NATIONAL DIRECTORS INSTITUTE | NDI Executive Exchange

TOP TAKEAWAYS

Investment Fund Boardroom Fiduciary Duties

1. **Shut It Down.** Cybersecurity is an SEC hot topic and affects investment advisers and funds alike, with the SEC using its powers over customer information under Regulation S-P and the duty to maintain internal controls to impress upon registrants the need for cybersecurity preparedness . Institute governance and risk assessment, access rights and controls, data loss prevention, vendor management and training. Best practices include the ability to lock and wipe employee remote devices if lost or stolen.

2. **Shareholder Weakness.** Proper cybersecurity procedures and protocols not only deal with the ability to defend against third-party threats, but should also include appropriate policies and procedures as related to shareholders with an eye to identifying "red flags", such as invalid redemption requests by identity thieves posing as shareholders.

3. **Know What You Don't Know.** When tasked as a director to oversee or participate in valuation of assets, especially level II and level III securities, be cognizant of what you do not know. Use independent financial counselors (not the adviser) when necessary to vet numbers presented to the Board. Be wary of implementing valuation guidance from those that stand to gain financially. Focus on position size and potential NAV impact if the position goes to "zero". These positions need to be looked at extra closely.

4. **Be Consistent.** When faced with a difficult valuation, stick to the fund's valuation procedures. Changing methodologies is a recipe for second-guessing and can lead to concerns regarding fair valuation. At the same time, your valuation should be tested against actual transactions.

5. **Hindsight is 20/20.** If possible, when faced with difficult valuation decisions, after the asset(s) have been sold, evaluate the transaction to determine the value placed on those assets by a third-party as compared to the valuation placed on those assets by the Board.

6. **Guard Against Complacency.** In performing your 15(c) duties as a fund director, do not simply accept the numbers and performance of the current adviser. The 15(c) process is there to allow and prompt the Board to ask the tough questions for the purpose of making clear what the Board thinks pertinent to its decision making and what the Board considered but decided not to include (e.g., separate institutional account fees charged by the same adviser)

7. **Know Your Reach.** As part of the 15(c) process and evaluation of the adviser, the Board cannot directly dictate actions of the adviser, such as suggesting who the adviser uses or stops employing a particular portfolio manager. But, the Board is certainly within its right to question the performance of the adviser as a firm and relate concerns regarding portfolio management to the adviser.

FOLEY

FOLEY & LARDNER LLP

8. **Be Conscious, Be Aware.** Firm testimonials on social media are troublesome because they inherently lend themselves to self-selection. Social media seems to invite non-compliance, and to be a trap for the unwary. However, firms simply must participate in social media in today's economy, and to do so, must have policies and procedures, training, monitoring, and recordkeeping.

For more information

For more information on Investment Fund Boardroom Fiduciary Duties, please feel free to contact the moderators directly:

Peter D. Fetzer
Foley & Lardner LLP
pfetzer@foley.com

Stuart E. Fross
Foley & Lardner LLP
sfross@foley.com