

# The International Bar Association Company Director Checklist – United States

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Item	Number	Check	Item	Number	Check
<b>Before appointment</b>			Potential liability	16	<input type="checkbox"/>
Items to understand	1	<input type="checkbox"/>	Duration of duties	17	<input type="checkbox"/>
People to meet with	2	<input type="checkbox"/>	<b>Special circumstances</b>		
Documents to review	3	<input type="checkbox"/>	Bankruptcy	18	<input type="checkbox"/>
<b>Ongoing duties</b>			Takeover bids	19	<input type="checkbox"/>
Points for attention	4	<input type="checkbox"/>	Market abuse/insider dealing	20	<input type="checkbox"/>
Legal status of directors	5	<input type="checkbox"/>	<b>Defenses</b>		
Parties to which duties are owed	6	<input type="checkbox"/>	Good corporate governance	21	<input type="checkbox"/>
Powers of directors	7	<input type="checkbox"/>	Minutes of board meetings	22	<input type="checkbox"/>
Duty of loyalty	8	<input type="checkbox"/>	Discharge and indemnification	23	<input type="checkbox"/>
Duty of care	9	<input type="checkbox"/>	Insurance	24	<input type="checkbox"/>
Duty to have and maintain skills	10	<input type="checkbox"/>	Resignation	25	<input type="checkbox"/>
Additional duties (confidentiality, etc.)	11	<input type="checkbox"/>	Restructuring of assets	26	<input type="checkbox"/>
Delegation of powers/authority	12	<input type="checkbox"/>	ESG and D&I policies, metrics	27	<input type="checkbox"/>
Conflicts of interest (inc. intragroup dealings)	13	<input type="checkbox"/>			
Compliance with statutory obligations	14	<input type="checkbox"/>			
Disclosure obligations	15	<input type="checkbox"/>			

## Introduction

This checklist is intended to serve as a practical guide with respect to the main duties and obligations of the directors of:

- corporations formed in the State of Delaware that are listed on a regulated market, such as the New York Stock Exchange (“NYSE”) or Nasdaq;
- privately held corporations formed in the State of Delaware;
- in each case arising from the laws of the State of Delaware, namely:
  - Delaware General Corporation Law (“DGCL”)
  - Delaware case law

In certain respects, (i) the Delaware Limited Liability Company Act and (ii) the rules and regulations of the United States Securities and Exchange Commission (“SEC”) are also addressed herein.

If any specifics of listed public companies are relevant, see the second column of this checklist below.

## Disclaimer

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DUTIES AND OBLIGATIONS OF THE DIRECTORS			
	Action/issue	Specifics of listed public companies (if relevant)	Comments/notes
<b>Before appointment</b>			
<b>1. Items to understand</b>	<ul style="list-style-type: none"> <li>• Applicable fiduciary duties;</li> <li>• Who the stockholders of the company are;</li> <li>• Whether you are expected to serve on one or more committees of the board of directors and the required qualifications to serve on any such committee;</li> <li>• The corporate governance guidelines of the company;</li> <li>• Key policies and codes of the company;</li> <li>• Whether adequate director liability protections are in place, including with respect to indemnification, expense reimbursement and director and officer (“D&amp;O”) insurance; and</li> <li>• The compensation package offered, including cash and/or equity components.</li> </ul> <p>Inquire whether the company has a director orientation program, and if so, take advantage of such program promptly after joining the board of directors.</p>	<ul style="list-style-type: none"> <li>• Whether the company has identified any material weaknesses in its internal control over financial reporting, which for a U.S. public company can be determined by reviewing the most recent Form 10-K of the company.</li> <li>• Whether the company will assist with any needed SEC filings (such as Section 16 securities transaction forms) on behalf of the director.</li> </ul>	<p>Before you accept an appointment, ensure that:</p> <ul style="list-style-type: none"> <li>• You are willing and able to make a valuable contribution to the company, including by dedicating adequate time to diligently perform your duties;</li> <li>• If you serve on the board of directors of other companies, your service with the new company does not conflict with any board or committee service limitations applicable to directors of the new company;</li> <li>• You identify and consider any conflicts of interest (or potential conflicts of interest) with the new company; and</li> <li>• You have the necessary expertise to meet the expectations of the company and satisfy any requirements for service on any applicable committee (for example, particularly for a public company, an audit committee).</li> </ul> <p>Also consider the following risks and matters:</p> <ul style="list-style-type: none"> <li>• If the financial statements of the company are audited, whether the company has identified any material weaknesses in its internal control over financial reporting;</li> <li>• The financial condition of the company, including whether there is any concern that the company is insolvent, in default under any debt covenants, or whether the company contemplates a sale transaction in the near term; and</li> </ul>

