Director Responsibilities And Liability Exposure In The Era Of Sarbanes-Oxley

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Of the many lessons that brought the Sarbanes-Oxley Act into being, one of the most important is that preventing corporate governance problems is easier than curing them.

IT IS DIFFICULT to imagine anyone, whether legal practitioner or layperson, who hasn't heard or read something about the extent of a public company director's personal liability exposure since the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"). Although some commentators state that the public company director's job has become untenably risky since Sarbanes-Oxley, others view Sarbanes-Oxley as simply confirming and supporting appropriate fiduciary obligations of public company directors. Naturally, this is more than a mere academic debate for directors of public companies themselves, who, in this environment of heightened corporate governance scrutiny, may now fear the possibility of having to dig deeply into their own pockets if they are found liable for some failure or wrongdoing.

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This article suggests that, although the specific responsibilities of outside directors of public companies have increased since Sarbanes-Oxley, that statute should not be construed as heralding any appreciably new or different theories or standards of liability for these directors. In the context of this viewpoint, the article first briefly reviews the fiduciary obligations of directors. After that, it summarizes the principal new responsibilities and any associated potential liabilities imposed on directors by Sarbanes-Oxley and regulations of the Securities and Exchange Commission ("SEC"), the New York Stock Exchange ("NYSE"), and the NASDAQ Stock Market ("NASDAQ"). Finally, the article proposes certain measures that public company directors should consider following to limit their liability exposure, particularly in the current regulatory and enforcement environment.

FIDUCIARY DUTIES OF DIRECTORS • Essential to any discussion of the liability exposure of a director is an appreciation of the fundamental and overarching fiduciary obligations attached to that corporate office. In their capacities as such, directors of a corporation can face civil liability for breaches of the fiduciary duties of care and loyalty that they owe to the corporation and its stockholders. The nature of these duties is briefly summarized below.

Duty Of Care

To fulfill their duty of care, directors must exercise an objective, reasonably prudent standard of skill and care in the discharge of their functions. If a director has special skills, she may not fail to apply them simply because the average director is not similarly gifted. On the other hand, below-average abilities will not excuse the director if she does not satisfy the standard of skill expected of the average director.

Duty Of Loyalty

Directors also owe their company a duty of loyalty; they are bound to act in good faith and in the best interests of the corporation, and must not place themselves in a position in which their duties to the corporation and their personal interests conflict. In cases of apparent breach of the duty of loyalty, the courts will not attack the transaction that is proven to be entirely fair to the corporation or if either a disinterested and informed majority of the corporation's directors approved the transaction or the transaction was approved or ratified by a majority of stockholders after full disclosure of all relevant material facts.

Business Judgment Rule

The rigor of these fiduciary duties is mitigated by the "business judgment" rule, which erects a general presumption that, in making a business decision, the directors acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the corporation. Under the rule, which operates as a standard of judicial review, the burden is placed on the party challenging a decision of the directors to establish facts rebutting that presumption. Also, so long as the directors' decision was reasonably informed and can be attributed to any rational business purpose, a court will not substitute its own notions of sound business judgment for that of the directors, unless that presumption is rebutted. The business judgment rule does not provide unlimited protection for directors. It does not, for example, protect directors if they act in bad faith, abuse their discretion, or labor under a conflict of interest in relation to the disputed transaction. Also, because the doctrine is properly invoked only when a particular action of the board is under attack, it provides no protection from claims that do not involve directorial decision-making, such as when the directors are charged with failing to exercise proper oversight through inaction. *See In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 278 (Del. Ch. 2003) (directors who "fail[ ] to make *any* good faith attempt to fulfill their fiduciary duties" and "abdicate[ ] all responsibility to consider appropriately an action of material importance to the corporation" are not entitled to protection under the business judgment rule from related liability).

Oversight And Monitoring Responsibility

In accordance with their duty of care, directors have an oversight responsibility to see that the corporation functions within the law to achieve its purposes. Before 1996, directors' oversight and monitoring duties in Delaware were subject to a "red-flag" test: if directors did not see any red flags, they could safely assume that all was well in the corporation. However, in 1996, the Delaware Court of Chancery held that "a director's obligation includes 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, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards." *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996). Before *Caremark*, ignorance could be an excuse, at least for directors' personal liability. Now, directors must take reasonable steps to detect and prevent violations of law by their companies. This includes ensuring that the corporation has in place an appropriate internal "information and reporting system" designed to enable adequate oversight by directors of the corporation's compliance with the law and business performance. *Id*.

