directors nominated by shareholders in the corporation's proxy solicitation materials. Section 113 permits a corporation to adopt a by-law providing for the reimbursement by the corporation of expense incurred by a shareholder in soliciting proxies in connection with the election of directors.

Under section 141(k), a director or the entire board of directors may be removed, with or without cause, by the holders of the majority of the shares entitled to vote at an election of directors, except when the corporation's certificate of incorporation provides otherwise, such as the existence of a classified board (sometimes called a 'staggered board').

The rights and equitable treatment of shareholders

3 Shareholder powers

What powers do shareholders have to appoint or remove directors or require the board to pursue a particular course of action?

Corporate governance under Delaware law is director-centric. Shareholders have the right to elect directors, but shareholders do not have the power to require the board to pursue a particular course of action. Under section 141 of the DGCL, the board of directors of a Delaware corporation has the power to manage the affairs of the corporation, and may not abdicate this duty. Under the business judgement rule, Delaware courts will show great deference to a board's decisions. Nonetheless, in certain situations Delaware courts will subject a board to enhanced scrutiny. For example, when a target board responds to a proposed M&A transaction, particularly a hostile one, the courts review the defensive manoeuvres the target has employed to see whether those defensive manoeuvres are both reasonable and proportionate responses to a reasonably perceived threat to corporate policy under *Unocal v Mesa Petroleum*, 493 A.2d 946 (Del. 1985). When a company has embarked on a transaction that has made a change of control inevitable (whether on its own initiative or in response to an unsolicited offer), the board must seek to get 'the best price reasonably available' for the shareholders under *Revlon, Inc v MacAndrews & Forbes Holdings, Inc*, 506 A.2d 173 (Del. 1986). In general, Delaware companies are under no obligation to sell themselves and are free to 'just say no' to unwanted suitors. But under *Revlon*, once a change of control becomes inevitable, the directors are transformed into the auctioneers of the company. As described in question 8, conflict transactions are subject to an entire fairness review.

Shareholder approval is required for certain fundamental transactions, such as amendment of a corporation's certificate of incorporation (section 242), mergers (section 251), a sale of substantially all of the corporation's assets (section 271), or dissolution (section 275). But these actions must first be initiated by the board. Although shareholders can through shareholder-enacted by-laws regulate the process and procedures through which a board acts, they may not enact by-laws that mandate how a board should decide specific substantive business decisions. For example, shareholders have enacted by-laws requiring unanimous board attendance and board approval for any board action, and unanimous ratification of any committee action. By contrast, a shareholder-proposed by-law purporting to limit a board's power to adopt or continue a shareholder rights plan (a 'poison pill'), would likely infringe upon a board's power to manage the affairs of the corporation. A board may not abdicate, contract away, or be stripped of, its obligation to exercise its fiduciary duties. *CA, Inc v AFSCME*, 953 A.2d 227, 238-240 (Del. 2008).

4 Shareholder decisions

What decisions must be reserved to the shareholders? What matters are required to be subject to a non-binding shareholder vote?

Under Delaware law, the only decisions reserved to the shareholders are the election of directors, approval of certain fundamental transactions (see question 3), and the enactment of by-laws (section 109). Delaware law does not address non-binding shareholder votes. Members of the Delaware courts have expressed their skepticism about non-binding shareholder resolution, noting they are a creature of federal securities regulation (Rule 14a-8) and have no statutory or common law basis under Delaware corporation law. See, for example, Leo E Strine, Jr, Vice Chancellor, Delaware Court of Chancery, SEC Roundtable Discussion on Proposals for Shareholders (25 May 2007) (transcript available at www.sec.gov/news/openmeetings/2007/openmtg_trans052507.pdf). Publicly traded Delaware corporations are subject to the requirement under section 14A of the Exchange Act requiring a non-binding vote on say on pay.

5 Disproportionate voting rights

To what extent are disproportionate voting rights or limits on the exercise of voting rights allowed?

