Corporate Governance Report

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• CANADA'S TOP COURT RULES ON PERSONAL LIABILITY OF DIRECTORS FOR OPPRESSION •

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On July 13, 2017, the Supreme Court of Canada issued its decision in *Wilson v. Alharayeri*.[1] The decision sounds an important cautionary note to directors concerning the potential consequences of engaging in conduct that is improper or defeats the reasonable expectations of minority shareholders, creditors or other potential complainants.

Most Canadian corporate statutes, including the *Canada Business Corporations Act*,[2] Ontario's *Business Corporations Act*[3] and Québec's *Business Corporations Act*,[4] allow stakeholders to obtain relief when any of the following leads to results that are oppressive, unfairly prejudicial to or unfairly disregard the stakeholders' interests: (i) an act of the corporation or its affiliates; (ii) the conduct of the business and affairs of the corporation or its affiliates; or (iii) the exercise of the powers of the directors of the corporation or its affiliates. This relief is generally referred to as an "oppression remedy" that grants the courts wide discretion to make orders to rectify the conduct complained of. Alharayeri confirmed and clarified the circumstances in which an

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individual director, as opposed to the corporation or another party, may be held personally liable for conduct that the court determines to be oppressive.

The facts of Alharayeri are briefly as follows. From 2005 to 2007, Ramzi Mahmoud Alharayeri (Alharayeri) as the president, CEO, a significant minority shareholder and a director of Wi2Wi Corporation. In early 2007, at the direction of Wi2Wi's board, Alharayeri began negotiations regarding the sale of Wi2Wi shares to Mitec Telecom Inc. During these negotiations, Alharayeri entered into an agreement with Mitec to sell some of Alharayeri's own Wi2Wi common shares. When Wi2Wi's board learned from Mitec of Alharayeri's proposed sale of his shares, Alharayeri was censured for failing to disclose to the board the deal to sell his shares and for putting himself in a potential conflict of interest. As a result, Alharayeri resigned from his functions at Wi2Wi.

After Alharayeri's resignation, the appellant Andrus Wilson (a director of the Wi2Wi board) (Wilson) became Wi2Wi's president and CEO. The merger of Wi2Wi and Mitec did not occur and, in light of Wi2Wi's increasingly precarious financial position, the board decided to issue convertible secured notes by way of a private placement to its existing common shareholders. Before the private placement, the board accelerated the conversion of Class C shares that were beneficially held for Wilson into common shares, even though Wi2Wi's auditors expressed doubts that the requisite financial tests had been met. At the same time, however, the board decided not to convert Alharayeri's Class A and B shares into common shares even though the financial tests for the conversion of these shares had certainly been met. In the result, Alharayeri was unable to participate in the private placement, and the values of both his Class A and his Class B shares and the proportion of his common shares in Wi2Wi were substantially reduced.

Alharayeri filed an application under section 241 of the Canada Business Corporations Act seeking relief from oppression against four of Wi2Wi's directors, including Wilson and Dr. Hans Black (Black), another shareholder and the chairperson of the audit committee. The Supreme Court of Canada

affirmed the decisions of the lower courts and held Black and Wilson (but not the other directors sued by Alharayeri) personally liable to pay damages.

The Supreme Court confirmed the two-pronged test set out by the Ontario Court of Appeal in the leading 1998 case of *Budd v. Gentra Inc.*[5] for the imposition of personal director liability for oppression, holding that such liability can be imposed when: (i) the director is implicated in the oppression; and (ii) the imposition of liability is "fit in all the circumstances". Recognizing that the question of fitness is "necessarily an amorphous concept", the Court went on to elaborate four general principles to "guide courts in fashioning a fit order":

1. The oppression remedy request must in itself be a fair way of dealing with the situation.
2. The order should go no further than necessary to rectify the oppression.
3. The order may serve only to vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stakeholders.
4. The court should consider the general corporate law context in exercising its remedial discretion.

It is the first criterion — that the remedy sought ought to be "fair" — which leaves the most room for uncertainty. The Supreme Court explained that when a director acts in bad faith and has obtained a personal benefit from the oppression, it is likely (but not necessarily) fit to hold the director personally liable; conversely, when there is neither bad faith nor personal gain on the part of the director, it is unlikely (but not impossible) that a court will find that it is fit to condemn a director to personal liability for oppression. However, a court's decision to grant relief under the oppression remedy turns on equitable considerations and is necessarily fact-specific. As a result, the Supreme Court warned that although bad faith and personal benefit "remain hallmarks of conduct properly attracting personal liability", they "should not overwhelm the analysis". There will thus certainly be many less obvious cases that must each be carefully analyzed in their particular, broader and more complex factual matrixes to determine whether the oppressive conduct is properly attributable to the director because of his or her implication in the oppression.

