

Delaware Case Addresses Board Process for Hiring and Terminating Executive

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The Delaware Court of Chancery recently issued a 75-page opinion granting additional books and records related to the hiring and termination of Yahoo's chief operating officer (COO), which triggered nearly \$60 million in severance payments after only 14 months on the job. The Court determined that a credible basis exists to infer that there is possible mismanagement that would warrant further investigation.

According to the opinion, in initial discussions with the compensation committee about the potential hire, the CEO "cryptically" withheld the individual's name, position and qualifications while asking the compensation committee to approve a compensation package that the compensation consultant had explained was more than what the peer data supported. The opinion noted that the committee approved the package in a meeting that lasted "a total of 30 minutes" and did not receive materials that illustrated the "complex interrelationships among the various compensation components or the amount of compensation they generate in particular scenarios." The opinion itself provides the types of information that the court believes could have been provided to the committee.

Inaccurate information was later given to the compensation committee, perhaps inadvertently, about the terms of the original offer letter when the committee was asked to approve a change. It effectively doubled the payout on certain equity awards. The opinion stated that the CEO also made other material changes to the final offer letter without informing the committee.

When it appeared that the COO was not working out, the committee approved his termination through an email exchange of written consents, without asking any questions. The opinion pointed out that the committee did not meet in person or by phone and that there is no indication that the committee considered a "for cause" termination, which would have materially affected the vesting of certain equity awards. The committee did not obtain a calculation of the severance awards that the COO would receive.

The committee met three weeks after the termination, which is the first time they discussed the reasons why the COO was being terminated. The opinion stated that "[t]he directors' involvement appears to have been tangential and episodic, and they seem to have accepted Mayer's statements uncritically. A board cannot mindlessly swallow information, particularly in the area of executive compensation." In granting the plaintiff's request, the opinion also evoked the Disney case, "with the details updated for a twenty-first century, New Economy company."

See also our recent client memorandum on another interesting aspect of executive compensation and SEC enforcement [here](#).

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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