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BOARD AND EXECUTIVES
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Acredula is the Latin word for "owl," connoting wisdom. This newsletter is intended as wise counsel for boards and executives. Acredula is available to clients and friends of the firm. It is not to be construed as legal advice or opinion.

Events Deemed Significant for Exercise of Duty of Care and Loyalty

EDITOR'S NOTE

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The SEC adopted new rules defining significant events requiring current disclosure on a Form 8-K. Directors and officers of all organizations, not just public reporting companies, should be aware that the following events are deemed significant enough to require current disclosure because it is likely that creditors as well as other regulators, including state attorneys general with respect to non-profit organizations, will also treat these events as significant with respect to the duties of care and loyalty under state law:

- Entry into a material definitive agreement (or a material amendment) not made in the ordinary course of business;
- Termination of a material definitive agreement not made in the ordinary course of business, other than by expiration of its stated term or as a result of all parties completing their obligations, if such termination is material;
- Creation of a material direct financial obligation or a material obligation under an off-balance sheet arrangement (direct financial obligations generally means any short-term debt obligations not made in the ordinary course of business and any long-term debt, capital lease, or operating lease obligation required to be reflected or disclosed on a balance sheet);
- Director or officer action committing to exit a business or otherwise dispose of either long-lived assets or employees that will result in material charges being incurred;
- Completion of an acquisition or disposition of significant assets other than in the ordinary course of business;
- Director or officer action concluding that a material charge for impairment of an asset (including securities or goodwill) is required under GAAP;
- Resignation (or declination to stand for re-appointment) or dismissal of the external auditor auditing the organization's financial statements;
- Receipt of notice either of the delisting of the organization's securities or the failure to satisfy a rule or standard for continued listing of the organization's securities for trading or quotation;
- Director or officer action concluding that any previously issued financial statements should no longer be relied upon because of error;
- Knowledge of directors or officers of a change in control;
- Resignation or refusal to stand for re-election by a director or removal of a director (note: more disclosure is required if the resignation or refusal to stand for re-election is because of a disagreement relating to the organization's operations, policies or practices or if the removal is for cause);
- Retirement, resignation or other termination of a principal officer;

- Appointment of a new principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer;
- Election of a new director (including appointment filling a vacancy) that is not by vote of shareholders;
- Appointment of a receiver or similar officer for the organization or its parents in a bankruptcy or similar proceeding;
- Amendment of the articles of incorporation, code of regulations or bylaws other than by vote of shareholders;
- Change in fiscal year other than by vote of shareholders;
- Suspension of trading by any of the organization's ERISA employee benefit plans because of a blackout; and
- Substantive amendment to the code of ethics or business conduct applicable to principal executive, financial or accounting officers or any waiver of such provisions with respect to any such officers.

In considering or otherwise dealing with any of these events, directors and officers should act in a manner believed to be in the best interests of the organization and with the care that an ordinarily prudent person in a like position would use under similar circumstances.

This issue of *Acredula* focuses even more thoroughly on the roles and responsibilities of corporate directors. In addition, this installment covers a director's responsibilities for employee benefits in light of the Enron ERISA litigation.

Time to Re-Think Oversight Responsibilities for Employee Benefits

By
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Because bad facts often result in bad laws, directors of any organization (publicly or privately held, for-profit or not-for-profit, taxable or tax-exempt) need to work with management to re-think their organization's responsibilities for overseeing employee benefit plans, including deferred compensation plans. The bad facts likely resulting in bad laws come from the Enron ERISA litigation proceeding in the United States District Court for the Southern District of Texas in Houston.

The Enron ERISA litigation case will be cited as finding that if an organization's board or compensation committee has _any_ authority regarding a plan's assets, it has some fiduciary duty regarding the investment of those assets.

For the reasons discussed herein, governing boards or their compensation committees together with management should, as a priority, review and revise, where appropriate, all existing employee benefit plans so that the board and independent directors serve no more than nonfiduciary "settlor" functions as described below.