So what does Alharayeri mean for directors and their counsel? The potential extent of their personal liability is a persistent concern for directors, and they can learn a number of lessons from this case.

First, while it is a long and well-established principle that directors must avoid and declare conflicts of interest, Alharayeri makes clear that even when a director acts in good faith, the director's gain of even an incidental advantage by a board decision may bear directly on his or her personal liability when oppression is claimed. It is thus essential that directors ensure that not only they declare all of their potential conflicts of interest, but that their fellow board members also do so.

Second, even though the SCC affirmed that merely adopting a "lead role" at board meetings will never in itself be sufficient to ground a director's personal liability for oppression, evidence concerning the extent of a director's support of a decision can affect his or her personal liability. In *Alharayeri*, the Québec Superior Court relied on, among other things, evidence of Wilson and Black's "lead roles in the discussions at the Board level" to conclude that Wilson and Black (and no other directors) were personally liable for Alharayeri's loss. The Québec Court of Appeal endorsed this approach. Wilson argued that the lower courts' conclusions were wrong because the oppressive decisions were attributable to Wi2Wi's board. Wilson also argued that the fact that one director may be more vocal than another is irrelevant where the board ultimately acted unanimously. The Supreme Court, however, disagreed and concluded that, in light of the "lead roles" of Wilson and Black, it was open to the trial judge to determine that the oppression was properly attributable to them. In short, the unanimity of a board decision will not in itself immunize specific board members from potential personal liability for the oppressive consequences that might result from such decision.

Finally, and despite the SCC's conclusion that it can be appropriate not to hold all board members liable in cases of unanimous board decisions, it should

be noted that board members always have the right to record their dissent from objectionable decisions of the board, and this remains the best way to protect directors from any liability that might result from such decisions.

Alharayeri brings much-needed clarity to the scope of potential individual liability of directors under the oppression remedy, but has left significant accommodation for further interpretation and argument about the circumstances in which such relief will appropriately be granted. Directors, companies and their insurers should carefully consider their director liability indemnification clauses in light of this decision in order to determine what types of conduct may or may not be covered.

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1 [2017] S.C.J. No. 39, 2017 SCC 39 ("*Alharayeri*").

2 R.S.C. 1985, c. C-44.

3 R.S.O. 1990, c. B.16.

4 CQLR, c. S-31.1.

5 [1998] O.J. No. 3109, 43 B.L.R. (2d) 27 (C.A.).

• OSC INTERVENES IN TACTICAL PRIVATE PLACEMENT IMPLEMENTED DURING PROXY CONTEST •

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On June 19, 2017, the Ontario Securities Commission (OSC) released its much anticipated reasons for its decision, *In the Matter of Eco Oro Minerals Corp.*, in which the OSC overturned the decision of the Toronto Stock Exchange (TSX) to approve a private placement by Eco Oro Minerals Corp. (TSX: EOM) (**Eco Oro**) — without requiring prior approval of Eco Oro's shareholders — in the midst of a proxy contest to replace the Eco Oro board. The OSC's order is the latest in a series of recent decisions by Canadian securities regulators considering the validity of so-called "tactical" private placements implemented in hostile situations, and provides important guidance about the regulation of tactical private placements implemented during a proxy contest in particular, while also leaving a number of important questions unanswered.

BACKGROUND

Eco Oro is a TSX-listed company whose main asset is an arbitration claim against the Government of Columbia to recover damages for the loss of the Angostura gold/silver mining project. In 2015, Eco Oro was in need of capital to fund the arbitration proceeding and its working capital needs. After unsuccessfully attempting to raise funds through conventional financings, Eco Oro entered into a series of investment agreements principally with three institutional investors (two of whom were significant shareholders of Eco Oro) (the **Noteholders**) that secured the financing needed to continue operating and fund the arbitration. The investment agreements provided for the issuance of common shares and convertible notes to the Noteholders in two tranches, with the shares issuable in the second tranche conditional upon shareholder approval, failing which the second tranche would consist of convertible notes and contingent value rights (**CVRs**) that entitled the Noteholders to a substantial portion of the proceeds of the arbitration proceedings if Eco Oro was successful. At a shareholders' meeting held in November 2016, over 93 per cent of disinterested shareholders voted against the issuance of shares for the second tranche. Accordingly, Eco Oro subsequently issued the convertible notes and CVRs to the Noteholders in accordance with the terms of the investment agreements. Taken together, the convertible notes had an aggregate principal amount of approximately $9.7 million and the CVRs entitled the Noteholders to over 70 per cent of any proceeds from the arbitration. Importantly, the terms of the convertible notes permitted Eco Oro to exchange the notes for equity at Eco Oro's discretion.

