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Crossing the Board-er Line: Issues to Consider When an Executive is Invited to Join an Outside Public Company Board

In recent years, many public company executives have been invited to serve on the board of an unrelated public company in their personal capacity. While the number of CEOs serving on outside boards has fallen over the last decade, a wider range of other executives including CFOs, GCs, CMOs, CTOs, operating division heads and others have been offered outside directorships including as part of the movement to expand the pool of candidates with diverse backgrounds and experience. These opportunities can present a potential “win-win-win,” with the executive gaining valuable external exposure and experience thereby benefiting both her employer and herself, and the other company benefitting from the insights and operational input from a sitting executive. Below we outline certain considerations for the executive and her employer in evaluating, implementing and monitoring an outside board role:

- *Overboarding.* The combination of policies from proxy advisors (ISS and Glass Lewis) and key institutional shareholders (including BlackRock, Vanguard and State Street) means that from a practical standpoint sitting executives are generally limited to one outside board.
- *Company Policies.* The executive and her employer should ensure that the outside board service complies with the substantive and process requirements of the employer’s policies, often found in the corporate governance guidelines, codes of conduct, or in the related party transaction, ethics or conflict of interest policies. This may include restrictions on serving as a director where a conflict may arise (e.g., a supplier or customer or potential acquisition candidate), the employer’s overboarding policies (which often do not address executives other than the CEO) or required approvals for any external board service (which sometimes only allow employees with a qualifying level of seniority to be considered).
- *Time Commitments.* The executive and her employer should have a clear understanding of the responsibilities and timing commitment associated with the outside board service and a plan for managing any time conflicts that may arise between the executive’s two roles. This is especially true for individuals expected to serve on time-consuming committees at the outside company (e.g., a CFO sitting on the other company’s audit committee).
- *Confidential Information.* The executive owes a duty of confidentiality to both her employer and the outside company. She must be careful not to disclose or use confidential information received in one role in fulfilling her duties to the other.
- *Actual or Potential Conflicts of Interest.* The employer will want to ensure that it has the benefit of the executive’s primary focus and responsibilities. Therefore, the executive should be extremely sensitive to identify and mitigate any conflicts that may arise in her board service. While conflicts involving business between the outside company and her employer are an obvious example, she should also be alert to possible conflicts involving potential M&A targets or key competitors, suppliers or customers of her employer. While many of these conflicts can be handled with disclosure or recusal where appropriate, certain circumstances might even require resignation from the board.
- *Business Opportunities/Competition.* The executive needs to be mindful of her duties to her employer and the outside company when a business opportunity presents itself and should take care to determine who the opportunity belongs to because it can’t be transferred to the other company without consent. Similarly, even if the two companies don’t currently compete, the executive should be alert to changes in strategy or acquisitions that may bring the two into competition, even if tangential. This raises the risk of conflicts (e.g., both companies pursuing the same business or M&A opportunity) and may implicate antitrust laws, including the Clayton Act, which prohibits service as an officer or director of two competing companies.

- *Delineation of Roles.* The executive should be careful that her two roles aren't blurred and that it is clear in which capacity she is acting at any given time. For example, the executive should not solicit customers of her employer with whom she has contact on behalf of the company on whose board she sits as an outside director.
- *Use of Company Resources.* The executive should not use her employer's resources, including email address and technology devices, for her outside board service. This will better protect confidentiality and privilege for both organizations.

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Opportunities for a sitting executive to serve as a director of another public company are expected to grow as a premium is placed on identifying a new pool of candidates for board service and finding board members with current operating experience especially in new areas of focus like cyber-security, ESG and technology. While there are potential pitfalls to outside board service, the risks can be mitigated given the potential benefits. Companies may want to consider using or updating written policies, conducting periodic compliance reviews and establishing lines of communication between legal personnel at the two companies to help with this risk management.

If you have any questions about the matters addressed in this *Kirkland M&A Update*, please contact the following Kirkland attorneys or your regular Kirkland contact.

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