The case in a nutshell

The case is a derivative action brought on behalf of Enron's employees for the loss of their benefits due to the investments made in Enron stock by three of Enron's employee benefits plans: the ESOP, savings plan and cash balance plan. The bad facts are that Enron employees participating in these plans lost all of their benefits.

The case alleges that the Enron employees' loss resulted from breach of fiduciary and co-fiduciary duties by the compensation committee of Enron's board, among other defendants, in failing to oversee and take appropriate action with respect to the investments being made by these plans. Because Enron's assets are not sufficient, the purpose of the case is to reach insurance coverage and assets of persons other than Enron. The defendants in the case include Enron's compensation committee, both individually and as a committee, the trustee of the plans, and Enron's law firms and auditor.

Although the case remains in a pleading and discovery phase, the court held that the case stated a claim against the compensation committee even though that committee exercised no responsibility with respect to the plans. The court based its holding on the definition of fiduciary and the concept of a named fiduciary under ERISA.

Under ERISA, a fiduciary is someone who falls within one of the following prongs:

1. Exercises any discretionary authority or discretionary control with respect to the management of such plan;
2. Exercises ***any*** authority or control with respect to the management or disposition of its assets [emphasis added];
3. Renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan

or has any discretionary authority or discretionary responsibility to do so; or

4. Has discretionary authority or discretionary responsibility in the administration of such plan.

A named fiduciary under ERISA is someone who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary. Because the compensation committee had authority to remove the trustees of the plans, the court found that the compensation committee is a named fiduciary having authority regarding the assets of those plans and falling within prong two of the above definition.

What is unsettling about the holding is that the trustees of the plans were directed by the plan documents to invest in Enron stock. Nevertheless the court found that:

- A directed trustee, even of an ESOP that is designed to invest in a designated security of a company, has "some duty . . . to keep apprized of the company's financial condition to the extent that trustee can determine whether its stock is an appropriate, i.e., prudent, investment;" and
- The compensation committee, because it has the power of removal, has some duty to monitor and supervise compliance with the forgoing duty by the trustee.

What is even more unsettling about the holding is that the court dismissed Skilling and Fastow, Enron's president and CFO, respectively, from the case because neither was named in the plan documents as a fiduciary.

Why the case may result in bad law

The case is a concern because the judge in this case, and perhaps even the judges upon any appeal, want to help the harmed Enron employees reach assets that are not otherwise available to restore some of their losses. Unless there is a different final outcome, the Enron ERISA litigation case will be cited as finding that if an organization's board or compensation committee has ***any*** authority regarding a plan's assets, including merely the authority to remove a trustee, it has some fiduciary duty regarding the investment of those assets.

Far reaching impact

This case is far reaching because it deals with an "employee benefit plan" under ERISA. Therefore, the holding impacts every organization providing employee benefits, including both publicly held companies like Enron and privately held companies, including non-profit and tax-exempt organizations.

In addition, the case finds liability for persons in their capacity as ***fiduciaries of an employee benefit plan*** rather than as directors of the employer sponsoring the plan. Therefore, the Ohio and Federal charitable immunity statutes shielding volunteers in their capacities as board members or officers of charitable organizations are not applicable because an employee benefit plan does not fall within the definition of a charitable organization under the Ohio statute or a non-profit organization under the federal statute. Moreover, the Ohio charitable immunity statute is likely not applicable because the Ohio act only gives immunity for breaches of fiduciary duty under state law and perhaps arguably only under Chapter 1702.

The holding impacts every organization providing employee benefits, including both publicly held companies like Enron and privately held companies, including non-profit and tax-exempt organizations.

Regardless of the ultimate outcome, the Enron ERISA litigation will consume not only the time, but also the energy, of Enron's compensation committee for possibly the rest of their careers or lives. It will also likely result in legal costs to them personally because Enron does not have the assets to reimburse them the retention or deductible under their D&O policies, and the legal costs may in fact exceed the policy limits, even if there is a favorable outcome.

To avoid this time and energy consuming ordeal of litigation, boards of any organization should work with the organization's management to re-think whether the board should have any authority that would make the board or any of its committees a fiduciary of any of the organization's employee benefit plans.

