

Atticus - In-House AI Counsel

Our organization is restructuring its board to inc...

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Practice Area: Corporate Law

Our organization is restructuring its board to include more diverse members, but one candidate has undisclosed ties to a competitor. Walk us through your due diligence process, potential conflicts of interest under corporate law, and how you'd structure a resolution that aligns with long-term business goals.

Assistant

2:57:09 PM

Azure OpenAI - GPT-4o

Practice Area: Corporate Law

Restructuring a board is a significant step toward improving governance, and prioritizing diversity is commendable. However, the undisclosed ties to a competitor raise potential conflicts of interest and fiduciary duty concerns. Below, I outline a robust due diligence process, assess the potential legal issues under corporate law, and propose steps for resolution that align with your long-term business goals.

1. Due Diligence Process for Board Candidates

The due diligence process must ensure that all candidates meet the organization's expectations for integrity, independence, and alignment with fiduciary responsibilities. For the candidate in question:

Step 1: Background and Conflict Check

- Investigate the undisclosed ties to the competitor:
 - Direct relationships: Check whether the candidate serves as a director, officer, employee, or significant consultant for the competitor.
 - Indirect relationships: Assess whether the candidate has ownership interests, familial relationships, or other financial ties to the competitor.
- Financial disclosures: Review the candidate's financial interests, including stock ownership, equity positions, or compensation arrangements that may link them to the competitor.
- Third-party due diligence: Engage an external firm to conduct background checks for further verification of undisclosed affiliations or conflicts.

Step 2: Candidate's Disclosure Obligations

- Require the candidate to complete a Director and Officer Questionnaire (D&O Questionnaire), which includes:

- Disclosure of all material financial interests.
- Identification of relationships with competitors, significant suppliers, or customers.
- Confirmation of compliance with the organization's conflict-of-interest policy.
- Evaluate whether the candidate's failure to disclose the ties was inadvertent or intentional, as this speaks to their integrity and suitability for board membership.

Step 3: Competitor Analysis

- Assess the nature of the competitor's business and determine whether it directly overlaps with your organization's strategic objectives.
- Identify potential risks, such as the sharing of proprietary information or competitive intelligence, if the candidate is seated on the board.

Step 4: Legal Review

- Review the organization's bylaws, corporate governance guidelines, and any board conflict-of-interest policies to determine whether the candidate's ties violate existing rules.
- Evaluate whether the candidate qualifies as "independent" under applicable corporate governance standards (e.g., NYSE or NASDAQ listing rules, if applicable).

2. Potential Conflicts of Interest Under Corporate Law

The candidate's ties to a competitor could create significant conflicts of interest, particularly under the following principles:

Fiduciary Duties of a Director

- Duty of Loyalty:
 - Directors must act in the best interest of the corporation and avoid situations where their personal interests (or those of a competitor) conflict with the corporation's interests.
 - Example: The candidate could be exposed to sensitive, competitively advantageous information as a board member and use this information to benefit the competitor.
- Duty of Confidentiality:
 - Directors owe a duty to maintain the confidentiality of the corporation's proprietary information, including trade secrets, strategies, and financial information.
 - A director with ties to a competitor might inadvertently or intentionally disclose confidential information.
- Corporate Opportunity Doctrine:
 - A director must not divert a business opportunity that belongs to the corporation to a competing entity.

Disclosure Obligations

- Under the Delaware General Corporation Law (DGCL), directors must disclose all material facts relating to potential conflicts of interest. Failure to disclose such ties could result in legal liability, including removal from the board.

Liabilities

- Breach of fiduciary duty: If the candidate uses their position to benefit a competitor or fails to act in the best interests of your organization, they could be held liable for breaches of fiduciary duties.
- Derivative lawsuits: Shareholders may bring a derivative suit if they believe the board has failed to address the conflict adequately, potentially exposing the entire board to liability.