			<ul style="list-style-type: none"> <li>• Whether there is any material litigation, arbitration, or internal or external investigation, including government investigations for possible violations of law, pending or threatened against the company, executive officers, board of directors, or particular board members.</li> </ul>
<b>2. People to meet with</b>	<ul style="list-style-type: none"> <li>• Board chair and/or lead director and other current directors, which will often occur anyway as part of the director candidate interview process;</li> <li>• Under certain circumstances it may be advisable to speak with former directors;</li> <li>• CEO and CFO, and other members of senior management;</li> <li>• Auditors;</li> <li>• General counsel and (if circumstances warrant) outside counsel; and</li> <li>• Other key personnel, such as any internal auditor, as appropriate.</li> </ul>	<p>You can review the public filings of a U.S. public company on the SEC website (and often linked within the investor relations sections of the website of the company) to discern its current board of directors, board committee members, executive officers, and certain other management personnel.</p>	<p>You should have confidence in the current directors, senior management team, and advisors. By meeting and interviewing these individuals, you should learn about the following with respect to the company:</p> <ul style="list-style-type: none"> <li>• History, present conditions, and strategic plans;</li> <li>• Primary forces underlying performance and key performance indicators;</li> <li>• Strengths, weaknesses, opportunities, and threats;</li> <li>• The industry and competitors;</li> <li>• Backgrounds of directors and senior managers;</li> <li>• Conflicts of interest, including relationships of directors and senior managers, that could cause them not to be independent and disinterested, and the identity of the chair of the board of directors and whether such role is occupied by the CEO;</li> <li>• Roles of senior managers and relationships (including reporting responsibilities) within the senior management team;</li> <li>• The identity of, and relationship with the company, of key suppliers and customers, and whether the company has a code of conduct applicable to its suppliers and whether certifications are required;</li> </ul>

			<ul style="list-style-type: none"> <li>• Historic and current relationship with employees and unions (if applicable) and any related disputes;</li> <li>• Auditor perception with respect to internal controls over financial reporting and internal accounting and audit staff;</li> <li>• Past and current material litigation and other disputes and any issues with compliance and regulators;</li> <li>• Supply chain and critical suppliers; and</li> <li>• Manufacturing and key office locations.</li> </ul>
<p><b>3. Documents to review</b></p>	<ul style="list-style-type: none"> <li>• Company organizational documents, such as the charter and bylaws;</li> <li>• Committee charters;</li> <li>• Corporate governance guidelines;</li> <li>• Policies: <ul style="list-style-type: none"> <li>○ Ethics/business conduct;</li> <li>○ Related person transactions;</li> <li>○ Insider trading;</li> <li>○ Foreign Corrupt Practices Act (FCPA);</li> <li>○ Confidentiality;</li> <li>○ Supplier code of conduct;</li> <li>○ Anti-pledging and anti-hedging;</li> <li>○ Etc.</li> </ul> </li> <li>• Stockholders' agreement, if any;</li> <li>• Financial statements (annual and quarterly) and annual report to stockholders;</li> <li>• Key credit facility and other debt documents or summaries thereof;</li> <li>• Form of indemnification agreement for directors, if any, and D&amp;O insurance policy or summary of coverage and limitations;</li> <li>• Employment agreement for CEO, CFO, and other key executives, including change of control, severance, and non-compete provisions;</li> </ul>	<ul style="list-style-type: none"> <li>• For a public/listed company, selected United States Securities and Exchange Commission (SEC) filings (<a href="http://www.sec.gov">www.sec.gov</a>) can be reviewed, such as the most recent Form 10-K, Form 10-Q, proxy statement and selected reports on Form 8-K;</li> <li>• Confirm no late filing have occurred or inquire about the reasons for any such failure to meet filing deadlines;</li> <li>• Review risk factors and other portions of Form 10-K to understand management view of key risks; and</li> <li>• Investor relations portion of company website, including information and documents contained or linked thereunder.</li> </ul>	<p>Be sure that you:</p> <ul style="list-style-type: none"> <li>• Review organizational documents to understand any restrictions on the authority of the board of directors, board of directors meeting and voting requirements, stockholder specific provisions, and capital stock structure, including key terms of any preferred stock;</li> <li>• Review financial statements for trends, abnormal losses, and recent accounting policy changes;</li> <li>• Understand critical accounting policies;</li> <li>• Review minutes/resolutions and briefing materials of the board of directors to become familiar with historic and current issues and notable actions taken by the board of directors; and</li> <li>• Review business summaries to gain an understanding of the business and business and industry specific issues.</li> </ul>

	<ul style="list-style-type: none"> <li>• Example or selected historic minutes, resolutions, and briefing materials of the board of directors and its key committees; and</li> <li>• Certain press clippings.</li> </ul>		
<b>Ongoing duties</b>			
<b>4. Points for attention</b>	<p>Think about:</p> <ul style="list-style-type: none"> <li>• Comprehensiveness, timeliness, and quality of information provided to you by management;</li> <li>• Accuracy and adequacy of information provided to stockholders and investors, including in light of disclosure obligations;</li> <li>• Consistency of information obtained from independent sources with information provided by the company;</li> <li>• Missing information regarding important areas of review;</li> <li>• Concerns regarding the CEO or other senior managers of the company; and</li> <li>• Concerns regarding auditors, compensation consultants, counsel, or other advisors, and their relationships with management and the board of directors.</li> </ul>	<p>Familiarize yourself with:</p> <ul style="list-style-type: none"> <li>• Institutional Shareholder Services (ISS) scores, guidelines, and other metrics.</li> <li>• These resources are intended to assist institutional investors in assessing the governance qualities and risks of public companies.</li> <li>• Because of their breadth of analysis and expertise in the field, ISS scores and guidelines can, and often do, impact stockholder voting on board of director elections.</li> <li>• You should review the topics, questions, and issues ISS focuses on related to boards of directors and corporate governance.</li> </ul>	<p>Be aware of:</p> <ul style="list-style-type: none"> <li>• Inactive non-executive directors: Do the non-executive directors actively participate, serving as a check and balance for decisions and actions of the CEO and management directors?</li> <li>• Dominant directors: Do any of the directors or managers have unchecked decision-making powers or exercise undue control over decision making, the business, assets, or affairs of the company?</li> <li>• Lack of independence: Does the company have independent directors; in particular, are a majority of the directors independent? Does the board of directors have entirely independent audit, compensation, and/or nominating/corporate governance committees?</li> <li>• Does the board of directors as a whole engage in robust discussions and thoughtful decisions, or is it often a “rubber stamp” decision maker?</li> <li>• Inadequate internal controls: Does the board of directors function effectively? Are there internal controls over financial reporting? Are reporting procedures comprehensive and effective? Do directors have sufficient and timely information about operations and financial status and are concerns</li> </ul>