What needs to be re-thought

A body of law has developed under both common law and ERISA that finds that being the "settlor" of a trust does not result in becoming a fiduciary, or having fiduciary duties, under the trust. A settlor is the legal term for the person creating, or serving the role of creator, of the trust.

With respect to ERISA, the settlor is the person who adopts or terminates a plan. The Enron ERISA litigation court recognized that those serving settlor functions on behalf of an employer are not fiduciaries. The Enron court concluded that determining the design of a plan, making decisions regarding the form or structure of a plan, and adopting, amending or terminating a plan does not constitute serving in a fiduciary capacity.

The Department of Labor recognizes that performing settlor functions, to the extent provided by the

employer's board, does not make the board a fiduciary. However, the DOL does state that being responsible for the selection ***and*** retention of plan fiduciaries is itself a fiduciary function because that involves the exercise of "discretionary authority or discretionary control respecting management of such plan."

What needs to be re-thought is the appropriateness of limiting the involvement of the board and its committees of directors to:

- Adopting the plan, including designating the original plan fiduciaries as stated in the plan;
- Amending the plan, but delegating to management or an employee committee the authority and responsibility for overseeing and, where appropriate, replacing plan fiduciaries without necessity of an amendment to the plan document; and
- Terminating the plan.

Management is often in a better position, and therefore may be a more appropriate group, to oversee the performance of the plan's fiduciaries and to remove those fiduciaries where appropriate. The plan document itself can limit management's discretion in appointing successor fiduciaries, such as limiting any change in trustee to a company having legal trust powers and managing a certain dollar amount of investments or any change in investment manager to a manager registered under the Investor Advisers Act and not having conflicting relationships with the company or related parties. If so, the plan document should make clear that a change in plan fiduciaries may be made without amendment of a plan document or otherwise requiring approval of the employer's board.

Performing settlor functions, to the extent provided by the employer's board, does not make the board a fiduciary.

Administrative decisions regarding the operation of the plan should also be delegated to management. This includes rules for determining eligibility; calculations of service and compensation credits for eligibility, vesting and benefits; preparation of employee communications and government reports; collection, allocation and payment of contributions; and processing of claims, including resolution of claims for benefits.

Traditionally under ERISA, the practice was to name the entity of the employer as the named fiduciary. The thought was that stakeholders as the employer, employees and the Department of Labor would look to corporate law and the employer's governing documents to determine who had fiduciary duties. However, this becomes a dangerous practice after the Enron ERISA litigation case because under all states' corporation laws, the board of directors ultimately has authority for all matters not expressly reserved to shareholders or members or properly delegated to others. To avoid courts' finding that boards implicitly assume responsibility because of this ultimate authority, the re-thought plan documents should identify clearly by name or, preferably, title the persons or committee to whom responsibility is actually delegated.

To avoid such risks of liability, we recommend governing boards or their compensation committees together with management review and revise, where appropriate, all existing employee benefit plans so that the board and independent directors serve no more than non-fiduciary "settlor" functions described above. In order to avoid implicit assumption of responsibility because of a board's ultimate authority for all matters not reserved to members/shareholders or otherwise properly delegated to others, authority other than for settlor functions should be delegated to management or committees of employees clearly identified in plan documents by name or title. This should be done on a priority basis because any change in responsibility under ERISA will likely be held only to apply prospectively.

A Primer on the Roles and Duties of a Corporate Director

A basic tenet of corporation law is that all of a corporation's power and authority are vested in its board of directors except to the extent otherwise reserved to or vested in shareholders. Typically, only limited power and authority are reserved to shareholders, such as the power and authority to approve: amendments to the corporation's governing documents; disposition of substantial assets; mergers, consolidations and similar reorganizations; and dissolution.

Another basic tenet of corporation law is that a board does not directly exercise all of that power and authority, but it is exercised "under the direction" of the board. Day-to-day management of the corporation and its business is left to management.

Accordingly, the role of a board is to make decisions, provide oversight, and give mentorship.