3. Structuring a Resolution

Given the potential risks, the organization should take clear, proactive steps to address the situation. Here is a structured approach to resolution:

Step 1: Assess the Candidate's Role and Necessity

- Determine whether the candidate's expertise, background, or diversity perspective is critical to the board's long-term goals.
- Assess whether the candidate's potential contributions outweigh the risks of the conflict or whether another candidate could bring similar value without the risks.

Step 2: Evaluate the Conflict of Interest

- Engage independent legal counsel to assess whether the candidate's ties to the competitor create an actual, potential, or perceived conflict of interest.
 - Actual conflict: The candidate's interests are directly adverse to your organization.
 - Potential conflict: The candidate's interests may conflict in the future.
 - Perceived conflict: The candidate's perceived ties to a competitor could undermine trust and confidence in the board.

Step 3: Develop Mitigation Measures

- If the organization decides to proceed with the candidate despite the ties, implement safeguards to mitigate conflicts:
 - Recusal: Require the candidate to recuse themselves from board discussions or decisions involving competitive strategy, pricing, or market-sensitive opportunities.
 - Non-disclosure agreements (NDAs): Require the candidate to sign a robust NDA that explicitly prohibits sharing proprietary or competitive information with the competitor.
 - Restricted access: Limit the candidate's access to highly sensitive or proprietary information, such as trade secrets or forward-looking strategies.
 - Periodic reviews: Conduct periodic reviews of the candidate's performance and adherence to conflict-mitigation measures.

Step 4: Amend Governance Policies

- Strengthen your conflict-of-interest policy to address situations like this in the future:
 - Require board candidates to disclose all material relationships with competitors, suppliers, or customers as part of the vetting process.
 - Establish clear procedures for identifying, disclosing, and addressing conflicts of interest.
 - Include a provision allowing for removal of directors who fail to disclose relevant conflicts.

Step 5: Communicate with Stakeholders

- Transparency is key to maintaining trust in the board:
 - Communicate the situation and the resolution to shareholders, emphasizing the steps taken to protect the corporation's interests.
 - Highlight the board's commitment to good governance and its efforts to strengthen policies.

4. Recommendation for Resolution

Given the seriousness of the undisclosed ties to a competitor, the organization has two primary options:

- Exclude the Candidate from Consideration:
 - If the ties to the competitor create an unavoidable conflict or if the candidate's failure to disclose appears intentional, it may be in the best interest of the organization to withdraw their nomination.
 - Prioritize other diverse candidates who meet the governance standards without posing similar risks.
- Proceed with Mitigation Measures:
 - If the candidate's skills and perspectives are critical to the organization's goals, implement the mitigation measures outlined above to address the conflict and protect the corporation's interests.

Long-Term Goal Alignment:

- By addressing this situation transparently and proactively, the board demonstrates its commitment to diversity, good governance, and protecting shareholder value.
- Strengthening governance policies and procedures ensures the organization is better prepared to identify and manage conflicts of interest in the future.

Important Legal Disclaimer

This analysis is for informational purposes only and does not constitute legal advice. Addressing conflicts of interest and fiduciary duties requires careful legal analysis tailored to your organization's unique circumstances. You should consult with licensed corporate counsel to ensure compliance with applicable laws and governance standards.

Assistant

2:57:09 PM

Azure OpenAI - GPT-4o mini

Practice Area: Corporate Law

When considering the inclusion of a board candidate with undisclosed ties to a competitor, it's essential to follow a thorough due diligence process to assess potential conflicts of interest and ensure compliance with corporate governance principles. Here's how to approach this situation:

Due Diligence Process

- **Background Checks:**
 - Conduct comprehensive background checks on the candidate, focusing on professional history, affiliations, and any ties to competitors.
 - Review public records, LinkedIn profiles, and news articles to gather information on the candidate's past roles and relationships.
- **Conflict of Interest Assessment:**
 - Identify any direct or indirect relationships the candidate may have with the competitor, including financial interests, advisory roles, or other affiliations.
 - Assess how these ties might influence the candidate's ability to act in the best interest of your organization.
- **Legal Compliance Review:**
 - Ensure that the candidate's background complies with relevant corporate governance laws, such as the Delaware General Corporation Law, which outlines standards for board member qualifications and fiduciary duties.
 - Review any applicable bylaws or codes of conduct that govern conflicts of interest.
- **Interviews and Discussions:**
 - Conduct interviews with the candidate to discuss their qualifications and any potential conflicts openly. This should include questions about their understanding of confidentiality and loyalty to your organization.
 - Gather insights from current board members or executives regarding their perceptions of the candidate's suitability and potential conflicts.
- **Consult Legal Counsel:**
 - Engage with legal counsel to assess the implications of the candidate's ties to a competitor and to understand the legal framework surrounding conflicts of interest.

Potential Conflicts of Interest

- **Fiduciary Duties:**
 - Board members owe fiduciary duties of care and loyalty to the corporation. The candidate's undisclosed ties could lead to divided loyalties, which may hinder their ability to act in the best interest of your organization.
- **Competitive Intelligence:**

- The candidate may unintentionally or intentionally share sensitive information with the competitor, risking the confidentiality and competitive advantage of your organization.
- Regulatory Scrutiny:
 - Depending on the industry, regulatory bodies may scrutinize board appointments and potential conflicts, particularly if there are antitrust concerns.

Structuring a Resolution

- Disclosure Requirement:
 - Require the candidate to disclose all relevant connections and relationships. This should be documented formally to create a transparency record.
- Board Committee Review:
 - Form a governance committee to evaluate the candidate based on the disclosed information. This committee can assess whether the candidate's experience outweighs potential conflicts.
- Independent Oversight:
 - Consider appointing an independent board member or advisor to oversee matters related to the candidate's involvement, ensuring that decisions are made without bias.
- Conditional Appointment:
 - If the candidate is deemed suitable, consider a conditional appointment with specific guidelines on how to handle any potential conflicts. This may include recusal from certain discussions or decisions related to competitive matters.
- Conflict of Interest Policy:
 - Update or reinforce the organization's conflict of interest policy to ensure that all board members understand their obligations to disclose any potential conflicts in the future.
- Long-term Strategy Alignment:
 - Communicate the commitment to diversity and inclusion while emphasizing the importance of board integrity and alignment with long-term business goals. This may involve training sessions or workshops on ethical decision-making and conflict management.

Conclusion

By conducting thorough due diligence, openly addressing potential conflicts, and implementing a structured resolution process, your organization can make informed decisions about board appointments that align with long-term business goals. However, it is crucial to engage specialized legal counsel throughout this process to ensure compliance with all relevant corporate governance standards and to mitigate risks associated with potential conflicts of interest.

--- Response from Azure OpenAI (GPT-4) ---

Assistant

2:57:09 PM

Azure OpenAI - GPT-4

Practice Area: Corporate Law

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9:14:44 PM

Practice Area: Corporate Law

Solidify these as talking points for a board meeting.

Assistant

9:15:01 PM

Azure OpenAI - GPT-4o

Practice Area: Corporate Law

For the upcoming board meeting, the following talking points should provide a clear and structured framework for discussing the candidate with ties to a competitor. These talking points balance the need for transparency and governance rigor while supporting strategic decision-making around board composition and business goals.

1. Introduction

- Objective: Address the due diligence findings regarding the board candidate with undisclosed ties to a competitor and determine the best course of action.
- Goal: Reinforce the board's commitment to good governance, mitigating risks, and aligning with the corporation's long-term interests.

2. Overview of the Situation

- Candidate Details:
 - The candidate in question was identified as having undisclosed ties to [Competitor Name].
 - These ties may create an actual, potential, or perceived conflict of interest.
- Importance of Inclusion:
 - This candidate was initially recommended due to their qualifications and their alignment with the organization's commitment to increasing board diversity and expertise.
- Key Issue:
 - Failure to disclose this professional relationship in the pre-screening process raises concerns regarding transparency, loyalty, and fiduciary obligations.