On February 10, 2017, certain dissident shareholders of Eco Oro requisitioned a shareholders' meeting to replace the board. Shortly thereafter,

all but one of the Noteholders executed support letters in favour of management's direction for Eco Oro. At the same time, Eco Oro applied to the TSX to exchange a portion of the convertible notes into an aggregate of 10,600,000 common shares (representing approximately 9.98 per cent of the outstanding common shares post-issuance such that no shareholder vote would be technically required under the TSX rules).

On March 2, 2017, Eco Oro announced that the requisitioned meeting would be held on April 25, 2017, and that the record date for determining which shareholders were entitled to vote at the meeting would be March 24, 2017. On March 10, 2017, the TSX conditionally approved the note exchange and Eco Oro announced the closing of the note exchange on March 16, 2017. Eco Oro stated that the purpose of the note exchange was to "de-risk" its balance sheet and enhance its financial flexibility. As a result of the note exchange, the Noteholders' voting interest in Eco Oro increased from approximately 41 per cent to 46 per cent.

On March 22, 2017, the dissident shareholders filed a petition with the B.C. Supreme Court seeking to set aside the note exchange under the "oppression remedy" in the *Business Corporations Act*[1] (British Columbia). Shortly thereafter, on March 27, 2017, the dissidents applied to the OSC for an order to set aside the TSX's decision to approve the note exchange without requiring the prior approval of Eco Oro's shareholders and to cease trade the common shares issued in exchange for the convertible notes.

BC SUPREME COURT PROCEEDINGS

The BC Supreme Court rejected the dissidents' oppression claim, following the longstanding practice of Canadian courts in deferring to the business judgement of the board of directors, particularly where the court determines that the board acted with a view to the best interests of the corporation and not in violation of any reasonable expectation held by the relevant stakeholders (in this case, the dissident Eco Oro shareholders). The Court's decision highlights the challenges faced by applicants when challenging corporate actions in court.

KEY FINDINGS OF THE OSC

The OSC set aside the TSX's decision to approve the note exchange without conditioning it on prior disinterested shareholder approval. While the OSC reiterated its general reluctance to substitute its own judgement for that of the TSX, in this case the OSC determined that it was not appropriate to defer to the TSX's decision, given the OSC's conclusions that, among other things:

- the TSX did not have (or did not absorb) all material information concerning the proposed note exchange (including the pending proxy contest and the fact that the Noteholders had signed letters of support for the incumbent board immediately before Eco Oro proceeded with the note exchange) in part due to the OSC's view that Eco Oro was "less than forthcoming" in its disclosure to the TSX; and
- the analysis of whether a private placement "materially affects control" of an issuer must take into account the particular circumstances of the transaction and the issuer, including the potential implications on any pending contest for control of the issuer (in this case, the OSC concluded the TSX decision did not fully account for the status of the pending proxy contest).

Accordingly, the OSC proceeded to conduct its own analysis of whether the note exchange materially affected control of Eco Oro. After considering the particular facts of this case, the OSC determined that the note exchange did indeed materially affect control of Eco Oro because it was reasonably expected to "tip the scales" in the proxy contest for control of Eco Oro in favour of the incumbent board. In doing so, the OSC concluded that a private placement that impacts the outcome of a pending proxy contest can materially affect control of the issuer even if the transaction does not result in the creation of a new

control person (usually a 20 per cent voting interest, absent unusual circumstances) or group.

Since the note exchange had already been completed without shareholder approval, the OSC imposed the following terms and conditions to give practical effect to its decision:

- an obligation on Eco Oro to allow shareholders to vote to either approve or reverse the note exchange (unless Eco Oro otherwise voluntarily unwound the note exchange), and to unwind the transaction if shareholders voted to reverse it;
- a cease-trade order in respect of the shares issued under the note exchange pending the outcome of the shareholder vote; and
- a requirement that Eco Oro not count any votes attached to the shares issued under the note exchange pending the outcome of the shareholder vote.

