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Cooley U @ TCA:

Board Governance Best Practices

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Presented by:
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Venture Capital Financings

We know the venture financing space like no one else. Cooley handles 1000+ private financings every year. With an equal split of investor and company clients, we understand both sides of the table and the landscape of current market terms. We lean on our experience to deliver the best value to our clients.

Beyond just mechanics, we thrive on seeing deals happen. We've fostered thousands of introductions to VCs for emerging companies. As the #1 firm for a number of venture funds formed in the US, our network can make the difference to a promising startup.

#1 firm for venture financings in San Diego for last ten years per Pitchbook.

#1 in US VC Financings

PitchBook, 2018

Leading the market in VC-backed IPOs for 15 years

Top Tier for VC + Startups

Chambers USA
The Legal 500
Vault



We have all the services you'll need, whenever you need them

Antitrust & Competition

Capital Markets

Class Action Defense

Compensation + Benefits

Commercial Litigation

Corporate Governance

Debt Finance

Employment + Labor

Environmental

Export Compliance +
Trade Regulation

Government Analytics

Intellectual Property

International Trade

Mergers + Acquisitions

Check out our tailor-made website for company founders and growth investors

The site is filled with information, tools and advice – all designed to help streamline your interactions with Cooley so you can get on with building your business.

We provide substantive insights on issues you'll face at every stage of growth.

The site lets you generate core legal documents – a full incorporation package, convertible note term sheet, privacy policy, terms of use and more – all on demand from any desktop or mobile device.

You get access to our venture financing data and deal term records through an interactive tool that lets you drill down into the information you find most useful.

Get it all at cooleygo.com



People's Voice Award Winner



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Forming the Corporation's Board of Directors

- A Board of Directors is a Legal Requirement for All Corporations
 - DE – One Director is Enough
 - CA – Three Directors are Generally Required Once Stock is Issued
 - Directors Do Not Need to be Stockholders
- Corporate Bylaws Set Parameters for Board & Directors
 - Size of the Board; How it is Set
 - Qualifications (not common)
 - Quorum
 - Filling Vacancies
 - Removal Procedures
 - How Action is Taken (more on this later)
 - Committees (more on this later)

How Directors Join and Leave the Board

- Initial Director(s) Most Typically Appointed by the Sole Incorporator
- Then: Directors and/or Stockholders (depending on what bylaws say) Fill Vacancies Created by Resignations, Removals, Additional Directorships
- Directors Serve Until:
 - the [Next] Annual Meeting of Stockholders;
 - and Until His/Her Replacement is Duly Elected and Qualified;
 - or Until His/Her Earlier Resignation or Removal.
- Removal Requires Stockholder Action
- Voting Agreements Among the Corporation, Founders and Investors Most Typically Specify Board Membership (designation rights, voting agreement)
- Certificate/Articles of Incorporation Can Specify Specific Class/Series Voting for Directors

How the Board Takes Action

- Meeting
 - Bylaws Set Notice Requirements (typically ~48 hours; can be waived)
 - Bylaws Set Quorum Requirements (typically majority)
 - Majority of Directors at the Meeting Can Take Action
 - Bylaws/Law Set Means of Meeting:
 - In-Person, Always Permitted
 - Does Not Need to Occur in State of Incorporation
 - Telephonic Nearly Always Permitted (all directors must be able to hear and be heard)
- Written Consent Must be Unanimous
- Typically One Director = One Vote
- FAQs/Follow-up Points
 - A Director may not “proxy” or delegate their vote.

What Does the Board Approve?

- Hiring CEO & senior management
- Appointing corporate officers (different than titles)
- Amendments to the certificate of incorporation or bylaws
- Equity grants (stock, options or warrants)
- Formation of subsidiary
- A sale of the company or any other transaction resulting in a change of control
- Items that are “material” to the business (as opposed to day-to-day)
 - Materiality will change as the company grows
 - Borrowing or lending money
 - An annual plan or large capital expenditure
 - Bonus or compensation programs
 - Selection of auditors

Chairman of the Board

- Role of the Chairman = Set the Agenda, Run the Meeting
 - Desired but Not Necessary to Have Chair Appointed
 - Frequently Chair is CEO for Early-Stage Corporations
 - Typically Chair is NOT the CEO for Public or Large Private Corporations