3. Due Diligence Findings

- Undisclosed Ties:
 - The candidate's role or financial interest in the competitor was not declared, despite being material enough to trigger a conflict of interest.
- Potential Risks Identified:
 - Fiduciary Duty of Loyalty: A conflict of interest could compromise their ability to prioritize the best interests of the organization over competing loyalties.
 - Duty of Confidentiality: The risk of sensitive organizational information being accessed by or shared with the competitor.
 - Board Integrity and Trust: Perceived or actual conflicts could undermine trust in board governance and invite shareholder scrutiny.
- Legal Compliance:
 - Under corporate law (e.g., Delaware General Corporation Law), undisclosed conflicts of

interest could expose both the individual and the board to potential liability.

4. Strategic Discussion Framework

Option 1: Remove the Candidate from Consideration

- Advantages:
 - Protects the board from future risks associated with fiduciary breaches and governance challenges.
 - Preserves the organization's reputation and demonstrates a zero-tolerance approach to undisclosed conflicts.
 - Avoids the need to implement complex mitigation strategies, which may still expose the organization to risk.
- Disadvantages:
 - Losing the opportunity to include a potentially valuable and diverse voice on the board.

Option 2: Proceed with Mitigation Measures

- Governance Mitigations:
 - Require full disclosure of all ties and a formal declaration of commitment to fiduciary duties.
 - Implement conflict-management strategies, such as recusal from competitive discussions and stricter NDAs.
 - Limit the candidate's access to sensitive or competitively significant information.
- Advantages:
 - Retains the expertise and diversity the candidate brings to the board.
 - Demonstrates a balanced approach to managing risks while meeting diversity goals.
- Disadvantages:
 - Tailored mitigation strategies may still create vulnerability, particularly if the competitive relationship becomes more significant over time.

Option 3: Pause and Re-Assess

- Defer a final decision until additional due diligence is completed.
- Seek further clarification on the candidate's relationship with the competitor, including potential exit from those ties if appointed.

5. Long-Term Governance Improvements

- Proposed Action Items:
 - Update conflict-of-interest policy:
 - Mandate periodic disclosures of relationships with competitors, vendors, and other entities.
 - Strengthen the screening process for new board members, emphasizing completeness and transparency.
 - Enhance the organization's director and officer questionnaire (D&O Questionnaire) to ensure comprehensive conflict detection.
 - Conduct governance training on fiduciary duties and conflict management for the board to

reinforce compliance.

- Key Messaging for Stakeholders:
 - The board is committed to maintaining high standards of integrity and transparency while structuring itself for long-term strategic success.
 - Any decisions about this candidate will focus on protecting the organization's competitive position, shareholder value, and governance standards.

6. Next Steps

- Board Decision:
 - Agree collectively on the candidate's status:
 - Decline candidacy, proceed with conditions and mitigations, or defer for further inquiry.
- Timelines: Establish clear timelines for final resolution, ensuring alignment with governance and operational priorities.
- Stakeholder Communication:
 - Develop a communication plan to transparently articulate the board's decision while reinforcing confidence in the governance structure.
- Alternate Candidates:
 - Initiate discussions on alternative candidates to ensure the diversity and expertise objectives for the restructuring are preserved if the candidate is removed.

7. Conclusion and Final Recommendation

- The board should:
 - Carefully weigh the candidate's qualifications and potential contributions against the risks presented.
 - Demonstrate leadership in addressing the issue transparently, responsibly, and in alignment with the corporation's governance principles.
 - Act decisively to mitigate any reputational or fiduciary risks, while maintaining the integrity of the board's composition process.