The DGCL allows disproportionate voting rights including stock with limited or no voting rights. Under section 212, each shareholder is entitled to one vote per share of capital stock held by that shareholder, but disproportionate voting rights may be set forth in a corporation's certificate of incorporation (section 102), or for preferred stock in a certificate of designation (section 151(g)). The certificate of incorporation may permit class voting on issues as well.

6 Shareholders' meetings and voting

Are there any special requirements for shareholders to participate in general meetings of shareholders or to vote?

Under the DGCL, there are no special requirements for shareholders to participate in general meetings of shareholders or to vote in those meetings. Section 213 requires that a board of directors set a record date for shareholder entitled to vote at a meeting of no more than 60 days, no less than 10 days before the date of the meeting. All shareholders of record as of the date of the record date who are entitled to vote on an issue may vote on that issue without meeting any special requirements.

7 Shareholders and the board

Are shareholders able to require meetings of shareholders to be convened, resolutions to be put to shareholders against the wishes of the board or the board to circulate statements by dissident shareholders?

Under section 211 of the DGCL, Delaware corporations are required to hold an annual meeting of shareholders for the purpose of electing directors. The shareholders may sue to compel an annual meeting of shareholders if one has not occurred for 13 months since the last annual meeting. Under section 212(d), a corporation may allow special meetings of shareholders to be called by the board of directors or by others authorised in the certificate of incorporation or by-laws. Without authorisation in the certificate of incorporation or by-laws, shareholders have no power to call a special meeting. By-laws often give shareholders the right to call special meetings, but condition that right by requiring a certain percentage of shareholders to call the meeting and requiring advance notice of the meeting and the issues to be considered at the meeting.

Shareholders may put resolutions to shareholders against the wishes of the board, but that power is typically limited by advance notice by-laws that require shareholders to give advance notice of resolutions in their content so the board may consider their presentation to the other shareholders. In addition, shareholders are free to conduct proxy contests at their own expense, although under section 113, a Delaware corporation's by-laws may provide for reimbursement of proxy expenses under certain conditions.

8 Controlling shareholders' duties

Do controlling shareholders owe duties to the company or to non-controlling shareholders? If so, can an enforcement action against controlling shareholders for breach of these duties be brought?

Under Delaware law, controlling shareholders owe a fiduciary duty of loyalty to minority shareholders not to use their power to control the corporation to extract benefits from the corporation at the expense of the corporation's minority shareholders. These duties typically arise when a controlling shareholder stands on both sides of a transaction with the corporation, the classic case being a freeze-out merger in which the controlling shareholder seeks to buy out the minority shareholders. See, for example, *Kahn v Lynch*, 638 A.2d 1110 (Del. 1994). In reviewing a conflict transaction between a controlling shareholder and a corporation, Delaware courts apply the entire fairness standard to determine whether the transaction is a product of a fair process and results in a fair price being paid to the minority. The controlling shareholder can shift the burden of proving entire fairness to the minority shareholders challenging a freeze-out transaction if the transaction is recommended by a disinterested and independent special committee of the board and approved by shareholders in a non-waivable vote of the majority of all the minority shareholders. In other types of conflict transactions, the use of procedural protections may provide a basis for more deferential review of the transaction under the business judgement rule. A controlling shareholder's decision when and for how much to sell shares or how to vote their shares are not subject to challenge outside the context of a conflict transaction.

A corporation may bring legal action against the controlling shareholder for a breach of fiduciary duties if the breach has injured the corporation.

9 Shareholder responsibility

Can shareholders ever be held responsible for the acts or omissions of the company?

In general, shareholders are not responsible for the acts or omissions of the corporation. The exceptions being that, under section 174(c) of the DGCL, a shareholder may be required to return an unlawful dividend if the shareholder knew the dividend was unlawful at the time the shareholder received it, and under section 325, a shareholder may be sued for the debts of a corporation if the complaint sets forth a valid claim against the corporation and a basis on which the plaintiff will establish the personal liability of the shareholder. A claim under section 325 cannot be brought against a shareholder until judgment has been entered against the corporation and the plaintiff has been unable to execute on the judgment against the corporation. Shareholders can be secondarily liable for the acts or omissions of the corporation under theories of agency, aiding and abetting or conspiracy. Delaware courts show great respect for the corporate form and will entertain applications to pierce the corporate veil or use theories of alter ego to hold shareholders liable for the wrongs of the corporation in only the most extreme cases.

