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DIRECTORS  
INSTITUTE**

# Executive Exchange

Private Company Corporate Governance Best Practices

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# Private Company Corporate Governance Best Practices

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## Panelists

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AT&T Inc.
- **Mat Klein**  
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## Overview

- Board Responsibilities
- Pitfalls for Private Equity Portfolio Boards
- Protective Measures
- Sarbanes-Oxley

## Board Responsibilities

## Board Responsibilities

- Board of Directors is Responsible for Overseeing the Business and Affairs of Its Company
  - Approving Leases, Contracts or Other Material Agreements
  - Approving Fundamental Operating Financial and Corporate Plans, Strategies and Objectives
  - Authorizing Sale of Company Assets and Other Strategic Transactions

## Board Responsibilities

- Overseeing the Business and Affairs of Its Company *(continued)*
  - Evaluating Performance of the Company and Its Management
  - Selecting, Evaluating and Fixing Compensation of Corporate Officers
  - Reviewing and Approving Management Plans
  - Adopting Policies of Corporate Conduct

## Board Responsibilities

- Evaluating the Overall Effectiveness of the Board Itself
  - How Well the Board Carries Out Its Functions
  - How Well Prepared the Directors Are to Fulfill Their Obligations

## Board Responsibilities

- The Directors Owe Certain Fiduciary Duties to Their Company
  - Duty of Care
  - Duty of Loyalty

## Board Responsibilities

- **Duty of Care:**
  - Requires Directors to Keep Themselves Informed About the Affairs of the Company and be Assured that They Have All Reasonably Available Information When Making Decisions
  - Directors are Expected to Act on an Informed Basis, in Good Faith, with the Care of an Ordinary Prudent Person in a Like Position Would Exercise and in a Manner the Directors Believe to be in the Best Interests of the Company

## Board Responsibilities

- **Duty of Loyalty**
  - Requires Directors to Uphold Their Fiduciary Duties to the Company and Its Stockholders by Placing the Company's Interests Ahead of Their Own
  - Directors Should Not Use Their Corporate Position to Make a Personal Profit or Gain or for Other Personal Advantage
  - Two Specific Considerations:
    - Conflict of Interests
    - Corporate Opportunity

## Board Responsibilities

- Business Judgment Rule
  - Qualifies the Duty of Care
  - Protects Disinterested Directors from Personal Liability to the Company and Its Shareholders, even if a Corporate Decision the Director Approved Turns Out to be Unwise or Unsuccessful

## Board Responsibilities

- Business Judgment Rule (*continued*)
  - A Court Generally Will Not Substitute Its Judgment for that of a Director, if the Director:
    - Acted in Good Faith
    - Was Reasonably Well Informed; and
    - Rationally Believed the Action Taken Was in the Best Interests of the Company

## Protective Measures

## Protective Measures

- Document Decision Making and Corporate Approval Process Carefully
  - Board Minutes
    - Must be More than Mark-up of Last Year's Minutes
    - Balance Between No Record of Deliberations and Keeping Transcripts
    - Reflect Substance and Process of Meeting



## Protective Measures

- Use Independent Directors
  - Conflicts of Interests
  - Executive Compensation
- Use Outside Experts
  - Mergers/Acquisitions
  - Executive Compensation
  - Other Substantial Transactions

## Protective Measures

- Know Where Your Duties Lie
  - When Acting as Partner/Manager of Private Equity Firm
  - When Acting as Director of Portfolio Company
  - When Serving on Multiple Boards Simultaneously
  - When Portfolio Company is in “Zone of Insolvency”

## Protective Measures

- Avoid “Deputization” Issues
  - Look Out for Interests of All Shareholders, Rather than Serving on the Board as a Representative or “Deputy” of the Private Equity Firm
  - Carefully Consider the Kinds of Communication You Have with Colleagues at the Private Equity Firm – Avoid the Appearance of Deputization

## Protective Measures

- Time and Effort
  - Ensure You Have Adequate Time to Fulfill Your Obligations
    - Attending Meetings
    - Communication Between Meetings
    - Reviewing Materials
    - Carefully Considering Decisions
  - Put Forth the Time and Effort Required
    - Experts Estimate between 150-200 hours annually

## Protective Measures

- Process
  - The Legal System Will Judge You Based on the Soundness of the Process You Undertook
    - Whether Independent Directors Approved Related-Party Transactions
    - How Many Meetings the Board Held to Discuss an Issue
    - How Much Time the Board Spent Discussing Certain Issues

## Protective Measures

- Process *(continued)*
  - What Materials Were Reviewed
  - Whether the Board Received Required Materials Sufficiently in Advance of Board Meetings
  - How Many Questions the Directors Asked

## Protective Measures

- Specific Concerns
  - Piercing the Corporate Veil
    - Maintain Corporate Records Appropriately
    - Follow Corporate Formalities
    - Ensure Directors and Officers Act on Behalf of the Company They are Serving
  - Management's Failure to Raise Issues
    - Create a Whistle-Blower System for Employees

## Protective Measures

- Specific Concerns *(continued)*
  - Insider Trading
    - Create and Follow Certain Procedures to Ensure that Partners and Employees of Private Equity Firm Do Not Intentionally or Accidentally Decide to Buy or Sell Shares of Public Portfolio Company's Stock While Possessing Material, Non-Public Information
    - Adhere to Such Procedures in Every Instance

## Sarbanes-Oxley

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- Why Adhere to Sarbanes-Oxley (“SOX”)?
  - Importance to Exit Strategy
    - Going Public
    - Sale to Public Company
  - Risk Management
  - Limited Provisions Currently Affect Private Companies
    - Whistleblower Protections
    - Enhanced Liabilities for Unlawful Document Destruction, Securities Fraud and White-Collar Crime

## Questions?

Donny Askin, TechTurn Consulting  
Paul Broude, Foley & Lardner LLP  
Patricia Diaz Dennis, AT&T, Inc.  
Matt Klein, Klein Tools  
Tom L'Helias, Health Care Services Corporation  
Ed Mason, Foley & Lardner LLP  
Lawrence Siff, Neptune Advisors, LLC