Since the OSC reached its decision and issued its orders (including the additional terms and conditions described above) solely on the basis of its authority to review decisions of the TSX, the OSC did not discuss whether it would intervene in the note exchange on the basis that it was contrary to the public interest. Nevertheless, it did acknowledge that its public interest jurisdiction extends to the fairness of all contests of control, whether in the context of a proxy battle or a takeover bid.

KEY TAKEAWAYS

There has been increased use by issuers, and scrutiny by regulators, of tactical private placements in recent years, particularly in the context of take-over bids. Most notably, the OSC and the British Columbia Securities Commission (BCSC) — in their joint decision *In the Matter of Hecla Mining Company and Dolly Varden Silver Corporation* — recently developed a comprehensive framework for evaluating tactical private placements implemented in the context of a take-over bid that involves an inquiry into the purpose of the private placement as well as a balancing of the benefits of the private placement and its adverse effect on shareholders' ability to tender to a bid.

The Eco Oro decision clearly signals to market participants that private placements implemented during proxy contests will also be scrutinized, and provides a number of important lessons for issuers, investors and other stakeholders:

- Enhanced Scrutiny of Private Placements. Before the Eco Oro decision, the TSX generally accepted representations from an issuer that a private placement did not "materially affect control" of the issuer (absent contrary information being brought to its attention). The OSC's decision clarifies that the TSX is now expected to conduct a reasonable degree of due diligence regarding the circumstances of the transaction and the issuer. Market participants should therefore expect that the TSX may scrutinize a private placement more carefully and require additional information. The scope and mechanics of this process will likely evolve as the TSX addresses this expectation going forward.
- More Frequent Shareholder Approval. The Eco Oro decision highlights the fact that the creation of a new 20 per cent shareholder (or group) is not the only basis on which a private placement can materially affect control of an issuer. In particular, the OSC has clarified that the concept of "materially affect control" can apply to private placements to groups of shareholders who are not necessarily "acting jointly or in concert" (within the meaning of applicable securities laws), if the transaction would nonetheless reasonably be expected to impact the outcome of a proxy contest. This may cause the TSX to more frequently require disinterested shareholder approval for private placements — even those that are relatively small or broadly distributed — if they are implemented during a proxy contest or might otherwise affect control.
- Potential Delays. Historically, as was the case in Eco Oro, it has been possible to obtain TSX conditional approval of, and potentially close,

a private placement before publicly announcing the transaction. Going forward, we expect that the TSX may generally require issuers to publicly announce private placements before closing in order to give other market participants an opportunity to raise concerns about the transaction with the TSX or securities regulators before the transaction closes.

- Full Disclosure. The OSC may intervene in a decision of the TSX to approve a private placement if the TSX did not have all material information available to it. The OSC relied on this factor (and others) in intervening in Eco Oro, noting that Eco Oro was "less than forthcoming" in its disclosure to the TSX. Going forward, issuers and investors would be well advised to provide all material information to the TSX to help protect the TSX's decision and the transaction from a subsequent challenge to the OSC on this basis.
- Acting Promptly. In determining that unwinding the note exchange (if not ratified by shareholders) was an appropriate remedy, the OSC placed significant weight on the fact that the dissident shareholders had no knowledge of the transaction before closing and took immediate steps, upon learning of the transaction, to challenge the TSX decision. It will be important for other stakeholders seeking to challenge tactical private placements to do the same. In particular, if the TSX requires the public announcement of a proposed private placement before closing, it will be critical for aggrieved stakeholders to challenge the transaction before it closes.

Eco Oro and the OSC's reasons also leave a number of critical questions regarding the regulation of tactical private placements in the proxy contest context unanswered, including the following:

- Standard of Proof. The unique facts in Eco Oro — most notably the relatively equal levels of support for the dissidents and the incumbent board, the support letters executed by the Noteholders just prior to the note exchange and the timing of the note exchange relative to the record date for the requisitioned shareholders meeting — made it easier for the OSC to conclude that this private placement would reasonably be expected to impact the outcome of the proxy contest (and therefore materially affect control of Eco Oro). While heightened scrutiny of private placements is expected, it is unclear what standard of proof the TSX will require in order to conclude that a transaction does or does not materially affect control of an issuer, or which party will bear that burden.
- Applicable Regulatory Framework. Securities regulators primarily regulate tactical private placements implemented in the take-over bid context under their public interest jurisdiction, guided by the principles set forth in National Policy 62-202 — *Defensive Tactics*. On the other hand, the OSC decided Eco Oro on the basis of the TSX rules, and declined to discuss whether it viewed the transaction as contrary to the public interest. Accordingly, the decision leaves open the question of whether tactical private placements during a proxy contest can be challenged under the OSC's public interest jurisdiction if they otherwise comply with the TSX's rules and, if so, whether the analytical framework would be the same as *Hecla* or whether different considerations would apply.
- Relevance of Business Purpose. At its core, the framework established in *Hecla* for regulating tactical private placements implemented in the context of take-over bids requires a balancing of the benefits of the private placement and its impact on the bid, in order to determine whether it is contrary to the public interest. In Eco Oro, the OSC's conclusion that the note exchange had minimal benefits to Eco Oro and its shareholders generally does not appear to have been a significant factor in the OSC's decision to overturn the TSX's decision (although it was relevant to the OSC's decision to impose the remedy of unwinding the transaction), likely because it was focused on whether the transaction materially affected control of Eco Oro, as opposed to a public interest

analysis. If private placements during proxy contests are regulated primarily on the basis of the TSX's rules (rather than public interest grounds), it is unclear whether, and if so how, the potential benefits of the private placement — which are of critical importance in the *Hecla* framework — would factor into the analysis.

- Jurisdiction to Unwind Transactions. In this case, the OSC concluded that it has the authority to effectively unwind a completed private placement. Prior to Eco Oro, this question had attracted considerable debate among market participants. At the same time, the OSC clearly recognized that it must proceed cautiously in unwinding completed transactions. In this case, the OSC concluded that unwinding the private placement (if not ratified by Eco Oro's disinterested shareholders) was appropriate, given its conclusion that the private placement provided minimal benefits to Eco Oro and its shareholders generally, as well as the fact that unwinding the note exchange presented no practical challenges (particularly since it was a non-cash transaction) or any adverse impact on the rights of third parties. It will be interesting to see how securities regulators, if called upon to do so, approach a situation where unwinding a private placement would potentially deprive the company and its shareholders of substantial benefits or materially adversely impact the rights of innocent third parties.
- Implications for the Take-Over Bid Context. In *Hecla*, the OSC and BCSC declined to intervene in Dolly Varden's substantial private placement on the basis that it was not, even in part intended as, a defensive tactic (even though it ultimately had that effect). However, Dolly Varden's private placement was not challenged on the basis that it materially affected control of Dolly Varden (and therefore should have required shareholder approval), notwithstanding the profound impact the private placement had on Hecla's take-over bid for 100 per cent of Dolly Varden. It remains to be seen whether the TSX or OSC will, in light of Eco Oro, determine that a private placement that would reasonably be expected to affect the outcome of a take-over bid materially affects control of the issuer and require shareholder approval as a condition to the private placement.

THE AFTERMATH OF THE ECO ORO DECISION

The dissident shareholders obtained leave to appeal the OSC's decision to Ontario's Divisional Court. However, on the eve of the hearing of the appeal, Eco Oro and the dissident shareholders, along with certain other shareholders (who collectively held approximately 66.3 per cent of Eco Oro's shares) reached a settlement that, if implemented, will, among other things, rescind the note exchange reconstitute the company's board to include representatives of the supporting shareholders and the dissident shareholders, and redistribute a portion of the CVRs to Eco Oro's other shareholders. Pending receipt of the approval of Eco Oro's shareholders required to implement the settlement, all pending litigation between Eco Oro and its shareholders has been deferred, and will be dismissed if the settlement is implemented by November 2017.

While the settlement may be a positive development for Eco Oro and its shareholders, many market participants were anxious to see whether the Divisional Court endorsed the decisions made by the OSC, in whole or in part, given their potential implications to a range of possible future transactions. With the appeal being dismissed, the OSC's decision in this matter will reign as the leading authority on the regulation of tactical private placements implemented during proxy contests. However, we expect that this will not be last chapter in the evolution of securities' regulators approach to regulating tactical private placements implemented during proxy contests, a context in which they have less experience intervening than the take-over bid context. It remains to be seen whether the Eco Oro decision will establish a general framework for regulating tactical private placements during proxy contests, or be confined to the relatively unique facts of the case. It appears that at a minimum, however,

Eco Oro will have a meaningful impact on how issuers seek to implement, and how activists attack, private placements during the course of a proxy contest or in other circumstances that could materially affect control of the issuer.

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[1] S.B.C. 2002, c. 57.

