GOVERNANCE ROUND-UP

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Delaware Court Dismisses Boeing *Caremark* Claims, Demonstrating the Value of Engaged Board Oversight

On August 13, 2026, the Delaware Court of Chancery dismissed a derivative suit brought against Boeing's directors and officers following the January 2024 incident in which a Boeing 737 MAX 9 door plug separated from the aircraft during flight. The court held that the plaintiffs failed to plead that a majority of Boeing's board faced a substantial likelihood of liability under *Caremark*, the Delaware doctrine under which directors and officers may face liability for a bad-faith failure to establish a reasonable information and reporting system or to monitor that system and respond to red flags. The decision provides useful guidance on the boundaries of *Caremark* liability and the protections available to boards that establish and actively engage with robust oversight systems.

The decision follows earlier litigation arising from the 2018 and 2019 737 MAX crashes, in which *Caremark* claims against Boeing's board survived dismissal after the court found that the board lacked a committee responsible for airplane safety and did not receive regular safety reporting. Following that litigation, Boeing implemented significant governance changes, including creating an independent Aerospace Safety Committee, assigning the Audit Committee responsibility for monitoring legal and regulatory compliance, separating the CEO and Chair roles, and making safety a standing item at every board meeting.

In this case, the plaintiffs alleged that extensive reporting to the board regarding manufacturing and compliance risks constituted "red flags" that the directors consciously ignored and that the board improperly prioritized production targets over safety and regulatory compliance. The court rejected both theories. As the court explained, a report constitutes a red flag only where it reaches the directors, clearly signals illegality or impending corporate trauma such that the need for action is evident, is consciously ignored and is sufficiently connected to the harm that ultimately occurs. Despite 95 pages of alleged red flags, the court found no basis to infer a bad-faith dereliction of duty, cautioning that the plaintiffs' theory risked turning "the volume and depth of Boeing's reporting from a best practice into evidence of disloyalty."

The decision offers important practical guidance for boards overseeing mission-critical risks. Rather than requiring directors to prevent every corporate failure, Delaware law expects boards to identify significant risks, establish appropriate oversight structures, engage with the information generated by those structures and maintain a record demonstrating that engagement. The decision also underscores the importance of clear responsibility for significant risks, appropriate escalation procedures, tracking remediation efforts and regularly reviewing the assumptions underlying significant business targets. For companies and in-house counsel, maintaining a high-quality contemporaneous record of board deliberations—including not only the risks reported to the board but also the diagnosis, responsible party and response—can provide important evidence that an oversight system is functioning as intended.

The opinion of the Court of Chancery is available here. For more information, see our Debevoise Update—Delaware Court Dismisses Boeing *Caremark* Claims, Demonstrating the Value of Engaged Board Oversight.

Delaware Court of Chancery Applies Heightened Director Independence Presumption for the First Time

In June 2026, the Delaware Court of Chancery applied, for the first time, the heightened presumption of director disinterestedness codified in Section 144(d)(2) of the Delaware General Corporation Law. The derivative action challenged two categories of compensation decisions by the board of Fidelity National Financial, Inc.: a $50 million equity grant to the company's founder and non-executive chairman, William P. Foley, and compensation awarded to the company's non-employee directors.

The court held that the heightened presumption is not confined to the statutory safe harbors in Section 144 but also applies in the demand futility context under Rule 23.1. For directors of listed companies who have been determined to satisfy applicable stock exchange independence standards, the presumption may be rebutted only with "substantial and particularized facts" showing a material interest in the challenged act or transaction or a material relationship with an interested person. The court interpreted "substantial" in a qualitative sense, requiring specific, non-conclusory facts of sufficient significance to support a reasonable inference that the alleged interest or relationship would impair the director's objective judgment.

Applying that standard, the court dismissed claims relating to Foley's equity grant for failure to plead demand futility. Allegations of overlapping board service, business ties and minority co-investments with Foley—including interests in professional sports teams—were insufficient to rebut the heightened statutory presumption absent particularized allegations showing that those relationships made the directors beholden to Foley or otherwise created a disabling bias, even though co-ownership of a professional sports team had previously been found by the court, in a 2018 decision, to support an allegation of demand futility. The court also rejected allegations based on the directors' receipt of fees from service on boards of other Foley affiliates, noting that the plaintiff had not pleaded particularized facts showing that the fees were personally material to the directors.

The court reached a different result as to the directors' self-compensation. Because the compensation committee members were approving their own compensation, Section 144(a)(1)'s disinterested-director safe harbor was unavailable, and the court concluded that the plaintiff had adequately pleaded a claim subject to entire fairness review.

The opinion of the Court of Chancery is available here. For more information, see our Debevoise Update—Delaware Court of Chancery Issues First Significant Ruling on Amended Section 144.

Watch This Space: SEC to Propose Rescinding Rule 14a-8

On August 28, 2026, the Office of Information and Regulatory Affairs ("OIRA") listed two SEC proposed rulemakings as pending review: "Shareholder Proposal Modernization," which the SEC has asked to be titled "Rescission of Rule 14a-8's Federal Regulation of Shareholder Proposals and Amendments to Rule 14a-4," and "Amendments to Certain Proxy Rules," which the SEC has asked to be titled "Proxy Solicitation Modernization." OIRA has 90 days to complete its review of the proposed rulemakings.