Another basic tenet of corporation law is that the board elects and removes the corporation's officers. As a limitation on the board's authority, when it removes an officer, it cannot abrogate or otherwise prejudice the contractual rights of officers, especially severance and other rights officers may have under their employment agreements.

In the American corporate system, the CEO is typically responsible directly to the board for the day-to-day management of the corporation. This often includes, subject to the overall authority and direction of the board, the power to hire, fire and determine the compensation of each other executive, and oversee the hiring, firing and compensation of all other employees, of the corporation.

Key Areas for Oversight

The oversight role of directors has received attention in recent years in response to the mismanagement of Enron, Worldcom and others. There are three key areas for oversight:

- Financial statement preparation and auditing (or review) processes;
- CEO compensation (which must exclude CEO's participation) and other executives' compensation (which may include CEO's participation); and
- Nomination of directors and planning for management succession.

The same areas are key for oversight under state law because the life of any organization is dependent upon the:

- Accuracy of its financial statement;
- Reasonableness of its compensation; and
- Appropriateness of its actions taken for succession.

Responsibilities of a Corporate Director

Directors have fiduciary duties under either state statutory law or state common law. Under Ohio, these duties are statutory. The duties include:

> **Duty of care** – to exercise the care that an ordinarily prudent person in a like position would use under similar circumstances. Under most states' laws, a director must perform his duties as a director, including his duties as a member of any committee of the directors upon which he may serve, with the care that an ordinarily prudent person in a like position would use under similar circumstances.
>
> **Duty of loyalty** – to act in good faith, in a manner he or she reasonably believes to be in or not opposed to the best interests of the corporation.

Duty of care

The duty of care requires that a director inform himself of all material information reasonably available before making a business decision. This duty also requires directors to inform themselves of alternatives to a proposed business decision; the more important the decision, the greater the need to consider additional information and alternatives. Once a director has become adequately informed, the director must act with the requisite care in performing his duties. A claim of "good faith" alone is no defense if a director fails to exercise the duty of care in order to arrive at an informed business decision.

The duty of care requires directors to become and stay reasonably informed. This generally includes:

- Attending meetings of the board and of the committees to which they belong;
- Reviewing and understanding financial statements, financial reports (especially forms 10-K or 10-KSB and 10-Q or 10-QSB filed with the SEC and the annual report and any interim report sent to shareholders), and materials furnished by the corporation for review by directors;
- Asking questions (in order to be able to rely upon management and others on any matters, you must have a reasonable belief that they are reliable and competent for such matters. The best way to form a belief on competence is to ask questions, and the best way to form a belief on reliability is to ask the same questions of different persons); and
- Making reasonable attempts at detection and prevention of illegal conduct.

Courts have held that a director's responsibilities include "a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may . . . render a director liable." The level of detail that is appropriate for such an information system has been held as a question of business judgment. Nevertheless, the leading case held that "only a sustained or systematic failure of the board to exercise oversight – such as an utter failure to attempt to assure a reasonable information and reporting

system exists – will establish the lack of good faith that is a necessary condition to liability."[1]

Duty of loyalty

There are three components to the duty of loyalty.

This first is that a director should act to the extent possible in a ***disinterested*** manner. That means not being influenced by any financial or personal interest in the matter under consideration by the corporation. A director should be alert and sensitive to any interest he or she may have that might be considered to conflict with the best interests of the corporation. When a director, directly or indirectly, has a financial or personal interest in a contract or transaction to which the corporation is to be a party, or is contemplating entering into a transaction that involves use of corporate assets of or competition against the corporation, the director is considered to be "interested" in the matter. This then requires disclosure by the director of that financial or personal interest.