• THE BOARD'S ROLE IN CRISIS MANAGEMENT •

Andrew MacDougall, Partner and Lawrence Ritchie, Partner

Andrew MacDougall

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Sooner or later, every enterprise will face a crisis. For this reason, preparedness and oversight of crisis management is a key responsibility of an organization's board of directors. Working with the Institute of Corporate Directors and its members, our law firm issued a publication on the board's role in crisis management which is summarized below.

THE BOARD'S ROLE IN CRISIS PREVENTION

(i) Address potential problems before they develop into a crisis

A key tool for identifying and managing risks is the organization's enterprise risk management system. A board should satisfy itself that the organization has a robust enterprise risk management program and that management is active, consistent and open in its efforts to identify and manage risk.

(ii) Be sensitive to early warning signals

Even the most robust risk enterprise management system will not capture all risks that can lead to a crisis. A board needs to be alert to early warning signs of a potential future crisis, such as complacency, over-optimism or blinkered thinking that may allow a budding risk to develop into a crisis. To be effective, directors must be familiar enough with the business and the strategy of the organization to question management's approach and assumptions.

(iii) Promote and safeguard culture and reputation

The culture within an organization and its reputation with stakeholders can profoundly influence the likelihood of identifying and managing risks before they develop into crises. A good reputation means some negative issues can roll off rather than stick.

It also helps an organization enjoy the benefit of the doubt, which buys time to address the issues underlying the crisis in a deliberate fashion. Organizations with a strong culture of integrity will routinely consider risks that have the potential to become headline news. To promote and safeguard culture and reputation, boards must ensure that management is setting the appropriate "tone at the top" and managing according to the values of the organization.

THE BOARD'S ROLE IN CRISIS PLANNING

(i) Oversee and monitor management's development of a crisis plan

While a crisis may be sudden and unexpected, planning can free up a precious commodity that is lacking when an organization is dealing with a crisis — time. A board can add value by requiring management to develop and document a crisis management plan that meets the board's approval.

Key components of the crisis management plan should include:

- An effective response plan that highlights the responsibilities of identified key team members who are prepared and trained to take immediate action on all aspects of the crisis, ranging from safety through to legal and insurance.
- A communications plan including a spokesperson for the media, and appropriate leadership internally for employees.
- Monitoring of corporate communications to check that statements and other actions are not incorrectly perceived despite their best intentions.
- Consideration of the potential impact on affected stakeholder groups, including shareholders, employees, customers, business partners, regulators, and elected officials — and contact information for communicating with them.
- Contemplation of where the board would turn to for external advice if needed.
- A business resumption plan to get things back on track as quickly and efficiently as possible.

(ii) Review internal whistleblowing programs

Regulators and government agencies are increasingly offering financial incentives to whistleblowers to report non-compliance with securities laws. These programs do not require whistleblowers to report concerns internally, which increases the risk of a surprise inquiry from a regulator. Internal whistleblower programs should be reviewed to ensure that they are effective, and are perceived as being effective by employees.

THE BOARD'S ROLE IN DEALING WITH A CRISIS

(i) Provide guidance and mentorship to management

If the organization has a formal crisis management plan, management should handle the immediate needs, and directors should resist the urge to make too many demands on management's time. Instead, boards should focus on how the organization should best address the underlying problem, making any necessary changes to policies, practices and personnel, and communicating an effective response. Boards may also play an important role in acting as mentors or sounding boards for highly taxed CEOs in the middle of a crisis.

In their role as mentors, boards should help management find a balance between public relations concerns (including an apology, if one is warranted) and managing potential liability. Such communications between management and the board provide an opportunity for sober second thought by directors who, unlike management, are not immersed in the day-to-day situation.

(ii) Board's Role when Management is Unavailable, Conflicted or Otherwise Compromised

Not all crises are the result of external forces. A crisis can arise due to the death or sudden incapacity of the CEO or because the CEO is implicated by the crisis in some way. The board will need to take a more active role in such circumstances. The board may need to determine whether the CEO should be terminated or removed temporarily while an interim CEO is

appointed. If management is implicated or conflicted by the crisis, the board should create a committee of independent directors to oversee investigations and to make recommendations to the broader board on how best to proceed in response.

THE BOARD'S ROLE POST-CRISIS

It is essential when dealing with a crisis that the concluding phase include a post-crisis assessment. Such a review is necessary to take advantage of the lessons learned in identifying and responding to the crisis and to improve preparedness in the future.

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