Additional Notes for Discussion (If Needed)

- Business Implications:
 - Highlight how a decision on this candidate aligns with the strategic priorities of the organization (e.g., innovation, market positioning, shareholder value).
- Precedent:
 - Consider the long-term precedents this decision could set for future board appointments and conflict management.
- Legal Risks Summary:
 - Briefly outline potential legal exposure if the conflict is not adequately addressed, emphasizing fiduciary duty under Delaware law or otherwise applicable jurisdiction.

Important Disclaimer:

The content of this discussion reflects a high-level strategy and does not constitute legal advice. Any decision-making process should be reviewed with the guidance of external counsel to ensure compliance with applicable corporate laws and governance standards.

Assistant

9:15:01 PM

Azure OpenAI - GPT-4o mini

Practice Area: Corporate Law

Certainly! Here are solidified talking points to present at your board meeting regarding the inclusion of a candidate with undisclosed ties to a competitor, including due diligence, potential conflicts of interest, and resolution strategies.

Talking Points for Board Meeting

1. Introduction

- Objective: Discuss the potential addition of [Candidate's Name] to the board, including their qualifications and the implications of their undisclosed ties to a competitor.
- Focus: Prioritize transparency, integrity, and alignment with our corporate governance standards.

2. Due Diligence Process

- Background Checks:
 - We conducted comprehensive background checks on [Candidate's Name], reviewing their professional history and affiliations.
 - The findings raised concerns regarding undisclosed ties to [Competitor's Name].
- Conflict of Interest Assessment:
 - Analyzed potential direct and indirect relationships with [Competitor's Name], with a focus on financial interests and consulting roles.
- Legal Compliance Review:
 - Ensured alignment with the Delaware General Corporation Law and our internal governance policies regarding board member qualifications.
- Interviews and Engagements:
 - Engaged in discussions with [Candidate's Name] to clarify their vision, values, and understanding of their responsibilities related to board duties.
- Legal Counsel Involvement:
 - Engaged with our legal counsel to understand the legal framework surrounding this potential conflict and its implications.

3. Potential Conflicts of Interest

- Fiduciary Duties:
 - Highlight the importance of the fiduciary duties of care and loyalty, which may be compromised due to the candidate's ties.
- Competitive Intelligence Risks:
 - Discuss potential risks regarding the sharing of sensitive, proprietary information that

could advantage [Competitor's Name].

- Regulatory Scrutiny:
 - Acknowledge the possibility of regulatory scrutiny linked to board appointments and potential conflicts, especially in our industry.

4. Proposed Resolution Strategies

- Disclosure Requirement:
 - Recommend the formal requirement for the candidate to disclose all relevant connections and affiliations going forward.
- Board Committee Review:
 - Propose the formation of a governance committee to evaluate the candidate's suitability based on the disclosed information and mitigate risks.
- Independent Oversight:
 - Suggest engaging an independent board member or advisor to oversee the candidate's participation on sensitive competitive matters.
- Conditional Appointment:
 - If the board agrees to proceed, consider a conditional appointment, stipulating recusal from discussions directly involving competitive strategies.
- Conflict of Interest Policy Update:
 - Recommend reinforcing our conflict of interest policy, ensuring all board members are aware of their obligations to disclose potential conflicts in the future.

5. Long-term Strategy Alignment

- Commitment to Diversity and Inclusion:
 - Emphasize our ongoing commitment to enhancing board diversity while maintaining the highest standards of integrity and governance.
- Integrity and Trust:
 - Stress the importance of building and maintaining trust both internally and externally, as it pertains to board governance and our corporate reputation.
- Next Steps:
 - Outline plans to advance the discussion, including setting timelines for further evaluations and establishing a path to decision-making.

Conclusion

- Final Thoughts:
 - Reiterate that successful governance requires balancing diverse perspectives with the utmost candor and integrity.
 - Encourage an open dialogue regarding questions or concerns, ensuring we make a decision that serves the long-term interests of our organization.

These talking points outline a comprehensive approach to addressing the situation while fostering transparency and governance integrity during the board meeting.

Assistant

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Azure OpenAI - GPT-4

Practice Area: Corporate Law

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