The second component, which naturally follows from the first, is ***full disclosure***, especially of possible financial or personal interests in any matter under consideration. In common law before statutory corporate law, courts often treated as void or voidable any contract or transaction approved by a board if a director had a financial or other personal interest in the contract or transaction. Many states' statutory laws provide that any contract, action, or transaction considered by the board or one of its committees is not void or voidable because of a financial or personal interest of a director if the material facts regarding that interest are disclosed or otherwise known to the board or the committee before the consideration. Any director having a possible financial or personal interest in any contract or transaction to which the corporation is to be a party should first make full disclosure to, subject to any confidentiality obligations owed to others outside the corporation, and seek approval of the contract or transaction by, those of the other directors who do not have any such interest. This generally requires the interested director to abstain from voting on the matter and, in most situations, after disclosing the interest, describing the relevant facts and responding to any questions, and not further participating in the meeting while the disinterested directors complete their discussion and vote.

The third component is substantive "**fairness**." Under many states' statutory laws, no contract, transaction or other action of a board is void or voidable, even if there is a financial or personal interest which is not fully disclosed, if the action is "fair to the corporation" as of the time it is authorized or approved. However, because what is "fair to the corporation" is a question of fact upon which reasonable minds may differ, directors should rely on full disclosure. Substantive fairness generally requires disinterested directors to determine:

- Whether the proposed transaction is on terms at least as favorable to the corporation as might be available from other persons or entities;
- Whether it is reasonably likely to further the corporation's business activities; and
- Whether the process by which the decision is approved or ratified is fair.

If minority shareholders could be adversely affected, the directors should be especially concerned that the minority interests respecting the transaction receive fair treatment. This concern is heightened when a director or dominant shareholder or shareholder group has a divergent or conflicting interest.

Officers also have common law duties that are similar to directors' duties of care and loyalty. Officers too must act as an ordinarily prudent person in a like position would act under similar circumstances. They too must act in good faith and in a manner they reasonably believed to be in or not opposed to the best interests of the corporation.

Confidentiality

An important part of both the duty of care and the duty of loyalty is to keep confidential all matters involving the corporation that have not been disclosed to the general public. A director of a publicly held corporation is sometimes asked by investors, analysts or investment advisors to comment on sensitive issues, particularly financial information; however, an individual director is not usually authorized to be a spokesperson for the corporation and, particularly when confidential or market-sensitive information is involved, should avoid responding to such inquiries. Even information that is not market-sensitive may be confidential – for example, information about new products or proprietary processes or strategic plans. A director who improperly discloses such information to persons outside the corporation can cause the corporation to violate federal securities regulations and can cause damage to investor relations, trigger personal liability as a "tipper" of inside information and harm the corporation's competitive position. Directors should refer requests for corporate information to the CEO or other person designated by the corporation to deal with such inquiries.

Corporate Opportunity

Another part of both the duty of care and the duty of loyalty is to protect corporate property and op-

portunity. A director must exercise care that he does not usurp a business opportunity that is related to the business of the corporation and is otherwise available to the corporation. The duty of loyalty may require the director to first offer that opportunity to the corporation before taking the opportunity for his or another's account, including the account of any other company of which he is a director, officer or employee.

Whether such an opportunity must first be offered to the corporation will often depend upon one or more of the following:

- The correlation of the opportunity to the corporation's existing or contemplated business;
- The circumstances in which the director became aware of the opportunity;
- The possible significance of the opportunity to the corporation and the degree of interest of the corporation in the opportunity; or
- The reasonableness of the basis for the corporation to expect that the director should make the opportunity available to the corporation.

If a director believes that a contemplated transaction might be found to be a corporate opportunity, the director should bring it to the attention of the board. If the board, acting through its disinterested directors, disclaims interest in the opportunity on the part of the corporation, then the director is free to pursue it. A director should bear in mind that the obligation to put the corporation's interests first also applies to opportunities for subsidiaries or affiliates of the corporation.

Other Duties

Directors have duties from other sources. These other sources include:

- **Contractual Sources**: Often, the corporation's governing documents, especially the committee charters, as well as any director agreements will generally create duties or obligations on the part of directors. The audit, compensation and nominating/governance committee charters are intended to create duties for the members of those committees on which other directors may rely.
- **Federal securities laws**: These include duties regarding registration statements filed with the SEC; duties as control persons; duties to report illegal acts not timely remedied; duties not to mislead an auditor; duties to disclose stock ownership; duties to avoid short-swing transaction in stock; duties to receive the audit report; duties to appoint independent directors to an audit committee; et seq.

