

ENSURE YOUR BOARD IS PICTURE-PERFECT

Olympus case spotlights need for directors to show diligence and be aware of economic, personal conflicts

We're only a few weeks into 2012, and you're probably still working your way through your list of business resolutions. But if reviewing your board of director appointments and brushing up on related skills is anywhere close to the top of your to-do list, Japan's Olympus Corp. just gave you a reason to process that list a bit faster.

Earlier this month, the company filed a \$47 million lawsuit against 19 current and former executives and board members (including its current president and internal auditors) that alleges there was an accounting scheme designed to hide losses going back more than a decade.

The suit accuses Olympus directors of inflating fees to advertisers on the \$2.1 billion acquisition of London-listed Group Plc in 2008 and overpaying for the purchase of three Japanese companies.

According to the plaintiffs, the moves were designed to artificially increase goodwill that could then be written off to mask investment losses.

A panel investigating the matter pointed to a "yes man" culture at Olympus and — wait for it — corporate directors who failed to stop "a rotten core of executives" from duping auditors, regulators and investors. In addition to the litigation, the company also faces criminal investigations in Japan, the U.S. and the U.K., making Olympus an easy and likely now undervalued M&A target.

Zoom in on the rules...

First, the good news. In general, "business judgment" rules provide a degree of



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protection to individual board members for their corporate decisions.

Directors are generally presumed to have satisfied their fiduciary duties in making a corporate business decision, provided they are "disinterested" directors acting in "good faith" after "reasonable investigation" who "honestly and reasonably" believe their choices will "reasonably benefit" the corporation.

Fail to tick any (or all) of these boxes, though, and the burden shifts to directors to justify the fairness of their decisions for and to the corporation — and that shift can get expensive quickly.

Before you write off the Olympus case as extreme, let's tighten the focus on some critical lessons this litigation offers you as a director.

Let's start by making it clear that "disinterested" doesn't mean "not interested." There's no time like the present to bolster your board's collective awareness of economic and personal conflicts.

At a minimum, all board members should review and sign a regularly updated corporate conflict of interest policy.

Beyond that, it's impossible to overstate the notion that "diligence" requires ... well

... diligence. What does that mean, exactly? Here's a quick snapshot of what to do:

- Attend all board and committee meetings for the board or boards on which you serve.

- Receive and review detailed information in advance about matters set for discussion — particularly financial reports and financial statements.

- Ask why senior management recommends a particular action, and assess the consequences — good and bad — such an action promises to bring.

- Use your own judgment when voting — don't simply follow the crowd.

- Review all internal controls, written policies and procedures that protect non-profit organizations from error, fraud and embezzlement.

- Participate in strategic planning activities that assess and plan for the future.

- Review board or committee minutes to ensure meetings and votes are properly documented and recorded. If there are errors in minutes, seek clarification or changes.

- Ask whether the organization has a directors and officers liability policy, and learn whether the directors and officers are indemnified from liability.

Here's to making 2012 an outstanding year for corporate governance — or at least avoiding the need for a photo finish!

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