			<p>addressed effectively and in a timely manner?</p> <ul style="list-style-type: none"> <li>• Have any directors or advisors resigned because of a disagreement?</li> </ul>
<b>5. Legal status of directors</b>	<ul style="list-style-type: none"> <li>• Directors are generally tasked (pursuant to the DGCL) with overseeing the management and direction of the company. Typically, directors do not need to be employees or stockholders or have any other relationship with the company to serve on the board of directors.</li> <li>• In general, directors act collectively by the requisite vote or consent of the board of directors (or a duly authorized committee thereof) pursuant to the DGCL and the organizational documents of the company.</li> </ul>		
<b>6. Parties to which duties are owed</b>	<p>Directors owe fiduciary duties to:</p> <ul style="list-style-type: none"> <li>• The Company and its stockholders; and</li> <li>• Potentially, other stakeholders. See Section 18 regarding creditors and insolvency, and Section 11 regarding preferred stockholders.</li> </ul>		See Sections 8-17 for a discussion of your duties.
<b>7. Powers of the board of directors</b>	<ul style="list-style-type: none"> <li>• Generally, the power of the board of directors includes the following powers/functions: <ul style="list-style-type: none"> <li>○ Oversee the conduct of company business and evaluate its management;</li> <li>○ Select, evaluate, and fix the compensation of specified officers/executives;</li> <li>○ Provide advice and counsel to management of the company;</li> <li>○ Instruct and delegate tasks to other committees or executives;</li> <li>○ Make recommendations to stockholders; and</li> </ul> </li> </ul>	NYSE and Nasdaq rules require (among other things) that certain matters be approved by the stockholders of the company.	The board of directors or committee thereof must take certain actions and certain actions must be approved by the stockholders of the company. For example, certain issuances of securities and approval of certain stock awards plans may require stockholder approval, not merely approval by the board of directors or by officers of the company.



	<ul style="list-style-type: none"> <li>○ Act where board of directors' approval is required pursuant to the DGCL or otherwise.</li> </ul>		
<p><b>8. Duty of loyalty</b></p>	<p>Director duties and responsibilities related to the duty of loyalty are:</p> <ul style="list-style-type: none"> <li>● Good faith - To act in good faith: <ul style="list-style-type: none"> <li>○ Fiduciary conduct motivated by an actual intent to do harm to the company is considered subjective bad faith;</li> <li>○ Conscious disregard of duty, actions of a director taken with the intent to violate the law, or failure of a director to act in the face of a known duty constitutes intentional dereliction of duty;</li> <li>○ Action taken solely by reason of gross negligence, including failure to become informed, without malevolent intent, does not constitute bad faith.</li> </ul> </li> <li>● No self-dealing - A transaction with the corporation in which a director has an "interest" implicates duty of loyalty concerns; however, such transaction will not be void or voidable solely for this reason if, among other things: <ul style="list-style-type: none"> <li>○ The transaction is approved by a majority of fully informed, disinterested directors, even if less than a quorum;</li> <li>○ The transaction is approved by a majority of fully informed stockholders; or</li> <li>○ The transaction is "fair" to the corporation at the time it is approved.</li> </ul> </li> <li>● No usurpation of corporate opportunities - Directors may not appropriate an</li> </ul>		

	<p>opportunity rightfully belonging to the corporation. Concerns arise when:</p> <ul style="list-style-type: none"> <li>○ There is an opportunity the corporation is financially able to undertake, and which, by its nature, falls into the line of business of the corporation and is of practical advantage to the corporation; or</li> <li>○ The corporation has an actual or expectant interest in such opportunity.</li> </ul> <ul style="list-style-type: none"> <li>● Confidentiality - To maintain the confidentiality of non-public information concerning the company because such information is the property of the company.</li> </ul>		
<p><b>9. Duty of care</b></p>	<ul style="list-style-type: none"> <li>● Directors must exercise ordinary care and prudence in supervising the officers and agents to whom they delegate corporate responsibility.</li> <li>● Care requires informed, deliberative decision-making based on all material information reasonably available.</li> <li>● The standard of review for evaluating the actions of the board of directors under the duty of care is the Business Judgment Rule.</li> </ul> <p>Keep the following things in mind concerning the Business Judgment Rule:</p> <ul style="list-style-type: none"> <li>● It is a judicial doctrine that limits the ability of courts to question business decisions of directors. It limits the focus of judicial inquiry with respect to the duty of care to the decision-making process and not the substantive decision;</li> <li>● It is a presumption that a director is acting in accordance with fiduciary duties and in the best interests of the company</li> </ul>		<p>Directors should avail themselves of all reasonably available and material information prior to making decisions. To this end, you should ensure that the company is providing appropriate materials to the board of directors in advance of board meetings, and you should prepare for meetings by reviewing this material in advance. Members of the board of directors should thoroughly deliberate on all matters upon which the board of directors will take action.</p> <p>Understanding the “Business Judgment Rule” is important. If you fulfill your basic fiduciary duties by acting:</p> <ul style="list-style-type: none"> <li>● With due care, being reasonably informed;</li> <li>● With loyalty and without material personal interest;</li> <li>● In good faith; and</li> <li>● In the honest belief that you are acting in the best interests of the company and its stockholders,</li> </ul>

