

D&O Dos and Don'ts – What Counsel and Directors Can Do to Embrace Requirements

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Assessing the independence of directors is an important annual event that is not only a US Government requirement, but also an essential metric that shareholders can use to gauge board effectiveness. Thus, assessing Directors and Officers (D&O) independence is about far more than insurance, rather an analysis requiring thoughtfulness, precision and punctuality in order to satisfy the needs of stakeholders. Given the importance of this requirement to the board, the senior leadership team and its constituents, the often consuming process can be efficient and effective when a few key principles are utilized.

The D&O is a critical activity that is generally completed toward the end of the calendar year. Initiated by the company's General Counsel and Secretary and completed by all Section 16 officers and directors, the labor intensive process is generally very detailed, sometimes including more than 80 questions. An inherently complicated process, the capital intensive nature of a D&O can be amplified by the utilization of outdated assessment techniques. However, there are a few essential security, automation and anonymity strategies that board leadership can employ to make it an effective and easy process.

1. Enhance Security by Utilizing Technology

The days of sending secure documents by mail are long gone noted by the surge in board portal use. Furthermore, the growing threat of information leaks means that even email is being abandoned, leaving secure board portals as the best option for director communication. With SpencerStuart reporting in its Global Board of Directors Survey that Cybersecurity being among the top three issues relevant to directors this year, this is undoubtedly a matter resonating with most participants.

2. Ensure Completion and Accuracy

Similar to honest financial reporting, assessing director independence requires nearly perfect execution. Not only must the questionnaire be clearly stated and easy to understand, but the results must also be thoroughly reviewed to ensure completion and accuracy. Many of our clients lament that questionnaires often go unfinished resulting in board leadership spending weeks confirming information and sending unfinished

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work back and forth. Using an electronic system combats this problem by making all entries mandatory, automatically checking for financial requirements and staying active until all questions are complete.

3. Questionnaire Options

The recommendations provided above are only possible through the use of a portal. However, simply using a portal doesn't solve all the problems associated with a D&O. Given the lengthiness of the document, participants should have the ability to save and complete later. Additionally, electronic assessments allow for personal information which can be automatically included in questionnaires. Finally, to ensure that the experience is a good one for all involved, making a tablet, PC or laptop viable choices for completion encourages swift and complete participation.

4. Start Early and Plan

In order to customize your questions, have time for review and allow for checks, it makes sense to allot at least 60 days before the questionnaire is launched. By streamlining set-up through the use of electronic resources, there is more time available to be spent on the assessment itself. With that, we encourage all of our clients to have a thoughtful approach and generally complete the setup time more than 30 days in advance.

While more than 50% of directors on a public company board must be independent, it is a generally accepted principle that having nearly all independent directors is best when it comes to the oversight of the organization. In fact, the Wall Street Journal reported last year that 83% of directors on S&P 500 boards are independent. To that end, the D&O process is a great way to demonstrate the board's commitment to financial, risk and strategic oversight of the organization by its collection of experienced and skilled directors. The D&O can certainly serve as a foundation for setting the tone for shareholders' understanding of the board and its role in the company's success.

Having worked with many boards over the years in moving beyond compliance and utilizing cutting-edge measures to satisfy requirements, we know how important it is to take advantage of any cost-effective resources that will help the board and senior leadership team effectively complete this undertaking and move forward. Directors must expect this process, like many others, to become increasingly more efficient and to provide a secure and straightforward system that will create a surplus of time that can be used for other essential activities.

About XCEO Inc. (<http://www.xceo.net>)

XCEO Inc. partners with corporate and public sector boards and directors to fulfill all of their governance needs, including individual director development, board recruiting and on-boarding services, automated performance assessments and a secure board portal for increased efficiency, communication and collaboration. XCEO also partners with senior executives on personal leadership, entrepreneurial initiatives, professional advancement strategies and board positioning. Founded in 2003, XCEO serves clients ranging from Silicon Valley start-ups to Fortune 500 companies.