The titles alone suggest significant changes to the existing shareholder proposal and proxy solicitation frameworks, although the substance of the proposals will not be known until they are released.

The developments follow closely on the Division of Corporation Finance's August 14 announcement that, effective immediately and until further notice, the Staff will discontinue responding to all Rule 14a-8 no-action requests, including requests under Rule 14a-8(i)(1). Chairman Atkins also stated in July that the SEC is "holistically evaluating" Rule 14a-8, including the relationship between the federal shareholder proposal regime and state corporate law and the appropriate federal role in regulating shareholder proposals.

ISS Seeks Input on Policies; Glass Lewis Prepares for 2027 Framework Changes

Institutional Shareholder Services ("ISS") recently concluded its annual policy survey, which solicited feedback from investors, public companies and other market participants on a wide range of corporate governance and executive compensation topics. The survey forms part of ISS's annual process for developing and updating its benchmark voting policies.

The ISS survey suggested that ISS is reassessing a number of significant governance standards in light of evolving market practices and regulatory developments. Among other topics, ISS sought feedback on whether long director tenure should factor into determinations of director independence; how investors should evaluate reincorporations and other actions that may reduce shareholder rights; and whether ISS should continue to issue ongoing adverse director recommendations for "problematic" governance provisions, including multiclass share structures and supermajority voting requirements. The survey also addressed the potential shift from quarterly to semiannual reporting and a range of executive compensation matters, including discretionary bonuses, say-on-pay accountability and disclosure of long-term incentive performance goals.

Although the ISS survey does not itself change ISS policies, it can provide useful insight into areas in which ISS is considering revisions to its voting framework. ISS has indicated that it will later open a public comment period on major proposed policy changes for 2027 before publishing final policy changes later in the year.

Glass Lewis has separately announced plans to move away from research and voting recommendations centered on a single house policy and toward a framework offering multiple research perspectives. In August 2026, Glass Lewis advised clients that it would seek feedback on four proposed perspectives, with consultation beginning in September. The new research perspectives are expected to become operational in September 2027.

Glass Lewis' existing Benchmark Voting Policy Guidelines continue to apply for the 2027 proxy season, with only limited revisions intended to address significant regulatory and corporate governance developments that arose in 2026.

Reviewing Policies with Prediction Markets In Mind

The misuse of material nonpublic information ("MNPI") in connection with prediction markets trading poses an emerging compliance risk for asset managers, broker-dealers and public companies, which may need to supplement existing policies and procedures to address this risk. Companies typically maintain sophisticated controls for brokerage accounts, securities preclearance and restricted lists, but event contract accounts may be outside those surveillance systems. As such, policies and procedures that prohibit the misuse of MNPI solely in connection with securities trading should be expanded to address all event contracts, with an explicit reference to prediction markets.

In response, we are seeing companies take steps to broaden their compliance frameworks in multiple ways. Some companies are updating their insider trading policies to extend prohibitions on the misuse of MNPI beyond transactions in traditional securities to encompass event contracts and other instruments, including those traded on prediction markets. Companies are also updating their codes of conduct to prohibit the misuse of MNPI more generally, regardless of the type of transaction or market involved. This broader approach may be particularly important given that prediction market contracts generally are not "securities" and that the breadth of events covered by prediction markets may create circumstances in which a wider range of employees have access to information that could be misused.

When revisiting their policies and codes of conduct, companies should consider including the following elements:

- define the terms "prediction markets" and "event contracts";
- define the controls framework for personal prediction markets accounts, including whether to require disclosure, require pre-clearance, restrict certain activity or prohibit it altogether;
- prohibit employees from misusing confidential, proprietary or material nonpublic information relating to the company or obtained through the course of their employment or affiliation with the company in connection with prediction markets trading;
- consider whether blackout periods and pre-clearance requirements should apply to trades on prediction markets or whether heightened restrictions or prohibitions should apply to employees with access to certain information;
- reevaluate holistically policies relating to trading in other non-securities contracts that are otherwise regulated by the CFTC; and
- update employee MNPI training and certification processes to address prediction markets-related policies and procedures.

For more information, see our Debevoise Update—It's Time for Prediction Markets MNPI Policy.

Board Oversight: Thoughts on AI Experts

As the use of AI across industries increases, many boards are considering whether they have the expertise necessary to oversee AI-related opportunities and risks. A frequent question is whether boards should have a director who is an "AI expert."

While appointing a director with AI expertise may be appealing, it can present practical and governance challenges. The pool of individuals with both deep AI expertise and the qualifications to serve effectively as a public company director is limited, and the percentage of companies for which AI is so fundamental to their business that it requires an AI expert on the board is very small. A designated AI expert may also affect board dynamics, as other directors may defer excessively, reducing the constructive challenge and debate that is critical to effective oversight. Additionally, individuals with deep AI expertise often have extensive experience in the technology industry and may have conflicts of interest, such as investments in

AI companies or commercial relationships with vendors, which would require careful management.