Corporate control**10 Anti-takeover devices**

Are anti-takeover devices permitted?

Delaware law allows several structural defenses to unsolicited or hostile transactions.

Section 141(d) of the DGCL permits a corporation to have a staggered board of up to three classes of directors. Because it can take three years to unseat a staggered board, this structure makes an attempt to replace the directors of the target board with individuals nominated by the acquirer more difficult and time-consuming.

Section 203, the so-called 'control share' statute, regulates certain business combinations with 'interested stockholders'. The statute was enacted to balance between the benefits of unfettered market for corporate shares and the need to limit abusive takeover tactics. Unless a corporation opts out of section 203, business combinations between a public corporation and a shareholder of a large percentage of its shares (15 per cent or more) are subject to high voting requirements (66 per cent of the disinterested shares) for a period of three years subsequent to the interested shareholder achieving that status. Although section 203 has exceptions that hostile acquirer can potentially satisfy, it provides an effective means for a target to slow down the hostile acquirer.

Delaware law also permits corporations to adopt shareholders' rights plans (also known as the 'poison pill'). The poison pill grants shareholders of the target corporation special rights to purchase or sell securities under favourable or preferential conditions in the midst or as the result of a hostile takeover. The poison pill has been held to serve the legitimate purpose of giving the board issuing the rights the leverage to prevent transactions it does not favour by diluting the buying proponent's interest. The typical pill sets a threshold (typically a 10 to 20 per cent ownership stake) beyond which the potential acquirer will be subject to substantial dilution.

Delaware corporations may enact advance notice by-laws that require shareholders to give notice in advance of a meeting of their intention to nominate directors or submit proposals to a shareholder vote. Advance notice by-laws typically require that notice be given 30 to 60 days in advance of the meeting and they often require shareholders to provide detailed information concerning the proposed nomination or proposal the shareholder wishes to submit to a vote. The purpose of an advance notice by-law is to permit orderly solicitation of votes in advance of a meeting. But such by-laws often serve as a procedural hurdle to the shareholders' right to nominate candidates for director.

11 Issuance of new shares

May the board be permitted to issue new shares without shareholder approval? Do shareholders have pre-emptive rights to acquire newly issued shares?

Under section 161 of the DGCL, the board of directors has the power to issue shares previously authorised in a corporation's certificate of incorporation (section 102(a)(4)) without further shareholder approval. Under section 102(b)(3), shareholders do not have preemptive rights to acquire newly issued shares unless those preemptive rights are specifically set forth in the certificate of incorporation.

12 Restrictions on the transfer of fully paid shares

Are restrictions on the transfer of fully paid shares permitted, and if so what restrictions are commonly adopted?

Section 202 of the DGCL permits a corporation to restrict transfer of its securities. This includes restrictions on the amount of a corporation's securities that can be held by a person or a group of persons. Restrictions on transfer must be in writing and may be included in the certificate of incorporation, by-laws, or an agreement among the shareholders of the corporation. In addition, restrictions on transfer must be noted conspicuously on the certificates representing those shares or by notice for uncertificated shares. Restrictions on the transfer of shares are more typical found in closely held corporations than with publicly traded corporations. However, publicly traded corporations that make stock grants to employees, officers or directors as part of executive compensation frequently subject those shares to transfer restrictions.

13 Compulsory repurchase rules

Are compulsory share repurchase rules allowed? Can they be made mandatory in certain circumstances?

A corporation may adopt compulsory share repurchase rules, but it is not typical for publicly traded corporations to do so with its common stock. Under Sections 160 and 151(b) of the DGCL, a corporation may include the right to compel 'redemption' of its shares and the terms of the redemption in its certificate of incorporation. A corporation may not make a redemption if it will impair the corporation's capital. There are also equitable limits on redemption to prevent a corporation from using redemptions to eliminate dissident shareholders or entrench incumbent directors and management. But under *Unocal* (discussed in question 3), a protective redemption may be a reasonable and proportionate response to a threat to corporate policy.

