

TOP TAKEAWAYS

Hot Topics in Private Equity Portfolio Company Corporate Governance

1. **Cybersecurity** – The board should have a clear understanding of who is responsible for cybersecurity oversight.
2. **Director Independence** – A director can find it challenging to have independence when he/she is sourced from the PE fund.
3. **Management Fees and Valuation** – In the exit stage, conflicts in valuation can be a concern with respect to management fees or if there are opportunities to misuse valuation to distort past performance.
4. **Corporate Formalities and Best Practices** – Courts tend to focus on the observance of corporate formalities when determining director liability. Courts are less likely to find a director liable for bad decisions if the director devoted adequate time and effort to making informed decisions.
5. **Director and Officer Liability Insurance** – Directors of portfolio companies are seeking increased protection from the threat of personal liability because of the perceived increase in risk associated with being on the board of directors of any company.
6. **Determining Executive Compensation** – When determining the compensation of senior executives, directors must be well informed and be able to make independent decisions.
7. **Sarbanes-Oxley Compliance** – While it is not applicable to private companies, Sarbanes-Oxley compliance could be a helpful tool to manage risk or in the anticipation of an IPO or sale to third parties.
8. **Fundamental Transactions** – Fundamental transactions, such as mergers or acquisitions, are scenarios in which the interests of management and the interests of the PE do not necessarily align. Directors must ensure they act in the best interest of the company and its shareholders.
9. **Terms of Additional Financings** – Additional rounds of financings may be necessary for the portfolio company, but the terms of such rounds may be detrimental to the interests of the PE Fund.
10. **Representation and Warranty Insurance Policies** – An increasingly popular tool among boards in M&A transactions, representation and warranty insurance policies serve as an alternative to indemnification escrows.

For more information

For more information on Hot Topics in Private Equity Portfolio Company Corporate Governance, please feel free to contact the moderator directly:

Gabor Garai
Foley & Lardner LLP
ggarai@foley.com