

Special Report

Board Communication

Board Portals Offer Benefits But Directors May Prefer Paper

Web-based portals can facilitate efficient communication between a public company and its board members, but some directors still prefer hardcopy instead of electronic board books, according to corporate attorneys and a portal provider who spoke with BNA.

Indeed, getting directors to make optimal use of a board portal may be the “biggest challenge” for a company adopting the product and transitioning away from traditional, hardcopy board books, Alex Sodi, president and chief executive officer of Diligent Board Member Services, Inc., told BNA March 31.

Similarly, Holly J. Gregory, partner in the New York office of Weil, Gotshal & Manges LLP, said in a March 27 interview that she has observed some directors’ preference for hardcopies of meeting documents.

Directors’ acceptance or resistance towards electronic board books likely “depends on demographics,” Nicki Locker, partner in Wilson Sonsini Goodrich & Rosati’s Palo Alto, Calif. office, told BNA April 1.

Usage is Uncertain. Locker currently represents companies with a market capitalization under \$2 billion. None of her clients use board portals, Locker said.

By contrast, Gregory’s practice shows “more and more companies” using board portals.

Similarly, Sodi indicated that portal use has increased among companies not only within but also outside the United States. Diligent’s product—Diligent Boardbooks—first appeared on the global market in 2002. Sodi approximated that, at that time, four companies per month purchased Boardbooks. That number has risen considerably over the years. Currently, Diligent sells its portal to 20 to 30 companies a month, Sodi said.

Charles M. Elson disagreed that portals have found much favor. Elson is a law professor and director of the John L. Weinberg Center for Corporate Governance at the University of Delaware, and has either advised or been a member of several corporate boards. Speaking with BNA on March 27, Elson estimated there is “little demand” for the product because they are “not conducive to the way a board operates.”

“I have never seen anyone at a board meeting with a laptop because it’s inconvenient,” Elson said. As a means for board members to

communicate, board portals offer little value, he added, emphasizing the importance of conducting business through conversation in person or over the telephone rather than an electronic medium.

Possibly Beneficial in Case of Litigation. Moreover, electronic communication is no less discoverable during litigation than hardcopy documents, Elson said.

Assessing portals from the perspective of litigation, corporate attorneys disagreed. Besides efficiently distributing information, board portals also serve as a “historical resource,” Amy Goodman, partner in Gibson, Dunn & Crutcher LLP’s Washington, D.C. office, told BNA March 27. With “ready access to historic materials,” individual directors need not retain hardcopies, Goodman added.

That is a benefit not only to directors, but also the company in case of litigation. During meetings, to the extent board members write notes on their hardcopies and retain them, these notes may be discoverable during litigation, Gregory and Goodman separately said.

Using board portals, however, allows a company electronically to store meeting materials in a manner that enables directors ease of future access. This may relieve directors of the temptation to retain their hardcopies, Gregory said.

Efficiencies May Include Better Compliance. Achieving better compliance may be the biggest advantage that portals offer, Sodi suggested. He referred to the 2002 Sarbanes-Oxley Act, which requires, among other things, that companies must track approval of various board documents. The electronic environment of portals—unlike the paper environment—provides an easy way to record this approval, and archived documents remain searchable at any time, Sodi said. This is “reassuring to a company,” he added.

Portals enable companies to conveniently and quickly disseminate information—not only board books—to board members, Gregory said.

Diligent Boardbooks exemplifies that portals have a broader use than board book distribution. The name may suggest otherwise, but “it’s not just about board books,” Sodi said. Rather, the portal facilitates “comprehensive” communication between a company’s directors, general counsel, executives, and administrators.

Users of Diligent Boardbooks can use a browser on any computer around the world, Sodi said, to log in and to gain access to board documents. The company decides who has access, and what information users can see. For example, only certain users will be authorized

to see information related to compensation, Sodi said.

When asked about the security risks of board portals, Gregory said that providers generally take significant efforts to ensure confidentiality. She also said that mailing a hardcopy packet of confidential information to a board member carries some risk. Of course, confidentiality is a “very important” consideration when selecting a board portal, Gregory added.

When asked to distinguish communication through the portal from communication via e-mail, Sodi said through the portal:

- there is only one version of documents,
- information is always current, and
- the company retains management and control of the system.

By contrast, the company cannot control e-mail and once documents are transmitted, there is no way of withdrawing or correcting them, Sodi said.

In terms of costs, portals offer some savings. For instance, electronic rather than manual dissemination of board books saves paper and express mail costs, Gregory said. In addition, Sodi pointed out the costs for a company to undertake the task of building its own system would be “astronomical.”

Nevertheless, if several board members continue to prefer a hardcopy, then companies will lose some of the efficiency of having a board portal, Gregory said. Companies must encourage board members to use the portal, she added.

Sodi said he believes director pushback is “diminishing.” Using portals involves a learning curve, and directors will accept the electronic environment as they get comfortable with it, he added.

By MALINI MANICKAVASAGAM

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