PRINCIPAL RESPONSIBILITIES AND RESTRICTIONS IMPOSED ON DIRECTORS UNDER SARBANES-OXLEY • It would be unrealistic to imagine that any board of directors could adequately monitor all of the compliance obligations of the Sarbanes-Oxley Act, so many of the functions are undertaken by committees. The principal committees and their responsibilities are discussed below.

Audit Committee

The Independent directors are key watchdogs and gatekeepers under Sarbanes-Oxley and related corporate governance standards promulgated by the SEC, NYSE, and NASDAQ. Perhaps most emblematic of the key role of independent directors are the extensive responsibilities of audit committees of listed corporations. As a recent article stated, "[t]he reforms reserve their heaviest regulation for the audit committee, with Sarbanes-Oxley and the revised listing standards significantly empowering the committee while also laying out its numerous responsibilities in great detail." *See Developments in the Law—Corporations and Society, And Now, The Independent Director! Have Congress, The NYSE, And NASDAQ Finally Figured Out How To Make The Independent Director Actually Work?* 117 Harv. L. Rev. 2181, 2193-94 (2004). Under the NYSE and NASDAQ rules, the audit committee should generally be constituted by independent directors possessing a certain financial competence, including at least one director who qualifies as a "financial expert" within the meaning of Item 401(h) of Regulation S-K under the Securities Act of 1933, 17 C.F.R. §229.401(h).

By virtue of Rule 10A-3, 17 C.F.R. §240.10A-3, under the Securities Exchange Act of 1934 (the "Exchange Act"), which was adopted in accordance with section 301 of Sarbanes-Oxley, the audit committee must be directly responsible for the appointment, compensation, retention, and oversight of the work of any accounting firm (including resolution of disagreements between management and the auditor relating to financial reporting) engaged to prepare or issue an audit report or related work or perform other audit, review, or attest services for the corporation, and each such accounting firm must report directly to the audit committee. In addition, the audit committee must establish procedures for the receipt, retention, and treatment of complaints regarding accounting, internal accounting controls or auditing matters, and the confidential, anonymous submission by the corporation's employees of concerns regarding questionable accounting or auditing matters.

Mandatory Activities

In addition to these requirements under Rule 10A-3, NYSE Listed Company Manual section 303A.07 goes on to provide that, among other things, the audit committee must:

- At least annually, obtain and review an annual report by the independent auditor with a description of specified oversight and evaluation matters relevant to the auditing firm;
- Meet to review and discuss the corporation's annual audited and quarterly financial statements with management and the independent auditor;
- Discuss the corporation's earnings press releases, and any financial information and earnings guidance provided to analysts and rating agencies;
- Discuss policies with respect to risk assessment and risk management;
- Meet separately, periodically, with management, with internal auditors (or other personnel responsible for the internal audit function) and with independent auditors;
- Review with the independent auditor any audit problems or difficulties and management's response;
- Set clear hiring policies for employees or former employees of the independent auditors; and
- Report regularly to the board of directors.

Similar to the NYSE rules, the NASDAQ rules state that the audit committee must have the specific audit committee responsibilities and authority necessary to comply with Rule 10A-3 relating to:

- Registered public accounting firms;
- Complaints relating to accounting, internal accounting controls, or auditing matters;
- Authority to engage advisors; and
- Funding as determined by the audit committee.

NASDAQ Marketplace Rule 4350(d)(3). Beyond this, the NASDAQ rules provide that the corporation must conduct an appropriate review of all related party transactions for potential conflict of interest situations on an ongoing basis, and all such transactions must be approved by the corporation's audit committee (or another independent body of the board of directors). NASDAQ Marketplace Rule 4350(h).