14 Dissenters' rights

Do shareholders have appraisal rights?

Section 262 of the DGCL sets forth a shareholder's appraisal rights in a merger in which the shareholder is being cashed out of the target. No appraisal rights are available in a merger in which the consideration is exclusively stock. Appraisal is available in mergers in which the consideration is mixed between stock and cash. Because shareholder approval is not required in the context of a tender offer, no appraisal rights are available in a tender offer. In an appraisal proceeding, the stockholder is entitled to its pro rata share of the going-concern value of the entity, which has been interpreted as the shareholder's proportionate share in the value of the entity exclusive of any synergies created by the merger. Delaware also allows a quasi-appraisal remedy when material facts relating to the shareholder's determination of whether to accept the merger consideration or seek statutory appraisal were not disclosed. Provided disclosure was

insufficient, minority stockholders who did not pursue appraisal are entitled to pursue a quasi-appraisal class action to recover the difference between judicially determined fair value and the merger price.

The responsibilities of the board (supervisory)

15 Board structure

Is the predominant board structure for listed companies best categorised as one-tier or two-tier?

The predominant board structure for listed corporations is a one-tier board. Section 141(d) of the DGCL permits that a corporation's certificate of incorporation or by-laws may provide a board to be divided into one, two or three classes, a so-called classified board. These classes are typically used to create a 'staggered' board, a board in which the three classes of directors will have staggered terms, making it impossible to unseat the entire board in a single annual election. Section 141(d) also permits the creating of classes of directors with different voting powers, but that structure is virtually unknown with listed corporations.

16 Board's legal responsibilities

What are the board's primary legal responsibilities?

As set forth in section 141(a) of the DGCL, the board's primary legal responsibilities are to 'manage' the 'business and affairs' of the corporation. This includes: a fiduciary duty to act with due care – making decisions on an informed and advised basis, and a fiduciary duty of loyalty that a director will act in the interest of the corporation and not for personal interests and that a director will act in good faith. The duty of loyalty has been interpreted to include a duty of oversight that requires directors to take steps that the corporation has reasonable internal controls and oversight mechanisms to inform the board of material risk. *Stone v Ritter*, 911 A.2d 362 (Del. 2006).

17 Board obligees

Whom does the board represent and to whom does it owe legal duties?

Under Delaware law, the board represents and owes legal duties to the corporation and the shareholders of the corporation. The board of a solvent corporation does not owe duties to a corporation's creditors or preferred stockholders, except for those duties for which the parties have specifically contracted. When a corporation enters the 'vicinity of insolvency', the fiduciary duty that the board owes to the corporation may encompass creditors as well.

18 Enforcement action against directors

Can an enforcement action against directors be brought by, or on behalf of, those to whom duties are owed?

Enforcement action against the directors may be brought by the corporation itself. In addition, the shareholders of a corporation may bring an action derivatively on behalf of the corporation against directors for wrongs that have caused injury to the corporation and shareholders may sue individually or as a class for direct injuries to them as shareholders.

19 Care and prudence

Do the board's duties include a care or prudence element?

A board's duties include a duty of care that requires a director to make decisions on an informed and advised basis. The standard of care owed under the duty of care is gross negligence. Under section

102(b)(7) of the DGCL, a corporation's certificate of incorporation may eliminate or limit a director's liability for monetary damages for breaches of the duty of care.

20 Board member duties

To what extent do the duties of individual members of the board differ?

The individual members of the board have the same duties and theoretically these duties do not differ from board member to board member. However, in connection with the board's duty of care, different levels of skill and experience may affect whether a director has met that duty. In particular, it has been suggested that a sophisticated director may have greater difficulty in meeting the duty of care in some circumstances. For example, section 141(e) of the DGCL allows a member of a board to rely in good faith as to matters the board member reasonably believes are within another person's professional or expert competence and who have been selected with reasonable care by or on behalf of the corporation. A director who is highly sophisticated in financial affairs (perhaps from past experience as a banker) or legal matters (due to legal training) may possess skill or knowledge that makes reasonable reliance upon expert opinion in his own area of expertise unreasonable, even though it would be reasonable for a board member without professional training to rely on that expert.