Boards may instead rely on management and outside experts. Directors can rely on members of management, such as a Chief Technology Officer or someone serving a similar function, to provide updates on the company's use of AI and related risks and opportunities. Management and outside advisors can also supplement board expertise through education and regular reporting on AI use cases, risks and governance frameworks.

All directors should, at a minimum, possess baseline AI literacy. As AI becomes more integral to many companies' operations, investors increasingly expect disclosure of relevant board skills and appropriate oversight processes for AI-related risks and opportunities. Companies may also use proxy disclosures to explain how they are addressing AI and other technology-related risks, including whether AI oversight is allocated to an existing committee or to a dedicated technology committee.

For more information, please see our Debevoise Debrief—Board Oversight of AI: Do Boards Need AI Experts?

Board Refreshment: More Than a Compliance Exercise

As companies face increasingly complex strategic, operational and regulatory challenges, boards should regularly evaluate whether they have the right mix of skills, experience and perspectives to provide effective oversight. Building a board refreshment strategy requires boards, nominating and governance committees and management teams to consider the following key factors as they evaluate board composition and long-term succession:

- **Start with Succession Planning**. Boards should establish an ongoing process for evaluating future leadership needs and preparing for expected and unexpected director departures rather than reacting only when vacancies arise.
- **Use Board Evaluations to Inform Refreshment Decisions**. Effective evaluations can help boards assess whether board and committee composition meet current and future needs, identify expertise gaps and determine whether director succession should become a near-term priority.

- **Periodically Assess Board Composition**. Boards should periodically consider whether their overall composition remains aligned with the company's strategic priorities and risk profile, including by evaluating industry knowledge, financial and operational expertise, leadership experience, tenure, age, and diversity of backgrounds and perspectives.

- **Maintain a Pipeline of Director Candidates**. An active candidate pipeline can help boards respond quickly to unexpected departures and recruit directors whose backgrounds align with the company's long-term strategic objectives.

For more information, see our Debevoise Debrief—Board Refreshment: More Than a Compliance Exercise.

Governance Considerations for Replacing External Auditors

Companies may elect to disengage their external auditors for many reasons. Regardless of the reason, a change in auditors triggers a series of governance, independence and disclosure obligations that requires careful coordination among the audit committee, management, counsel and the outgoing and newly engaged external auditors.

- **Audit Committee**. The audit committee is directly responsible for the appointment, compensation and oversight of the company's independent auditor under Section 301 of the Sarbanes-Oxley Act; Rule 10A-3 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"); and the applicable NYSE and Nasdaq listing standards. As such, the auditor must be formally engaged by the audit committee through an engagement letter, often signed by the company's management, ratified by the board and, although not legally required, typically ratified by the shareholders.

- **Auditor Independence**. The audit committee is responsible for deciding whether an audit firm will be independent during the audit engagement period. Rule 2-01 of Regulation S-X sets forth the independence requirements for auditors and states that an auditor's independence is impaired if the auditor is not, or a reasonable investor with all relevant facts and circumstances would conclude that the auditor is not, capable of exercising objective and impartial judgment on all issues encompassed within the audit engagement.

- **Disclosures**. When a company's independent auditor is dismissed, resigns or declines to stand for reelection, Item 304(a) of Regulation S-K is triggered, and if a company does not simultaneously engage a new auditor, a separate reporting obligation is triggered when one is engaged. If a company's principal independent auditor resigns, is dismissed or indicates it has declined to stand for reelection after the completion of the current audit, the company must disclose this by filing a Form 8-K under Item 4.01. Companies reporting an auditor's departure must also comply with the process in Item 304(a)(3) and provide the former auditor with a copy of the disclosures and request a letter indicating whether it agrees with those disclosures, a copy of which must be filed as an exhibit. Item 304(a) also requires disclosure of "disagreements" between company personnel responsible for financial statement presentation and accounting firm personnel responsible for rendering the audit report and specified "reportable events," including where the former auditor advised that necessary internal controls do not exist, it is unwilling to rely on management's representations or be associated with the company's financial statements, the audit scope should be significantly expanded or newly discovered information would have materially affected prior audit reports.

- **Capital Markets Considerations**. In connection with a registered offering, a company must obtain the consent of an auditor whose report is included or incorporated by reference in the registration statement and a comfort letter from the company's independent auditor(s) for the periods included or incorporated by reference in the offering document. If an auditor change occurs in the audit engagement lookback period for a securities offering, the company must obtain consents from the former auditor and comfort letters from both the former and new auditor covering the financial statements included in the offering documents.

For more information, see our Debevoise In Depth—Governance Considerations for Replacing External Auditors.

Debevoise Publishes Practical Guide to Special Committees

Earlier this year, Debevoise published a comprehensive guide to the formation and operation of special committees in conflict transactions under Delaware law. The guide addresses key practical considerations for special committees, including composition requirements (disinterestedness and independence), the importance of a clear mandate with the "power to say no," the selection and independence of legal and financial advisors, compensation structures and documentation of the committee's process.

The guide is available here.

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