Nominating Committee

As a further component of their invigorated listing standards involving director independence since Sarbanes-Oxley, both NYSE and NASDAQ require generally that new director and board committee nominations be made by independent directors (except to the extent that a third party has a contractual right to nominate directors). The NYSE rules provide that listed corporations must have a nominating/corporate governance committee composed entirely of independent directors. The nominating/corporate governance committee must have a written charter that addresses the committee's purpose and responsibilities, which, at minimum, must be to:

- Identify individuals qualified to become board members consistent with criteria approved by the board;
- Select, or to recommend that the board select, the director nominees for the next annual meeting of shareholders;
- Develop and recommend to the board a set of corporate governance guidelines applicable to the corporation; and
- Oversee the evaluation of the board and management.

NYSE Listed Company Manual section 303A.04. Similarly, the NASDAQ rules provide that director nominees must either be selected, or recommended for selection by the board of directors, either by:

- A majority of the independent directors; or
- A nominations committee composed solely of independent directors.

NASDAQ Marketplace Rule 4350(c)(4).

Compensation Committee

Both the NYSE and NASDAQ rules vest overall responsibility for approving and evaluating executive officer compensation plans, policies, and programs of listed companies in the compensation committee. Under the NYSE rule, all listed companies must have a compensation committee composed entirely of independent directors. NYSE Listed Company Manual section 303A.05. The rule stipulates that the compensation committee must have a written charter stating the committee's minimum responsibilities to:

- Review and approve corporate goals and objectives relevant to chief executive officer ("CEO") compensation, evaluate the CEO's performance in light of those goals and objectives, and either as a committee or together with the other independent directors (as directed by the board), determine and approve the CEO's compensation level based on this evaluation; and
- Make recommendations to the board with respect to non-CEO executive officer compensation, and incentive-compensation plans and equity-based plans that are subject to board approval.

The NASDAQ rules require that CEO and other executive officer compensation be determined, or recommended to the board of directors for its determination, either by a majority of the independent directors or a compensation committee composed solely of independent directors. NASDAQ Marketplace Rule 4350(c)(3).

Prohibition On Director Loans

Sarbanes-Oxley section 402 and section 13(k) of the Exchange Act, 15 U.S.C. §78m(k), make it illegal for a public corporation to make, renew, or arrange for personal loans to its directors and executive officers. (Loans outstanding on July 30, 2002 are grandfathered and may be kept in place, but only without material modification or extension of their terms.) Certain loans (including home improvement and manufactured home loans, consumer credit loans, credit under an open-end credit plan, charge cards, and margin loans not used to purchase the corporation's stock) made in the ordinary course of the corporation's business and on market terms are still allowed.

Pension Fund Blackout Period Trading Restriction

SEC Regulation BTR, 17 C.F.R. §§245.100-245.104, implemented pursuant to Sarbanes-Oxley section 306, forbids insiders of a public corporation, including directors, from "directly or indirectly, purchasing, selling, or otherwise acquiring or transferring any equity security of the issuer (other than an exempted security) during any blackout period with respect to such equity security, if such director or officer acquires such equity security in connection with his or her service or employment as a director or executive officer." A "blackout period" means any period of more than three consecutive business days during which the corporation or the fiduciary of the plan suspends the ability of at least 50 percent of the participants under all individual account plans maintained by the corporation to purchase, sell, or otherwise acquire or transfer an interest in any equity security of the corporation held in such an individual account plan.

Accelerated Filing Of Section 16 Beneficial Ownership Reports

Section 403 of Sarbanes-Oxley amended section 16(a) of the Exchange Act, 15 U.S.C. §78p(a) to require certain insiders of public corporations, including directors, to report any changes in their holdings of the corporation's equity securities within two business days. More specifically, the SEC rules require (with narrow exceptions) a Form 4 to be filed before 5:30 p.m., Eastern time, on the second business day following the execution date of any transaction that results in a change in beneficial ownership.

Improper Influence On Conduct Of Audits

Sarbanes-Oxley section 303, 15 U.S.C. §7242, makes it unlawful for a director of a public corporation to take any action to fraudulently influence, coerce, manipulate, or mislead any independent public or certified accountant engaged in the performance of an audit of the financial statements of that corporation for the purpose of rendering such financial statements materially misleading.