	<p>— essentially a gross negligence standard; and</p> <ul style="list-style-type: none"> <li>• It does not protect directors against a duty of disclosure claim.</li> </ul>		<p>your decisions that are made for any rational business purpose should not be second-guessed by a court.</p> <p>According to the Delaware Limited Liability Company Act, the governing agreement of a Limited Liability Company (LLC) may limit the scope of the fiduciary duties of its manager or board of managers, or eliminate fiduciary duties, with the exception of the implied contractual covenant of good faith and fair dealing. Unless the LLC agreement expressly limits or eliminates fiduciary duties, such managers are subject to “default” fiduciary duties of care and loyalty to the members of the LLC.</p> <p>At times, the operating agreement of an LLC will provide that directors and/or officers have duties similar to those of a corporation formed under the DGCL.</p>
<b>10. Duty to have and maintain skills</b>	In general, the DGCL does not require directors to possess any specific skills or qualifications or impose any director education requirements.	For public companies, the proxy statement of the company should be examined to identify and consider the qualifications and any skills and attributes that directors are expected to possess.	As a practical matter, when director candidates are considered, the existing board members consider whether the director candidate possesses certain desired skills or qualifications, often with the goal of complimenting the skill and qualification set of the existing directors.
<b>11. Additional duties (confidentiality, etc.)</b>	<ul style="list-style-type: none"> <li>• Confidentiality – Part of the duty of loyalty: to maintain the confidentiality of non-public information concerning the company because such information is the property of the company.</li> </ul> <p>Special responsibilities in the context of controlling stockholder transactions:</p> <ul style="list-style-type: none"> <li>• In general, the strictest level of scrutiny, the entire fairness standard, applies to transactions between a company and a</li> </ul>		<p>Controlling stockholder transactions:</p> <ul style="list-style-type: none"> <li>• Various factors are considered to determine whether a stockholder is a controlling stockholder, including the voting power of the stockholder and its right to appoint directors and right to veto any action by the board of directors.</li> </ul> <p>Preferred stockholders:</p> <ul style="list-style-type: none"> <li>• The special rights and limitations of preferred stock are created by the</li> </ul>

	<p>controlling stockholder (or its affiliate) in which the controlling stockholder receives a non-ratable benefit from the company.</p> <ul style="list-style-type: none"> <li>• In general, the Business Judgment Rule may apply to a conflict of interest transaction if the transaction is conditioned on and approved by both (1) a sufficiently authorized board committee comprised of independent and disinterested directors, and (2) a majority of shares owned by fully informed and non-coerced stockholders who are unaffiliated with the controlling stockholder (a majority of the minority stockholders).</li> </ul> <p>Duties to preferred stockholders:</p> <ul style="list-style-type: none"> <li>• The rights of preferred stockholders are primarily contractual in nature.</li> <li>• If preferred stockholders share a right equally with the common stockholders, the directors owe the preferred stockholders the same fiduciary duties they owe the common stockholders with respect to those rights.</li> <li>• It is the duty of directors to pursue the best interests of the corporation and its common stockholders if that can be done faithfully with the contractual promises owed to preferred stockholders. In circumstances where the interests of the common stockholders diverge from those of the preferred stockholders, it is possible that a director could breach his or her duty by improperly favoring the interests of the preferred stockholders over those of the common stockholders.</li> </ul>		<p>corporate charter or a certificate of designation.</p>
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<p><b>12. Delegation of powers/authority</b></p>	<p>Directors must exercise ordinary care and prudence in supervising the officers and agents to whom they delegate corporate responsibility.</p> <p>The board of directors should establish compliance and risk management programs and must ensure reporting and information systems are established that are reasonably designed to provide directors with timely, accurate information, and then monitor or oversee such systems.</p> <p>Directors cannot ignore material “red flags” that come to their attention.</p> <p>You may rely on information and reports provided by employees of the corporation, or by any other person, as to matters you reasonably believe are within the professional or expert competence of such other person, who has been selected with reasonable care.</p>		<p>Be aware that:</p> <ul style="list-style-type: none"> <li>• Reliance on experts must be in good faith and be reasonable;</li> <li>• You should ask questions of experts and management and inquire about and diligently examine presentations of information; and</li> <li>• While management may be delegated the day to day management of the business, there is a current heightened focus on, among other things, cybersecurity, privacy, ESG and D&amp;I matters, and the key particular risks facing the company, so it is ideal for directors to periodically receive a presentation and information from certain subject matter experts within the company and exercise appropriate oversight.</li> </ul>
<p><b>13. Conflicts of interest (inc. intragroup dealings)</b></p>	<ul style="list-style-type: none"> <li>• No self-dealing - A transaction with the corporation in which a director has an “interest” implicates duty of loyalty concerns; however, such transaction will not be void or voidable solely for this reason if, among other things: <ul style="list-style-type: none"> <li>○ The transaction is approved by a majority of fully informed, disinterested directors, even if less than a quorum;</li> <li>○ The transaction is approved by a majority of fully informed stockholders; or</li> <li>○ The transaction is “fair” to the corporation at the time it is approved.</li> </ul> </li> </ul>	<p>NYSE/NASDAQ-listed companies use a status-based approach to independence, focused on whether a director has financial ties to, or some other material relationship (such as employment) with, the company that merit finding the director not independent. This assessment is made without reference to any particular matter before the board of directors.</p> <p>Whether a director is independent (or not) can have an impact on the ability of a director to serve on certain committees of the board of directors.</p>	<ul style="list-style-type: none"> <li>• Under certain circumstances, you may want to exercise your right to abstain from voting on matters before the board of directors in which you have a conflict of interest. Other directors cannot force you to abstain.</li> <li>• Notice of any personal interest should detail the nature and extent of such interest and describe how it relates to the subject contract or transaction.</li> </ul> <p>A director should refrain from self-interested transactions with the company unless the self-interest and transaction are:</p> <ul style="list-style-type: none"> <li>• Disclosed to and approved by a majority of disinterested directors;</li> </ul>