21 Delegation of board responsibilities

To what extent can the board delegate responsibilities to management, a board committee or board members, or other persons?

A board can make delegations of responsibilities to management, a board committee, or board members. Those delegations must be expressed either through the certificate of incorporation (sometimes called the 'charter'), by-laws or board resolution.

22 Non-executive and independent directors

Is there a minimum number of 'non-executive' or 'independent' directors required by law, regulation or listing requirement? If so, what is the definition of 'non-executive' and 'independent' directors and how do their responsibilities differ from executive directors?

Delaware law does not require that there be a minimum number of 'non-executive' or 'independent' directors. For public companies, this is subject to federal securities law and the listing requirements for certain exchanges.

23 Board composition

Are there criteria that individual directors or the board as a whole must fulfil? Are there any disclosure requirements relating to board composition?

Delaware law does not impose any board composition requirements. The disclosure requirements relating to board composition are a matter of federal securities law and exchange listing requirements.

Update and trends

The most significant trend affecting the corporate governance of Delaware corporations in the last year is increased sensitivity by the Delaware courts to conflicts of interest of financial advisers to boards. The central principle of corporate governance under Delaware law is the primacy of the board of directors in corporate decision-making. The director-centric approach is reflected in the business judgement rule, under which Delaware's courts have typically deferred to the decisions of an informed, advised and unconflicted board. Shareholders' protections have come from their ability to elect directors and to challenge breaches of the fiduciary duties of care and loyalty, especially breaches that involve a conflict of interest and lack of independence affecting the board.

In the past year, the Delaware courts have been highly critical of financial advisers who have conflicts of interest. Delaware courts have 'examined banker conflicts closely to determine whether they tainted the directors' process'. *In re Del Monte Foods Co S'holders Litig.*, 25 A.3d 813, 832 (Del. Ch. 2011) (preliminarily enjoining for 20 days a sale to a third-party acquirer where the target board failed to adequately oversee a self-interested investment banker's role in the sale process). Of particular concern are situations where the banker's conflicts were disclosed to the board and questions as to whether the board reasonably could rely on the banker's expert advice despite the alleged conflict. *Id.* at 836. Related to this trend is a requirement that proxy statements disclose any contingent compensation payable to the target's financial adviser and employment opportunities offered by

and acquired to the target's CEO. *In re Atheros Communs, Inc S'holder Litig.*, 2011 Del. Ch. LEXIS 36 (Del. Ch. 4 March 2011).

In addition, Delaware courts have taken a hard look at special committees and other methods used to sterilise potential conflicts. In particular, in *In re S Peru Copper Corp S'holder Deriv. Litig.*, 30 A.3d 60 (Del. Ch. 14 October 2011), the Court of Chancery was highly critical of a special committee of independent directors established by the board of Southern Peru Copper to evaluate a transaction proposed by its controlling stockholder, the Grupo Mexico. Because the court found that the special committee was not 'well-functioning' and passive in its dealings with the controller, Grupo Mexico, the court determined that the merger was unfair to Southern Peru and its minority stockholders and awarded \$1.347 billion in damages, the largest amount ever awarded by the Court of Chancery. Similarly, in *In re El Paso Corp S'holder Litig.*, 2012 Del. Ch. LEXIS 46 (Del. Ch. 29 February 2012), the court was highly critical of conflicts affecting the target's investment banker, Goldman Sachs, in particular its other work for the acquirer Kinder Morgan and the lead investment banker's ownership's interest in Kinder Morgan.

Accordingly, lawyers advising boards of Delaware corporations should give focused consideration to identifying potential board, management and adviser conflicts, and where conflicts are discovered take effective steps to sterilise those conflicts through the use of independent and vigorous boards, committees and advisers.

24 Board leadership

Do law, regulation, listing rules or practice require separation of the functions of board chairman and CEO? If flexibility on board leadership is allowed, what is generally recognised as best practice and what is the common practice?

