

Best Practices for Officers, Directors, and Advisers Navigating Fiduciary Challenges Amid Economic Uncertainty

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Amid heightened inquiries from boards and board advisers within the private sector, a prevalent concern arises concerning fiduciary duties that may surface when debt covenants are triggered, when expenses are projected to exceed revenues, or when boards are otherwise asked to assess solvency matters. Given the current economic uncertainty worldwide, and considering that one may find oneself in an active role in corporate governance, Carlton Fields has highlighted some best practices should you find yourself in a similar position. It is worth saying that it is all about process. Decisions may turn out to be bad. There can be many reasons for that — the market unexpectedly turns, the economy tanks, a key customer goes out of business, etc. But as long as prudent practices are employed in reaching a decision — gathering reliable information, staying informed, hiring experts in areas outside your skill sets, and deliberating — then one's fiduciary duties are likely to have been discharged.

- **Exercise Care and Loyalty:** Decisions guided by thorough research and deliberation, even if the outcomes are suboptimal, remain within legal bounds, provided you comply with the duties of care and loyalty.
- **Enhance Board Meeting Frequency and Documentation:** Consider more frequent board meetings, with thorough minutes and comprehensive agendas to maintain transparency and accountability.
- **Engage Advisers for Significant Transactions:** For endeavors like sales or undertaking major credit facilities, determining whether to close your doors, etc., consider enlisting advisers, such as investment bankers, lawyers, and other professionals, to provide expertise.

- **Prudent Debt Management With Care:** If additional debt is required, ensure compliance with fiduciary duties, recognizing that such decisions will face heightened scrutiny. You can incur debt, provided you do so after proper deliberation and armed with adequate information.
- **Review and Update Insurance Policies:** Ensure your existing policies adequately cover potential director and officer liabilities.
- **Seek Legal Counsel in Times of Distress:** Engage legal counsel to navigate duties in challenging circumstances. The sooner, the better.
- **Public Versus Private:** Board members' supervisory duties over their company's solvency are not limited to a director of a publicly traded company. Private company directors and board members of nonprofits have corresponding duties of loyalty and care.

If you have any questions, or if you ever find yourself in such a circumstance, please contact the authors of this article.

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