	<ul style="list-style-type: none"> <li>• No usurpation of corporate opportunities <ul style="list-style-type: none"> <li>- Directors may not appropriate an opportunity rightfully belonging to the corporation. Concerns arise when: <ul style="list-style-type: none"> <li>○ There is an opportunity the corporation is financially able to undertake, and which, by its nature, falls into the line of business of the corporation and is of practical advantage to the corporation; or</li> <li>○ The corporation has an actual or expectant interest in such opportunity.</li> </ul> </li> </ul> </li> </ul> <p>Directors should be aware of whether they are “disinterested” and “independent.” The analysis focuses on the particular matter being acted upon:</p> <ul style="list-style-type: none"> <li>• A disinterested director has no potential personal benefit or detriment, including financial, not shared equally with stockholders.</li> <li>• An independent director does not have any other material interest or relationship that could influence their decision and is not beholden to an interested director.</li> </ul> <p>You should fully disclose to the other directors any material personal interest you have in a proposed transaction or arrangement involving the company. This includes informing the company if:</p> <ul style="list-style-type: none"> <li>• You are a party to a contract or transaction;</li> <li>• You are a director or an officer, or acting in a similar capacity, of a party to a contract or transaction with the company; or</li> </ul>		<ul style="list-style-type: none"> <li>• Disclosed to and approved by the stockholders; or</li> <li>• The contract or transaction is “fair” to the company at the time it is approved.</li> </ul> <p>In general, approval of an interested director transaction by fully-informed, disinterested directors permits invocation of the Business Judgment Rule.</p>
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	<ul style="list-style-type: none"> <li>You have (or a close family member has) a direct or indirect material interest in a party to the contract or transaction.</li> </ul>		
<b>14. Compliance with statutory obligations</b>	<p>The DGCL vests certain authority with the board of directors without requiring stockholder approval. At other times, stockholder approval is required for certain corporate actions. Examples include:</p> <ul style="list-style-type: none"> <li>Subject to any limitations contained in the certificate of incorporation and the DGCL, the board of directors may declare and pay dividends without stockholder approval;</li> <li>Amendments to the certificate of incorporation must be approved by stockholders; and</li> <li>Stockholders must approve a sale, lease, or exchange of all or substantially all of the assets of a corporation.</li> </ul> <p>When the board of directors seeks stockholder action:</p> <ul style="list-style-type: none"> <li>It has an affirmative duty under Delaware law to disclose to stockholders all information material to the matter in a balanced and truthful manner. An omitted fact is “material” if there is a substantial likelihood that a reasonable stockholder would consider it important in deciding how to vote.</li> <li>The board of directors may have a duty to disclose financial projections to stockholders (in the context of a change in control transaction) where such projections are material.</li> </ul>		<ul style="list-style-type: none"> <li>There is no obligation that all available information must be disclosed to stockholders.</li> <li>Under the DGCL, any stockholder has the right to inspect and make copies of the stock ledger and other books and records of the company for any proper purpose.</li> <li>In general, communications between the board of directors and counsel may be protected from disclosure in litigation by the attorney-client privilege.</li> </ul>
<b>15. Disclosure obligations of listed companies</b>		Disclosures required with respect to public companies (that is, companies subject to SEC reporting obligations):	<ul style="list-style-type: none"> <li>There is no obligation that all available information must be disclosed to stockholders.</li> </ul>

		<ul style="list-style-type: none"> <li>Public companies are required to file annual (Form 10-K), quarterly (Form 10-Q), and periodic (Form 8-K) reports with the United States Securities and Exchange Commission. Extensive disclosure is required and audited, and other financial statement requirements are applicable. This information becomes publicly available upon filing with the SEC. Investors and financial professionals rely on the information in these filings, and the company is exposed to liability for material misstatements and omissions in the filings.</li> <li>Certain other disclosure obligations and SEC filings may be required in connection with securities offerings of the company.</li> <li>NYSE and Nasdaq rules with respect to disclosure should also be considered.</li> </ul>	<ul style="list-style-type: none"> <li>Under the DGCL, any stockholder has the right to inspect and make copies of the company's stock ledger and other books and records for any proper purpose.</li> <li>A stockholder's agreement may require periodic financial and other disclosures to stockholders with respect to private companies. Absent such an agreement, the board of directors has broad discretion as to the information to be given to stockholders.</li> <li>While beyond the scope of this document, you should be aware that, in general, communications between the board of directors and counsel may be protected from disclosure in litigation by the attorney-client privilege.</li> </ul>
<p><b>16. Potential liability</b></p>	<p>The company charter may limit the scope of your personal liability as a director. However, liability cannot be eliminated or limited (or certain exposures exist) for:</p> <ul style="list-style-type: none"> <li>A breach of the duty of loyalty;</li> <li>Acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law;</li> <li>In certain respects, unlawful payment of a dividend or unlawful stock purchase or redemption; or</li> <li>Any transaction from which a director derived an improper personal benefit.</li> </ul> <p>A director may choose to vote in opposition to a proposed action of the board of directors or may abstain from voting. The choice to vote in opposition to a proposed action, or to abstain from voting, should be recorded in the minutes of the board of directors. In general, an interested director who played no</p>		<ul style="list-style-type: none"> <li>The DGCL authorizes the inclusion in the certificate of incorporation of a provision eliminating or limiting, with certain exceptions, the personal liability of a director to the company or its stockholders for monetary damages for violations of the duty of care. Prior to accepting service on a board of directors, inclusion of this exculpatory provision in the charter of the company should be confirmed.</li> <li>Keep in mind that directors are exposed to personal liability for making dividends or redemptions of company stock unlawfully. In general, dividends or redemptions should only be made from surplus, which is a function of the fair value of the assets over the liabilities of the company.</li> </ul>