Meetings and Agenda

- At Least Once Per Year; 4-8 Times Per Year is Common
- Advisable to Schedule in Advance for the Whole Year
- Set An Agenda & Manage the Time Carefully
- Typical Agenda Items
 - Corporate Housekeeping (e.g. approve minutes (more on these later))
 - Business Overview (can include detailed updates by executives responsible for particular business unit such as sales, product development)
 - Financial Review
 - Executive Session (usually includes option grants, if any)
- Create a Board “Deck” and Circulate in Advance – Nothing Discussed at the Meeting Should be Brand New Information for Directors; Manage “Bad News”

Who Attends Board Meetings and Where

- Who Attends:
 - All Board Members
 - Key Members of Executive Team (some depending on the agenda)
 - Outside Counsel
 - Board Observers, if any
- Location: Large-Enough Room and Privacy from Employees (borrow space from investor, outside counsel, etc.)
- Considerations: Confidentiality; Sensitive Matters; Need to Know

Minutes and Record Keeping

- It is Important to Keep Good Corporate Records
 - Deal/Financing Diligence
 - Legal Opinions
 - Legal Requirement
- Corporate Records Should be in the “Minute Book”
 - Charter and Bylaws
 - Board Minutes (signed by the secretary) and Actions by Written Consent
 - Stockholder Meeting Minutes and Actions by Written Consent
- Audience for *Official* Minutes
 - Potential Investors and Acquirers
 - Litigants
- Keep the Minutes Formal, Accurate and High-level; Do Not Include Sensitive Information
- Other Key Records = Personnel, IP, Leases, Debt, Commercial, Financings, Options, Etc.

Committees

- Role of Committees = Handle Delegated Board–Level Matters Without Having to Involve the Full Board; Particularly Used Where Conflicts Exist
- Committee Membership is Limited to Members of the Board (others may attend meetings)
- DE Committee Can Be 1 or More Directors; CA Committee Can Be 2 or More Directors
- Most Common Committees = Audit & Compensation
- Other Committees: Nominating and Corporate Governance (most Public Corporations have this), Financing Committee, Non-Executive Stock Option Committee & Committees Set Up for Specific Transaction or Issue
- Certain Actions Cannot Be Delegated
 - DE: Actions that Require Stockholder Approval & Amending Bylaws
 - CA: Actions that Require Stockholder Approval, Filling Vacancies on the Board or Committees, Fixing Director Compensation, Amending Bylaws, Certain Distributions, Appointment Of Committees

Fiduciary Duties of Directors

- Duty of Loyalty
 - Act Solely for the Benefit of the Corporation and its Stockholders
 - Refrain from Conflicts of Interest
- Duty of Care
 - Be Informed
 - Act Reasonably
 - Act Responsibly After Consideration of Relevant Materials and Information and After Appropriate Deliberation (get input from advisors)

Fiduciary Duties of Directors

- Other Duties: Confidentiality, Corporate Opportunity, Candor
- Business Judgment Rule: Directors are Presumed to Have Acted in Good Faith and in the Interest of the Corporation
- Interested Transactions
- Procedural Considerations: Independent Directors; Disclosure of Conflicts; Recusal of Directors; Clear Record Keeping; Use Advisors; Stockholder Approval

Fiduciary Duties of Directors Cont.

- Breaches of Fiduciary Duties (i.e. breach of duty of loyalty):
 - Personal Liability for Damages
 - Injunctions
 - Loss of Indemnification (more on this later)
 - Loss of D&O Insurance Protection (more on this later)
 - Court Costs, Legal Expenses, Awards, Damages, Time and Money
- Duty to Stockholders Shifts to Duty to Creditors in the Case of Insolvency

Indemnification of Directors and D&O Insurance

- Certificate/Articles of Incorporation and Bylaws Typically Include Indemnification Provisions for Directors and Officers
- Many Corporations Also Adopt Indemnification Agreements with Directors and Officers; Include More Details of Procedures and Coverage
- D&O Insurance is a Good Idea for Early-Stage Corporations and usually a Must-Have for VC-Backed, Later-Stage and Public Corporations
 - Covers Directors' and Officers' Personal Liability for Corporate Actions

Questions? Ask Matt!

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