

Jennifer Wisinski Discusses Board Confidentiality, Communications With Practical Law - The Journal

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Haynes Boone Partner [Jennifer Wisinski](#) is featured in the October/November issue of *Thomson Reuters' Practical Law - The Journal* discussing board confidentiality and communications. Jennifer is chair of the Business Transactions Department at Haynes Boone.

Below is an excerpt:

Recent developments in Delaware case law highlight the importance for companies of periodically reviewing and updating their corporate governance policies and procedures to protect confidential corporate information provided to directors, as well as board communications and deliberations, from both intentional and inadvertent disclosure outside the company. *Practical Law* asked *Jennifer T. Wisinski of Haynes Boone* for guidance on adopting and updating corporate governance policies that address board confidentiality and communications.

Q: Why is it important to address director confidentiality and communications in a company's corporate governance policies?

A confidentiality policy specifically applicable to directors (board confidentiality policy) serves to inform and remind directors of the importance of confidentiality. A board confidentiality policy is important because most general confidentiality policies define "confidential information" to include "material, non-public information." However, this definition does not necessarily cover all information provided to directors, board deliberations, or communications between and among directors and the company. In addition, the scope and parameters of a director's duty of confidentiality are not well defined under Delaware law. Maintaining the confidentiality of this information is critical not only to protect the company from competitive or other harm, but also to protect the integrity of the boardroom and board process. As the Delaware Chancery Court noted in *Disney v. Walt Disney Co.*, when considering whether to permit the disclosure of board communications relating to executive compensation matters in response to a stockholder demand under Section 220 of the Delaware General Corporation Law (DGCL), a potential harm of disclosure is the chilling effect on board deliberations that likely would result "[i]f any shareholder can make public the preliminary discussions, opinions, and assessments of board members and other high-ranking employees." The court also observed that the "preliminary deliberations of a corporate board of directors generally are non-public and should enjoy 'a reasonable expectation that they [will] remain private.'" (2005 WL 1538336, at *4 (Del. Ch. June 20, 2005)).

Q: What is a director's legal obligation to maintain confidentiality under Delaware law?

Directors have a general duty to maintain the confidentiality of information obtained through their service on the board (see Am. Bar Ass'n, Bus. Law Section, Corporate Director's Guidebook, 75 Bus. Law. 2741, 2766 (7th ed. 2020)). This duty emanates from the duty of loyalty. Notably, a director's confidentiality obligation is not set forth in the DGCL, and relevant Delaware case law is

sparse. Delaware courts have held that directors violate their fiduciary duty of loyalty by, among other acts, improperly using confidential information belonging to the company, without authorization from the board, to advance their personal interests and not those of the company. For example, in *Hollinger International Inc. v. Black*, when the company was considering strategic alternatives, including a corporate restructuring, one of its directors (who was also a controlling stockholder) used confidential information learned through the board's strategic review process to negotiate a secret deal with a third party to sell the equity in his holding company, which owned 30.1% of the company, thwarting the company's efforts to complete its proposed restructuring (844 A.2d 1022, 1061-62 (Del. Ch. 2004)).

Delaware case law does not, however, address in depth the scope of the duty of confidentiality, including the types of information that are considered to be confidential.

To read the full article, click on the PDF below:

[Thomson Reuters' Practical Law – The Journal](#)