Delaware law does not require separation (or joining) of the functions of board chair and CEO. There is disagreement about what is best practice. Common practice remains for the CEO to be the board chair, but an increasing number of corporations have separated the functions.

25 Board committees

What board committees are mandatory? What board committees are allowed? Are there mandatory requirements for committee composition?

Delaware law does not make any board committees mandatory, but section 141(c) of the DGCL permits the formation of board committees for functions. A committee cannot approve or recommend any action for which the DGCL requires a shareholder vote (eg, merger, sale of all the assets, dissolution) or adopt, amend or repeal any by-law. A committee's power to declare dividends or issue preferred stock will depend on when the corporation was incorporated. There are not mandatory requirements for committee composition in terms of independence, financial literacy or expertise. For public companies, this is the subject of federal securities law and listing requirements for certain exchanges.

26 Board meetings

Is a minimum or set number of board meetings per year required by law, regulation or listing requirement?

There is no minimum or set number of board meetings per year required by Delaware law. A corporation's by-laws may provide for the number and frequency of meetings.

27 Board practices

Is disclosure of board practices required by law, regulation or listing requirement?

Delaware law does not have a specific requirement that board practices be disclosed. However, in connection with asking for shareholder approval of a transaction, such as a merger, a corporation must disclose specific items set forth in the DGCL and directors are subject to fiduciary duties of disclosure to provide the shareholders with all information material to their decision to approve or not approve a transaction. As a result, in connection with a major transaction, it is typical for a board to disclose the number of meetings and proceedings of the board in connection with the transaction to provide background concerning the transaction in the proxy materials sent to shareholders. Failure to make adequate disclosure may provide a basis to enjoin the transaction until such time as full disclosure can be made.

28 Remuneration of directors

How is remuneration of directors determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of directors, the length of directors' service contracts, loans to directors or other transactions between the company and any director?

Delaware law does not limit how remuneration of directors is determined. For publicly listed Delaware corporations, remuneration decisions are subject to the disclosure requirements under the federal securities laws and the listing requirements of certain exchanges.

29 Remuneration of senior management

How is the remuneration of the most senior management determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of senior managers, loans to senior managers or other transactions between the company and senior managers?

Delaware law does not prescribe how remuneration of senior management is to be determined. Typically it is determined by disinterested members of a corporation's board and challenges to executive

compensation decisions be reviewed under the deferential business judgement rule. In addition, Delaware law does not prohibit loans to senior managers or other transactions between a corporation and senior managers. Again, these transactions are usually approved by independent and disinterested members of the corporation's board. If not, the transactions between the corporation and senior managers may be considered conflict transactions, and thus subject to review for entire fairness.

30 D&O liability insurance

Is directors' and officers' liability insurance permitted or common practice? Can the company pay the premiums?

Section 145(g) of the DGCL specifically permits a corporation to purchase and maintain insurance on behalf of any person who is or was a director or officer. It is common practice for publicly traded corporations to have a directors and officers liability insurance policy. It is also common for these policies to have several coverage 'towers' or 'blocks' that provide separate pools of insurance for the corporation, the directors and officers, and others.

31 Indemnification of directors and officers

Are there any constraints on the company indemnifying directors and officers in respect of liabilities incurred in their professional capacity? If not, are such indemnities common?

Sections 145(a), (b) and (c) of the DGCL give Delaware corporations broad power to indemnify directors and officers in respect of liabilities incurred in their capacity as directors and officers. Such indemnities are common and are typically set forth in a corporation's certificate of incorporation, by-laws and indemnification agreements. This generally means that any director or officer will be entitled to indemnification so long as the director or officer believes the actions he or she took were in good faith and in a manner the director reasonably believed to be in or not opposed to the best interest of the corporation. In addition, section 145(c) provides for mandatory indemnification to a director or officer for legal fees and expenses if the director or officer is successful in defense of the claim. Under section 145(e), a corporation may advance a director's or officer's legal expenses in connection with that director's or officer's defence of a claim against them. Typically, advancement is made 'mandatory' in a corporation's certificate of incorporation, by-laws or separate agreement with the director or officer.

