

WHITE PAPER

# The Case for Board Portals: A Litigator's View

*An Argument for the Use of Web-Based Board Portals  
as a Corporate Governance Tool to Ensure Document Security  
and Effectuate Appropriate Document Retention Policies*

by

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## Abstract

An increasing number of companies, both within and outside the technology sector, are utilizing confidential Internet-based portals to enhance and facilitate board communications and document sharing. These so-called board portals centralize documents, communication, and processes for board members, general counsel, and corporate secretaries in a secure, user-friendly Web environment. This article offers a litigator's perspective on board portals, and how they can be highly effective tools that enable corporations to protect confidential board member communications and documents and effectuate appropriate document retention policies and practices.

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## Table of Contents

Introduction .....	3
Web-Based Board Portal Technology .....	3
Board Portals: An Effective Tool for Implementing Document Retention Policies at the Board Level .....	4
Conclusion.....	5
About Wilson Sonsini Goodrich & Rosati, P.C. ....	5

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## Introduction

Increasing regulation and expanding board duties are prompting boards to re-examine their processes and practices. Since the passage of the Sarbanes-Oxley Act of 2002, the need for fast, efficient, and secure board communication and document sharing is greater than ever. Enter the board portal. With the advent of a new generation of technology, Internet-based portals geared to boards of directors are quickly becoming a meaningful corporate governance tool. Board portals enhance board communication with basic features such as document review, director questionnaires, and Web conferencing in a secure environment. Board portals also have document-sharing technology specifically tailored for corporate directors, and provide processes for written board consents that permit directors online access to time-sensitive filings under Delaware and federal law.

Apart from their convenience and efficiency, board portals also can play an important role in ensuring document security and effectuating appropriate document retention policies. Board portals permit communication and document sharing in a secure, contained environment. Content within the portal is encrypted and password protected. In addition, some vendors offer board portals with a remote-purge function that permits documents and content stored remotely—including unread items and emails—to be deleted automatically within a specified time frame. This latter function can serve to eliminate impolitic or imprudent emails and document annotations that are often used as potent weapons in subsequent litigation against a corporation and its board of directors. Although such a remote-purge function should not be used once litigation is pending or likely, it can be an important part of corporate document management in the ordinary course of business. This white paper provides an overview of Web-based board portal technology and how it can serve as an effective corporate governance tool to control and manage board member communications, data, and documents as part of an appropriate document retention policy.

## Web-Based Board Portal Technology

Board portals centralize pertinent information in a secure and user-friendly Web environment for board work. Board members can access company documents instantly, with a single click. This is an obvious advantage for geographically dispersed directors, who can now review lengthy board books, SEC filings, and other board-related documents remotely, and access exhibits and attachments easily through hyperlinks. An online repository provides access to current and archived materials, and directors are notified of new updates through email or voicemail alerts. In addition, board portals from certain vendors provide comprehensive but user-friendly methods that permit directors to effectuate consents and complete director questionnaires.

One of the key advantages to board portals is that they permit corporate secretaries to deliver sensitive files at any time to a busy, itinerant demographic. Board members tend to be mobile. With the advent of board portals, relevant information can be provided to board members whether they are at home, traveling on business, or on vacation. Thus, for example, last-minute changes to a board book or other corporate document can be delivered to board members in a timely manner, regardless of their physical location.

In addition to the obvious time efficiencies, board portals provide directors with flexibility and added document security. Companies such as Silicon Valley-based BoardVantage, Inc., offer a board portal product that allows directors to download, store, and annotate board materials on their own computers in a folder known as the "Secure Vault." Content in the Secure Vault is encrypted, password protected, and stays current with automatic synchronization to the latest document versions online with each log-in. Thus, board portals allow directors access to documents even when they are without access to the Internet. In addition, board portals can help to ensure the security of confidential information by limiting or eliminating the need for paper copies that might be left inadvertently in public locations during a board member's travels.

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To address confidentiality concerns, board portals are hosted in a secured data center and protected by encryption and authentication. Typically, there is no audit trail of documents or other confidential communications conducted on the board portal server.

Another key advantage to board portals is that they offer the ability to set automatic document retention and storage rules. In most cases, only a single encrypted copy of each customer's data is maintained, and any deleted data will be purged from all board portal servers and backup media. Board portal storage rules also can extend the automatic delete function to documents and data stored remotely on, for example, board members' personal computers and handheld devices.

Board portals also facilitate appropriate document distribution through the use of so-called role-based security. Access to corporate documents can be limited to certain board members and certain committees, as well as specific time frames. This latter function can be extremely useful when outside auditors or bankers need access to specific corporate documents during particular periods of time.