	<p>role in the decision making process of the board of directors (including by abstaining) should not be liable with respect to a claim that the challenged board of directors action was wrongful.</p> <p>Environmental Law:</p> <ul style="list-style-type: none"> <li>• The judicially developed Responsible Corporate Officer Doctrine allows the possible imposition of criminal environmental liabilities in the absence of corporate veil piercing or any wrongdoing and based solely on one’s position or leadership role within a company.</li> <li>• It is important to note that actively participating in the environmental violation can result in direct criminal and/or civil liability.</li> <li>• Under the responsible corporate officer doctrine, environmental liability may result where the director or officer: (1) held a position of responsibility; (2) had knowledge of the environmental violation; (3) had the ability and authority to prevent the environmental violation; and (4) failed to prevent such violation.</li> </ul> <p>Tax Law:</p> <ul style="list-style-type: none"> <li>• Generally, directors are not liable for the tax obligations of their company.</li> <li>• Exceptions apply under the U.S. Internal Revenue Code for directors with responsibility or participation concerning failures to withhold (e.g., employment taxes, withholding on dividends, and certain proceeds), or for participation in misconduct related to the tax obligations of the company.</li> </ul>		<ul style="list-style-type: none"> <li>• Directors are also potentially exposed to liability in connection with securities offerings by the company.</li> </ul> <p>Environmental Law:</p> <ul style="list-style-type: none"> <li>• Typically, there is a nexus between individual actions and environmental liabilities. However, there is a growing willingness by regulators and prosecutors to impose liability in the absence of any actual or alleged wrongdoing, especially in situations where there was an ability to prevent and/or correct the alleged violation.</li> <li>• Effective environmental, health and safety compliance systems supported by adequate technical resources and funding mitigate against the imposition of such environmental liability on officers and directors. <ul style="list-style-type: none"> <li>○ For example, implementation of an effective EHS auditing program and/or ISO 14001 or OHSAS 18001 certifications may help to minimize the likelihood of liability under this doctrine.</li> </ul> </li> </ul> <p>Tax Law:</p> <ul style="list-style-type: none"> <li>• Directors should avoid direct responsibility, oversight for, or involvement in the company tax determinations or filings.</li> </ul>
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	<ul style="list-style-type: none"> <li>Particular attention should be paid to two areas in which director liability may arise are: (1) aiding and abetting understatements of the company's tax liability; and (2) failing to properly withhold and remit company payroll or other withholding taxes to the Internal Revenue Service.</li> </ul>		
<b>17. Duration of duties</b>	<p>Generally, when a person ceases to be a director of a company, he or she ceases to owe any duties to the company. This does not mean a director is absolved of all pre-termination or resignation acts and omissions. To the contrary, in certain circumstances, directors may still be liable for pre-termination or resignation acts or omissions.</p>		<p>Review organizational documents to understand the scope and duration of any fiduciary duties, including any limits on confidentiality of information, non-competition, etc.</p>
<b>Special circumstances</b>			
<b>18. Bankruptcy</b>	<p>Insolvency: Creditors are afforded protection through contractual agreements, fraudulent conveyance law, implied covenants of good faith and fair dealing, bankruptcy law, general commercial law, and other sources of creditor rights. Be aware that:</p> <ul style="list-style-type: none"> <li>Creditors are not owed fiduciary duties unless the corporation is actually insolvent. That is, no "zone of insolvency" concept applies;</li> <li>For any period of actual insolvency, creditors may be entitled to bring a derivative claim (not a direct breach of duty claim) for breach of fiduciary duty on behalf of the company; and</li> <li>Creditors do not lose standing in a derivative suit even if the company regains solvency during the course of litigation.</li> </ul>		<p>Directors of an insolvent company:</p> <ul style="list-style-type: none"> <li>Still must fulfill their obligation to act in the best interests of the company; and</li> <li>Should act with a view toward maximizing the value of the insolvent company.</li> </ul>