Rule 13b2-2, 17 C.F.R. §240.13b2-2, under the Exchange Act substantially mirrors the proscriptions of section 303. In addition, Rule 13b2-2 prohibits directors and other insiders of public corporations, in connection with audits or reviews of the corporation's financial statements or the preparation or filing of any document or report required to be filed with the SEC, from directly or indirectly:

- Making or causing to be made a materially false or misleading statement to an accountant; or
- Omitting to state to an accountant, or causing another person to omit to state to an accountant, any material fact necessary to make statements made, in light of the circumstances under which they were made, not misleading.

DIRECTOR LIABILITY • Given the extensive new or increased focus on responsibilities of public corporation directors since the enactment of Sarbanes-Oxley, it would be natural for public company directors to wonder whether they are now exposed to new or increased standards of personal liability. Of course, in connection with a director's responsibilities under Sarbanes-Oxley and related SEC, NYSE, and NASDAQ requirements, the director may face liability from specific failures to satisfy those requirements. However, these potential liabilities, as described and discussed next, do not appear to be premised upon any novel theories of director responsibility.

Liability Associated With Audit, Nomination, And Compensation Committee Responsibilities

Although Sarbanes-Oxley and the NYSE and NASDAQ listing requirements contain specific requirements to enhance the oversight function of the audit, nomination, and compensation committees, there are no specific penalties imposed upon directors for failure to observe these requirements. In most cases, the penalty for noncompliance with these requirements would be a delisting of the corporation. In a proposing release relating to proxy statement audit committee disclosures that predates Sarbanes-Oxley, the SEC underscores the general viewpoint that audit committee services should not enhance or expand the liability exposure of directors, as follows:

"In making these proposals, we do not intend to subject companies or their directors to increased exposure to liability under the federal securities laws, or to create new standards for directors to fulfill their duties under state corporation law.... To the extent the proposed disclosure requirements would result in more clearly defined procedures for, and disclosure of, the operation of the audit committee, liability claims alleging breach of fiduciary duties under state law actually may be reduced."

SEC Release No. 34-41987 (Oct. 7, 1999). In other words, a properly functioning audit committee, through its role in strengthening the internal financial information and reporting system of a corporation, reinforces the directors' monitoring and oversight performance and thereby diminishes their exposure to liability for breach of duty of care. Nothing in Sarbanes-Oxley alters this conclusion.

Liability Associated With Prohibitions On Director Loans

Personal loans by corporations to directors implicate the duty of loyalty because authorization of the loans could potentially place the directors in a situation in which their duties to the corporation and their personal interests conflict. As discussed above, Delaware corporation law would generally permit such loans to directors, provided that either the transactions are proven by the directors to be entirely fair to the corporation, or a disinterested and informed majority of the corporation's directors approved the transaction, or the transaction was approved or ratified by a majority of stockholders after full disclosure of all relevant material facts. Sarbanes-Oxley section 402 and section 13(k) of the Exchange Act, 15 U.S.C. §78m(k), generally prohibit such personal loans by public corporations. As with any willful violation of the Exchange Act or the rules and regulations thereunder, a director who willfully infringes this prohibition can face a maximum monetary penalty of $5 million and/or a maximum 20-year imprisonment term. *See* section 32(a) of the Exchange Act, 15 U.S.C. §78ff(a).

To the extent that section 402 of Sarbanes-Oxley creates a new statutory offense preempting state law that would otherwise permit such personal loans (for a discussion of such preemption, *see* generally Lyman P.Q. Johnson & Mark A. Sides, *The Sarbanes-Oxley Act and Fiduciary Duties*, 30 Wm. Mitchell L. Rev. 1149, 1210 (2004)), the statute represents an instance of enhanced liability exposure for directors. The statute does not, however, alter the theories of liability associated with being a director. The director's ordinary obligations to obey the law, and duty of care to ensure that statutory proscriptions are complied with by the corporation, remain the same.

Liabilities Associated With Blackout Period Trading Restriction

Rule 103 under Regulation BTR, 17 C.F.R. §245.103, implemented pursuant to Sarbanes-Oxley section 306(a)(2), specifically authorizes the corporation to sue any director or executive officer to recover any profits realized by them from any purchase, sale, or other transaction involving equity securities of the corporation during a blackout period in violation of Regulation BTR. If the corporation declines to bring, or diligently prosecute, such a suit within specified time periods, any holder of equity securities of the corporation may file suit on behalf of the corporation. The rule also sets forth the formula to be used in determining the amount of any such profits. Rule 103 specifically reserves the right of the SEC to seek other remedies in the event of a violation of the Regulation BTR prohibitions.