## Board Portals: An Effective Tool for Implementing Document Retention Policies at the Board Level

Document retention policies provide for the systematic review, retention, and destruction of documents received or created in the ordinary course of business. Document retention policies among corporations run the gamut from the "preserve everything" philosophy to the view that less is more. Regardless of where a particular corporation's document retention policy falls on this continuum, board portals can assist in centralizing document retention by board members, with obvious advantages. The need to canvas files, computers, and other data sources maintained by directors at their homes or businesses during discovery, often on an expedited and repeated basis, can be minimized or even eliminated if communication and document sharing is contained within a board portal.

Board portals also can reduce the likelihood that sensitive documents—e.g., annotated documents, drafts of press releases, or SEC filings with suggested changes that were never adopted—will be obtained and used against the corporation in subsequent litigation. Cases are legion in which litigation against a corporation and its board has been permitted to proceed beyond the summary judgment stage based on the discovery of unfortunate documents including, in one real-world example, the discovery in shareholder litigation of a document containing the following board member annotation: "delete disclosure of quarter-end backlog so it doesn't look like we closed the quarter early." Virtually all board portals can be programmed to purge documents automatically within a specified time frame from the secure server. Some also can be programmed to remote-purge documents that directors have saved offline on their personal computers. Thus, board portals can minimize the common risk that drafts of corporate documents or other sensitive documents will be discovered in subsequent litigation.

Board portals can serve an even more crucial function by eliminating emails that can be fertile ground for discovery in shareholder and other litigation and government investigations. Examples abound of impolitic or imprudent emails sent between board members. The following are actual emails that, in retrospect, never should have seen the light of day:

- Email from a board member to the rest of the board advocating that it is time for a "change" at the CEO level: "We've waited far too long, and the consequences have been disastrous. . . ."
- Email from a board member to the CEO regarding the competitive landscape, discovered two years later during an FTC review of the company's proposed acquisition of the target: "If we can eliminate [the target company] we can monopolize the market."
- Email from a board member to the rest of the board expressing frustration after the company missed its guidance several quarters in a row: "I

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simply cannot believe anything [management] tells me anymore.”

- Email from a board member to the independent lead director regarding management's efforts to usurp the board's role: “Management has been making too many strategic decisions without consulting the board under the guise that these are ‘purely’ operational issues. We’ve let this go on too long.”
- Email to other board members from a board member who felt alienated and often expressed a minority view: “. . . your failure to investigate constitutes an unacceptable abdication of your fiduciary responsibilities to this company. . . .”

The automatic purge function typical in board portals can avoid such potentially embarrassing or damaging admissions in subsequent litigation and effectuate appropriate document retention in the ordinary course of business, before the obligation to preserve documents has been triggered.

When the obligation to preserve documents and data has been triggered, board portals are an equally effective mechanism to enable a corporation to comply with its discovery obligations. Documents and data are maintained centrally, typically on a single server. Thus, board portals can help simplify the increasingly complicated task of identifying and preserving all relevant electronic data and documents. Board portals also can relieve board members of at least some of the burdens associated with document preservation orders and directives, particularly when documents and communications sent between directors are contained within the portal.

## Conclusion

Board portals are increasingly effective corporate governance tools that enable corporations and their directors to communicate easily despite geographic dispersion, and to discuss and share proprietary corporate information in a timely and secure manner. Board portals also can play an important role in effectuating appropriate document retention policies. From a litigator's perspective, board portals can serve an even more crucial function in eliminating documents and emails in the ordinary course of business that could otherwise be fertile ground for discovery and provide the basis for embarrassing or damaging admissions against the corporation and its board members in subsequent litigation.

## About Wilson Sonsini Goodrich & Rosati, P.C.

Wilson Sonsini Goodrich & Rosati's broad range of services and legal disciplines are focused on serving the principal challenges faced by the management and boards of directors of business enterprises. The firm is nationally recognized as a leader in corporate governance, public and private offerings of equity and debt securities, mergers and acquisitions, securities class action litigation, employment law, intellectual property litigation, patent prosecution, joint ventures and strategic alliances, and technology licensing and other intellectual property transactions. The firm, which is headquartered in Palo Alto, California, has offices in Austin, New York, Reston, Salt Lake City, San Diego, San Francisco, and Seattle. It also plans to open offices in Washington, D.C., and Shanghai, China, in 2006. For additional information, please visit [www.wsgr.com](http://www.wsgr.com).