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FIDUCIARY DUTIES OF DIRECTORS

Created by Elizabeth Resteghini from Morse for Scroobious

This article was created by Elizabeth Resteghini from Morse for Scroobious founders.

Scroobious is increasing diversity in the startup ecosystem by providing the education, tools, and community founders need to create investor-compelling pitch material and a platform to help investors easily find them through data-driven curation. For startup founders who have a story to tell but need help telling it, The Pitch it Plan™, or PiP, is a virtual platform that helps you get your compelling story into an investor-ready format. Unlike googling for hours or paying thousands for a pitch coach, PiP is affordable and approachable through online education and personalized feedback from a human who understands the investor mindset. Our framework has been published, vetted by investors, and has helped founders score meetings, raise rounds, and get into prestigious accelerators. Founders can sign up here or book an intro call to chat.

Combining the best practices of traditional law firms with an inventive approach, Morse's founders created a solid basis for a more modern practice of law. We offer our clients responsive and reliable service, sound and insightful business advice, and reasonable fees. We're dedicated to developing real partnerships with our clients, addressing each client's specific challenges, and delivering effective results tailored to each client's needs. While we have long enjoyed a reputation for special competency in technology ventures, we represent clients of all sizes and industries in all stages of the business life cycle. Our clients include startups, emerging growth entities, established family businesses, and Fortune 1000 companies. Our exceptional business model affords clients access to highly experienced counsel in the areas of M&A, Venture Capital, IP, Employment, Taxation, Privacy, and Litigation.

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Under Delaware General Corporation Law (the "DGCL") , the business and affairs of a corporation are managed by or under the direction of a corporation's board of directors. Pursuant to the DGCL, directors owe legal and ethical fiduciary duties and responsibilities to corporations and their stockholders which fall under two umbrellas of the fiduciary duty of loyalty and the fiduciary duty of care. A breach of these duties can result in liability for the directors.

Duty of Care

The duty of care requires directors to make informed business decisions. In carrying out this duty, directors should act in good faith, with the same level of care as a prudent person in a similar circumstance would act, and in a manner that the director reasonably believes to be in the best interests of the corporation and its stockholders to make informed business decisions. To satisfy this duty, among other things, directors should review all reasonably available material information, ask questions, hold Board meetings, consider alternatives and devote a reasonable amount of time to reviewing relevant issues. Directors should also be informed about the business and its financial status, conduct diligence, speak with financial and legal experts, receive input from management and advisors, and review the records of the corporation and opinions and reports presented by any of the corporation's management or committees of the board of directors or by any person reasonably believed to have expertise in such area. In addition, directors should take ample time to adequately understand the transaction and carefully deliberate before making any business decisions.

If a director is sued for breach of the duty of care, the default judicial standard of review is that such actions will be evaluated under the Business Judgment Rule. The Business Judgment Rule means that a court will have the presumption that the director acted on an informed basis, in good faith and with the honest belief that the actions taken were done in the best interests of the corporation. The Business Judgment Rule therefore may provide protection from liability. However, this standard is a rebuttable presumption, so if a plaintiff can demonstrate that the director did not act on an informed basis or in good faith in the interests of the corporation, or acted in bad faith, fraudulently, with illegal conduct or made an egregious decision, or if a conflict of interest existed, then the Business Judgment Rule likely will not apply. If the Business Judgment Rule does not apply, the burden shifts to the defendant directors under the entire fairness standard to demonstrate that the challenged act or transaction was entirely fair to the corporation and its stockholders.

Duty of Loyalty

The duty of loyalty requires directors to act in good faith and with a reasonable belief that what the director does is in the best interests of the corporation and its stockholders and should not put any personal interest ahead of the interests of the corporation or its stockholders. A director must refrain from self-dealing. Breaches of the duty of loyalty can often arise in conflict-of-interest situations such as when a director sits on the Board of two different corporations and a conflict-of-interest arises, or where a director usurps a corporate opportunity without first offering it to the corporation, or where a director participates in setting their own compensation. To try to avoid breaching the duty of loyalty, directors should refrain from self-dealing, and where appropriate recuse

themselves from board decisions on matters in which they are self-interested or where there is an appearance of a conflict of interest. In addition, to help avoid liability, directors should disclose any conflicts of interest of which they are aware. One way of doing this is "cleansing the transaction" by having a majority of the fully informed and disinterested directors and/or the fully informed and disinterested stockholders approve the transaction. It is important to note that the Business Judgment Rule does not apply to the duty of loyalty, so directors must act carefully to avoid conflicts-of-interest.

Indemnification

Delaware law allows corporations to indemnify directors for certain breach of fiduciary duty claims. This permission to indemnify should be authorized in the corporation's certificate of incorporation. In addition, corporations can provide directors with an indemnification agreement which will clearly and in a detailed manner spell out the rights to indemnification. Corporations should also consider purchasing Directors and Officers Insurance (commonly referred to as D&O insurance), which can help cover directors and officers for costs and expenses associated with defending claims against them.

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