Again, although Sarbanes-Oxley section 306 and Regulation BTR erect new potential statutory offenses and associated liabilities for directors, they do not dictate any unique standard of conduct or new theory of liability for directors. The policy and theory underlying these blackout period trading restrictions (which arise out of the Enron scenario when, in the face of a plunging market price for the company's stock, the CEO liquidated personal holdings of company shares while plan blackout restrictions prevented employees from selling company shares held in their retirement accounts) are arguably "kith and kin" with those underlying established fiduciary duty of loyalty standards under state law and insider trading prohibitions under federal securities laws.

Liabilities Associated With Accelerated Filing Of Section 16 Reports

The accelerated deadlines mandated by Sarbanes-Oxley for filing changes in beneficial ownership reports under section 16 of the Exchange Act, 15 U.S.C. §78p, perhaps increase the likelihood that directors will be untimely in filing these reports but establish no new ground in terms of director liability. Unaffected by the new deadline is the fact that a director's delinquency in filing these reports would constitute a violation of section 16(a) and, in response, the SEC can institute enforcement proceedings against the director. (In addition, under Item 405 of SEC Regulation S-K, 17 C.F.R. §229.405, the corporation would be required to disclose the delinquency in its annual proxy statements and Form 10-K.)

Liabilities Associated With Improper Influence On Conduct Of Audits

Sarbanes-Oxley section 303(b), 15 U.S.C. §7242(b), provides the SEC with exclusive authority to enforce section 303 and any rules or regulations issued under that section in a civil proceeding. Consequently, there is no private right of action (although a director's breach of section 303 may implicate a private civil suit against the director for breach of fiduciary duty). Of course, a director who willfully violates the prohibitions of Exchange Act Rule 13b2-2, 17 C.F.R. §240.13b2-2 (which implements Sarbanes-Oxley section 303) can face criminal penalties under section 32(a) of that Act, 15 U.S.C. §78ff(a).

Sarbanes-Oxley section 303 and the SEC implementing rule neither alter the standards of conduct for public company directors nor, other than incrementally, expand their personal liability exposure. As stated in the SEC adopting release for Exchange Act Rule 13b2-2, the prohibitions under the new rule simply "supplement the rules currently in Regulation 13B-2, which address the falsification of books, records, and accounts, and false or misleading statements, or omissions to make certain statements, to accountants" (and with respect to which the SEC already had the power to institute enforcement proceedings). SEC Release No. 34-47890 (May 20, 2003). Rule 13b2-2 merely provides the SEC with "an additional means of addressing efforts by persons acting under the direction of an officer or director to improperly influence the audit process and the accuracy of the issuer's financial statements…including conduct that did not succeed in affecting the audit or review." *Id.* Moreover, under existing state law fiduciary duty principles, a director's negligent conduct causing materially false corporate financial reports would itself arguably constitute a breach of that director's fiduciary duty of care. (The SEC indicated in the adopting release for Exchange Act Rule 13b2-2 that it views the rule as "imposing a negligence standard" that is "consistent with the [SEC]'s enforcement actions in this area." *Id.*)

Director Bars

Sarbanes-Oxley section 305 reduced the threshold for courts in SEC actions under section 21(d)(2) of the Exchange Act, 15 U.S.C. §78u(d)(2), and section 20(e) of the Securities Act, 15 U.S.C. §77t(e), to bar officers and directors of public companies from serving as such from "substantial unfitness" to "unfitness." The Act also amended section 21C of the Exchange Act, 15 U.S.C. §78u-3, and section 8A of the Securities Act, 15 U.S.C. §77h-1 by authorizing the SEC, in any administrative cease-and-desist proceeding for violations of section 10(b) of the Exchange Act, 15 U.S.C. §78j(b), or section 17(a)(1) of the Securities Act, 15 U.S.C. §77q(a)(1), to bar persons from serving as officers or directors of any public company if their conduct demonstrates unfitness to so serve. It is open to debate whether this is an instance in which a standard of liability for directors has changed. If it does represent such a change, it is one that is incremental and not revolutionary. Moreover, there is a substantial question whether these revisions to the law translate to increased personal liability exposure for public company directors. Although there is obvious reputational harm to a public company director who is subjected to such a bar, it is questionable whether, to any meaningful extent, it is more or less personally damaging to be dubbed "unfit" than "substantially unfit."