32 Exculpation of directors and officers

To what extent may companies or shareholders preclude or limit the liability of directors and officers?

Under section 102(b)(7), a corporation may eliminate its directors' liability for monetary damages related to the breaches of the duty of care. Directors cannot be exculpated for breaches of the duty of loyalty, acts or omissions not in good faith or which involve intentional misconduct of a knowing violation of law, for the improper payment of dividends, or for any transaction from which the director derived an improper, personal benefit. An exculpation provision under section 102(b)(7) must be included in the certificate of incorporation and an exculpation provision cannot eliminate or limit liability of a director for any act or omission prior to the date when the exculpation provision became effective.

33 Employees

What role do employees play in corporate governance?

Under Delaware law, employees have no mandated role in the corporate governance of Delaware corporations.

Disclosure and transparency

34 Corporate charter and by-laws

Are the corporate charter and by-laws of companies publicly available? If so, where?

The certificate of incorporation (sometimes referred to as the articles of incorporation or charter) of a Delaware corporation are publicly available through the Delaware secretary of state. Delaware corporations are not required to file their by-laws publicly. However, for publicly listed corporations, the by-laws of the corporation can typically be found as part of the corporation's filings with the SEC.

35 Company information

What information must companies publicly disclose? How often must disclosure be made?

Delaware corporation law does not require extensive public disclosure through initial or annual filings. In its certificate of incorporation, a Delaware corporation is required to disclose the name of the corporation, the address of its registered office and name of its registered agent, the stock the corporation is authorised to issue and its par value, and the name and address of the incorporator. Corporations must file an annual report for the purpose of the annual



Rolin P Bissell
Elena C Norman

rbissell@ycst.com
enorman@ycst.com

1000 North King Street
Rodney Square
Wilmington, DE 19801
United States

Tel: +302 571 6560
www.youngconaway.com

franchise tax. In addition to an update to the information provided in the certificate of incorporation, an annual report sets forth the location of the corporation's principal office, the names and addresses of directors, and the name and address of the officer signing the report.

Hot topics

36 Say-on-pay

Do shareholders have an advisory or other vote regarding executive remuneration? How frequently may they vote?

Delaware law does not provide for an advisory or other vote regarding executive remuneration. However, to the extent federal securities laws or exchange listing require advisory votes, such as say-on-pay, Delaware law does not prohibit such votes.

37 Proxy solicitation

Do shareholders have the ability to nominate directors without incurring the expense of proxy solicitation?

Under section 112 of the DGCL, a Delaware corporation may provide in its by-laws procedures and conditions under which the shareholders of a Delaware corporation can have access to the corporate proxy. Under section 113, a Delaware corporation may provide in its by-laws for the reimbursement of shareholders by the corporation for expenses incurred by a shareholder in soliciting proxies in connection with an election of directors.

Annual volumes published on:

Air Transport	Licensing
Anti-Corruption Regulation	Life Sciences
Arbitration	Merger Control
Banking Regulation	Mergers & Acquisitions
Cartel Regulation	Mining
Climate Regulation	Oil Regulation
Construction	Patents
Copyright	Pharmaceutical Antitrust
Corporate Governance	Private Antitrust Litigation
Corporate Immigration	Private Equity
Dispute Resolution	Product Liability
Dominance	Product Recall
e-Commerce	Project Finance
Electricity Regulation	Public Procurement
Enforcement of Foreign Judgments	Real Estate
Environment	Restructuring & Insolvency
Foreign Investment Review	Right of Publicity
Franchise	Securities Finance
Gas Regulation	Shipbuilding
Insurance & Reinsurance	Shipping
Intellectual Property & Antitrust	Tax on Inbound Investment
Labour & Employment	Telecoms and Media
	Trademarks
	Vertical Agreements



**For more information or to
purchase books, please visit:**
www.GettingTheDealThrough.com



Strategic research partners of
the ABA International section



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



The Official Research Partner of
the International Bar Association