Some Special Areas of Concern for Directors

A director should be particularly concerned that the corporation has established and implemented programs designed to address the following:

Quality of Disclosure

Do the corporation's disclosure documents, such as quarterly and annual reports to shareholders, proxy statements, prospectuses, press releases, web pages and other key communications to shareholders and the investing public, fairly present material information? A director's primary responsibility in the disclosure process is to be satisfied that corporate procedures are reasonably designed to produce accurate and appropriate public disclosures. Management has the primary responsibility for implementing these processes, subject to directors' oversight and periodic review of the steps taken by management.

Compliance with Law

Does the corporation have appropriate policies designed to result in compliance with applicable laws and regulations? Does the board receive reasonable assurances that employees of the corporation are informed of corporate policies directed at compliance with applicable laws, including (i) antidiscrimination and employment laws, (ii) environmental and health and safety laws, (iii) antitrust laws and (iv) securities laws, particularly those prohibiting insider trading? The corporation should have appropriate procedures for monitoring compliance with such laws throughout the organization. All persons involved in the compliance process should have direct access to the general counsel or other compliance officer so that sensitive compliance situations may be raised for prompt consideration. Directors do not administer legal compliance programs but should review their functioning periodically and endeavor to be reasonably satisfied that appropriate programs are in place.

Most large, publicly owned corporations have adopted codes of business conduct expressing principles of business ethics, legal compliance and other matters relating to business conduct. Subjects commonly addressed by such codes are legal compliance (antitrust laws and policies, Foreign Corrupt Practices Act of 1977 and insider trading, to name a few), conflicts of interest, corporate opportunities, gifts from business associates, misuse of confidential information and political contributions.

A program of legal compliance that is well conceived and properly implemented can significantly reduce the incidence of violations of laws and corporate policy. It may also reduce or eliminate civil lawsuits,

penalties or prosecution against the organization for those violations of law that occur in spite of such a program. Since the enactment of the United States Sentencing Commission's sentencing guidelines for organizations, corporations have been given further reason to review and reassess their compliance policies and procedures. These guidelines greatly increase the penalties for businesses found guilty of criminal violations, but provide significant fine reductions for convicted corporations that maintain appropriate programs to prevent and detect violations of law.

Approval of Commitments

Is there a functioning and effective system in place for approval of commitments of the corporation's financial and commercial resources?

Although board approval of all or even most corporate commitments is not necessary, the board should be satisfied that a reasonable approval system exists and should have a clear understanding with management, which may be embodied in a formal policy, as to which major commitments require board approval.

Adequacy of Internal Controls

Does the corporation maintain appropriate systems of internal financial control and is there a functioning and appropriate system for monitoring their adequacy? Periodic review of the functioning of these systems is appropriate.

Protection of Assets

Does the board receive periodic reports describing the corporation's program for the protection of its assets? In addition to insurance arrangements, such a program should include procedures for protecting intellectual property and safeguarding confidential corporate information.

Counseling of Directors

Does the corporation provide board members competent legal advice regarding the corporation's affairs and the conduct of its directors? In addition to the corporation's general counsel or regular outside counsel, there may be occasions when the board or a committee in connection with a particular matter should specially retain an additional outside legal advisor.

Disagreements

If, after a thorough discussion, a director disagrees with any significant action proposed by the board, the director may vote against the proposal and request that the dissent be recorded in the meeting's minutes. Except in unusual circumstances, taking such a position should not cause a director to consider resigning. However, if a director believes that information being disclosed by the corporation is inadequate, incomplete or incorrect, or that management is not dealing with the directors, the shareholders or the public in good faith, the director should first encourage that corrective action be taken. If that request is not satisfied or the problem continues, the director should encourage the board to replace management and, if such a change does not occur, the director should resign.

(Endnotes)

[1] In re Caremark International Derivative Litigation, 698 A.2d 959, 970-71 (Del. Ch. 1996).

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