MEASURES TO LIMIT DIRECTORS' PERSONAL LIABILITY EXPOSURE • As outlined above, the responsibilities and potential liability of the public company director under Sarbanes-Oxley are wide ranging. Nevertheless, in the absence of obvious wrongdoing (such as self-dealing and enrichment) and with some deliberate preparation, an outside director can reasonably expect to avoid significant personal liability in connection with that function. In that light, the next sections outline certain barriers that should be erected and some key steps that should be taken by public company directors to limit their personal liability exposure in the Sarbanes-Oxley era.

Traditional Director Liability "Shields"

Public company directors should ensure that the organic documents of their corporations permit the directors to be indemnified by the corporation to the fullest extent permitted by law. The directors should also make certain to maximize their liability protection under directors' and officers' ("D&O") insurance.

Delaware law, as well as standard corporate organic documents, permit or require corporations to "indemnify" (i.e., financially protect and restore) their directors and officers with respect to liabilities they may incur in the conduct of their corporate functions. Also, Delaware law expressly permits corporations to carry D&O insurance, which, subject to exclusions and conditions, can reimburse the corporation for indemnification payments made to directors and officers, as well as reimburse directors and officers directly for losses to the extent not indemnified by the corporation. Of course, indemnification and insurance may not always be effective as, for example, in the case of a penalty involving imprisonment or a sum in excess of available assets of the company or the insurance policy's limits. Also, indemnification of a director by the corporation is allowed only if the director "acted in good faith and in a common sense manner reasonably believed to be in or not opposed to the best interests of the corporation." Moreover, damage to individual reputations and the often irreversible harm to personal interests and relationships resulting from defending a compliance investigation or action cannot be indemnified or insured against.

Delaware law provides that the certificate of incorporation of a corporation may contain "exculpation" (or liability-excusing) provisions that, apart from certain exceptions (including breach of the duty of loyalty, failure to act in good faith, intentional misconduct, or knowing violations of law), eliminate or limit the "personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director." *See* Del. Code Ann. tit. 8, §102(b)(7). Of course, exculpation provisions would not protect directors from actions brought against them by non-stockholder third parties.

CONCLUSION • Unquestionably, the duties and responsibilities of public company directors have expanded since the enactment of Sarbanes-Oxley. In addition, public company directors must now discharge their functions in an environment of heightened scrutiny by legislators, regulators, prosecutors, media, and the investing public. This does not mean that the standards of required conduct and personal liability for public company directors have increased. It does mean, however, that directors will not easily or lightly escape the consequences of failing to observe their fiduciary duties. As E. Norman Veasey, former Chief Justice of the Delaware Supreme Court, recently stated:

"[T]he WorldCom and Enron settlements are not harbingers of new exposure of directors to personal liability by reason of any change in statutory or case law at either the state or federal level. Indeed, the law continues to be that conscientious directors who exercise due care, good faith, and independent judgment in the honest belief that they are acting in the best interests of the corporation and its stockholders should be protected by the courts. The time-honored business judgment rule is indeed alive and well under state law. Similarly, good faith and diligence should be a safe harbor under federal law. Courts are not ratcheting up new pitfalls for conscientious directors. I firmly believe that Delaware law, the Sarbanes-Oxley Act, and the self-regulatory organization rules have not eroded the business judgment rule. If directors act reasonably and in good faith, they will be protected from liability."

E. Norman Veasey, *A Perspective on Liability Risks to Directors*, 29 NACD—Directors Monthly No. 2 (Feb. 2005), available at http://nacdonline.org/images/liability/Veasey-Feb05DM.pdf. In sum, the responsibilities and obligations of the public company director since Sarbanes-Oxley, although multitudinous and replete with potential liability, can be safely assumed and discharged if done so in good faith and with diligence and care.