	<p>There is no objective definition of insolvency, but relevant factors include:</p> <ul style="list-style-type: none"> <li>• Inability of the company to pay debts in a timely fashion; and</li> <li>• Liabilities of the company exceeding the fair market value of its assets.</li> </ul>		
<b>19. Takeover bids</b>	<p>Special fiduciary duties (<i>Revlon</i> duties) are generally triggered in a sale or attempted sale of control of the company for cash or stock plus a material amount of cash. In this context, directors are obligated to seek the transaction offering the best value available to the stockholders.</p> <ul style="list-style-type: none"> <li>• In general, an auction is the preferred way to determine the best value available. <ul style="list-style-type: none"> <li>○ While not required, if an auction is not undertaken, directors should be able to articulate the rationale for that decision and justify why the decision was made in the best interests of the stockholders.</li> </ul> </li> <li>• In comparing transactions, directors may consider all relevant factors, including: <ul style="list-style-type: none"> <li>○ The value of non-cash consideration;</li> <li>○ Financing contingencies;</li> <li>○ Regulatory approval risks; and</li> <li>○ Other risks of non-consummation.</li> </ul> </li> <li>• Where the sale transaction is approved by a fully-informed, uncoerced majority of disinterested stockholders, directors owe only basic fiduciary duties under the Business Judgment Rule, as opposed to the heightened <i>Revlon</i> duties.</li> </ul>		<ul style="list-style-type: none"> <li>• <i>Revlon</i> was a landmark decision of the Delaware Supreme Court, in which the Court declared that, in certain limited circumstances indicating that a "sale" or "break-up" of the company is inevitable, the fiduciary obligations of the directors of a target company are narrowed significantly. In these situations, the singular responsibility of the board of directors is to maximize immediate stockholder value by securing the highest price available.</li> <li>• "Go-Shop" provisions enable the directors of a target company to proactively canvas the market to solicit competing bids for a limited period of time after signing a definitive agreement. <ul style="list-style-type: none"> <li>○ A target board of directors considering a Go-Shop should be able to articulate a reasonable basis for its use and explain why it was sufficiently flexible to permit a search for potential alternative buyers.</li> <li>○ If the board of directors did not engage in any "shopping" before signing, it should be able to explain why a pre-signing auction or market check was not practical or desirable.</li> </ul> </li> </ul>
<b>20. Market abuse/insider dealing</b>		<ul style="list-style-type: none"> <li>• Public companies usually have insider trading policies which may restrict transactions in company securities during certain times, as well as polices that</li> </ul>	

		<p>prohibit or limit the pledging of securities, hedging in respect of company securities, and otherwise.</p> <ul style="list-style-type: none"> <li>• Directors and executive officers are subject to Section 16 of the Exchange Act and have an obligation to file certain forms with the SEC (such as Form 3, 4 or 5) upon certain transactions in securities of the company.</li> </ul>	
<b>Defenses</b>			
<p><b>21. Good corporate governance</b></p>	<p>The following components of a good corporate governance process can help minimize the risk of liability for directors:</p> <ul style="list-style-type: none"> <li>• Oversight and reporting systems should be well structured and complied with at all times;</li> <li>• Formation of committees (such as audit, nominating/corporate governance, and compensation) can aid the board of directors in the discharge of its duties; consider whether each such committee must be (pursuant to any applicable stock exchange rule) or should be comprised entirely of independent directors;</li> <li>• Committee charters, governance guidelines, and codes of ethics should meet any applicable stock exchange requirements and otherwise reflect best practices; and</li> <li>• Consider regular executive sessions (that is, excluding management directors) of the board of directors.</li> </ul> <p>What constitutes an appropriate corporate governance process for a public company may be different, and possibly less comprehensive, than for a private company.</p>	<p>With regard to the structure and composition of the board of directors of public companies:</p> <ul style="list-style-type: none"> <li>• Boards of directors of NYSE/NASDAQ-listed companies must consist of a majority of independent directors, subject to limited exceptions, including a controlled company exception for listed companies where more than half of the voting power of the company is held by a major stockholder.</li> <li>• Boards of directors of NYSE/NASDAQ-listed companies must have certain committees, including audit, nominating/corporate governance, and compensation committees.</li> </ul>	<p>Structure and composition of the board of directors should reflect:</p> <ul style="list-style-type: none"> <li>• A board size that matches the size and complexity of the company;</li> <li>• An appropriate mix of skill sets;</li> <li>• Proper separation of roles; <ul style="list-style-type: none"> <li>○ Consider separating the roles of CEO and chairperson of the board or appointing a (rotating) lead director.</li> </ul> </li> <li>• A proper balance of management directors and independent directors; and</li> <li>• The existence of necessary committees.</li> </ul> <p>Functions and roles should ensure that:</p> <ul style="list-style-type: none"> <li>• Core tasks of the board of directors are being completed in a timely manner and with due care;</li> <li>• The level of oversight by the board of directors and involvement in company affairs is appropriate; and</li> <li>• There is a well-defined and appropriate relationship between the board of directors and the management team.</li> </ul> <p>Oversight and reporting systems should:</p> <ul style="list-style-type: none"> <li>• Determine the frequency and content of reports to the board of directors;</li> <li>• Set expectations for meeting practices and decision-making procedures;</li> </ul>

			<ul style="list-style-type: none"> <li>• Define key performance indicators and mechanisms by which directors may gain regular and immediate access to information;</li> <li>• Determine reporting lines; and</li> <li>• Determine processes to evaluate the performance of directors.</li> </ul>
<b>22. Minutes of board meetings and publication requirements</b>	<ul style="list-style-type: none"> <li>• Minutes of board of directors meetings and committee meetings should be prepared and carefully reviewed by directors. Often such are signed by the chair of the board of directors and/or applicable committee.</li> <li>• Maintaining good minutes of board of directors and committee meetings and following all notice and publication requirements can minimize director risk of liability by showing that directors are faithfully and adequately executing their duties. This is also part of the company observing good and proper formalities and will help the separate legal existence of the company be respected.</li> </ul>		<ul style="list-style-type: none"> <li>• Some organizational documents or policies may require certain entries be made in the board minutes. For example, a conflict of interest policy may require the minutes reflect discussions on conflicts with particular specificity.</li> <li>• Certain provisions of the DGCL (and other sources of law and regulation) require that particular actions be taken by the board of directors or a committee of the board. It is a good practice to document in the minutes that these actions have been so approved by the requisite vote.</li> </ul>
<b>23. Discharge and Indemnification</b>	<p>Know whether the company (pursuant to its charter, bylaws, or indemnification agreement for directors) provides:</p> <ul style="list-style-type: none"> <li>• Mandatory or permissive indemnification; and</li> <li>• A separate mandatory or permissive right to expense reimbursement or advancement of defense costs.</li> </ul> <p>Know the limitations on the obligation of the company to indemnify you:</p> <ul style="list-style-type: none"> <li>• Indemnification may be limited by the extent of your liability to the company;</li> <li>• You may only be entitled to mandatory indemnification if you meet the</li> </ul>		<ul style="list-style-type: none"> <li>• In general, in order to be entitled to indemnification for third party claims, you must have acted in good faith and in a manner you reasonably believed to be in (or not opposed to) the best interests of the company.</li> <li>• The company will be unable to indemnify you (subject to a very limited exception) if you are found to be liable to the company, unless a court specifically orders otherwise. <ul style="list-style-type: none"> <li>○ For an action brought against you by, or in the right of, the company (a derivative claim), the company cannot indemnify you for amounts paid in judgment or settlement.</li> </ul> </li> </ul>

	<p>“successful on the merits” requirements under the DGCL;</p> <ul style="list-style-type: none"> <li>• You will only be entitled to mandatory or permissive indemnification if you meet the “good faith” standard under the DGCL;</li> <li>• Reimbursement/advancement of defense costs, if mandatory, will initially not be subject to a good faith conduct standard but will have to be paid back to the Company if it is later determined the conduct requirement was not met; and</li> <li>• Advancement of defense costs, as incurred, is not mandatory by statute; it is mandatory by contract, charter, or by-law provision, or through reimbursement later in the context of indemnification.</li> </ul>		<ul style="list-style-type: none"> <li>○ However, subject to the preceding, the company can indemnify you for fees and expenses incurred in connection with the defense or settlement of such claim if you have acted in good faith and in a manner you reasonably believed to be in (or not opposed to) the best interests of the company.</li> <li>• Where the company reimburses or advances defense costs and expenses to you, such will likely be conditioned upon your agreement to repay such amounts if it is ultimately determined that you are not entitled to be indemnified by the company.</li> </ul>
<p><b>24. Insurance</b></p>	<p>Be sure that directors are provided coverage through a D&amp;O liability insurance policy:</p> <ul style="list-style-type: none"> <li>• For all of the roles that you will perform for the company and its subsidiaries;</li> <li>• Be aware of any retention amount for directors (that is, whether a deductible is applicable);</li> <li>• Know the policy coverage amount; and</li> <li>• Be aware of exclusions, such as for securities law violations.</li> </ul>		<p>Typically, a D&amp;O liability insurance policy contains what is often referred to as Side A and Side B coverage:</p> <ul style="list-style-type: none"> <li>• Side A coverage relates to the payment of defense expenses and payments of settlements or judgments on behalf of directors where such amounts are not indemnified by the company; while</li> <li>• Side B coverage provides for reimbursement to the company for costs associated with payment of claims against (including expenses incurred by) individual directors where the company is either required or permitted to indemnify them.</li> </ul> <p>D&amp;O policies typically operate on a “claims-made” basis:</p> <ul style="list-style-type: none"> <li>• It is essential that coverage remain in place following your resignation;</li> <li>• This type of policy provides protection only if the policy is in force when a claim</li> </ul>

			<p>is made, rather than when the act giving rise to the claim occurs.</p> <p>Contractual considerations:</p> <ul style="list-style-type: none"> <li>• Consider requesting a contract right such that the company must maintain D&amp;O liability insurance during your tenure and throughout the statute of limitations period after service has ceased (often 5 or 6 years), and/or must purchase a “tail” policy upon certain events, such as a change of control.</li> <li>• Note that virtually all public companies will have adequate or robust coverage.</li> </ul>
<b>25. Resignation</b>	<p>You may resign at any time upon notice given in writing or by electronic transmission (such as email) to the company. Review and follow any procedures for director resignation included in the company bylaws. The bylaws should require that notice be given to all members of the board of directors or to an agent of the company, such as the chairperson of the board of directors, the president, or the secretary. Your resignation is effective when the resignation is delivered, unless the resignation specifies a later effective date or an effective date determined upon the happening of a future event. A resignation that is conditioned upon your failing to receive a specified vote for reelection as a director may provide that it is irrevocable.</p>		<ul style="list-style-type: none"> <li>• Neither the company nor the board of directors must formally accept your resignation, and such resignation cannot be rejected.</li> <li>• A director cannot be removed by the board of directors or other directors. <ul style="list-style-type: none"> <li>○ However, a director or the entire board of directors can be removed with or without cause by the stockholders, with certain exceptions, including where there is a “staggered” board of directors.</li> </ul> </li> </ul>
<b>26. Restructuring of assets</b>	<p>You should seek professional advice regarding whether and how to structure your assets, as there may be tax consequences and anti-avoidance measures that apply to certain arrangements.</p>		

<p><b>27. ESG and D&amp;I policies, metrics, reports</b></p>	<p>Companies are monitoring and reporting on ESG and D&amp;I now more than ever. Some companies publish annual ESG and D&amp;I reports that highlight the work they are doing in these spaces.</p>	<p>Public companies may be required to make certain disclosures in their SEC filings on ESG related-risks.</p>	<ul style="list-style-type: none"> <li>• If you are in a state that has enacted legislation related to D&amp;I requirements for board of directors' composition, review those applicable laws.</li> <li>• Review any ESG and D&amp;I reports, metrics, etc.</li> </ul>
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