

EVALUATING THE ROLE OF INDEPENDENT DIRECTORS IN CORPORATE GOVERNANCE

HELPING COMPANIES STAY COMPLIANT

Miguel Ferreyra de Bone, Head of US Operations for Acrux Partners, an ESG advisory firm, recently sat down with Vic Duva, President of CT Corporation Staffing, Inc., to discuss the role of the Independent Director in corporate governance in order to ensure legal compliance and brand protection. Their discussion follows:



“Our main duty and responsibility as an Independent Director/Manager is to prevent otherwise solvent special purpose entities (SPEs) from seeking bankruptcy protection, particularly in instances when related or parent entities become insolvent.”

M: Vic, you have been in this industry for over 30 years and are one of the most prolific and well known Independent Directors so if anyone can answer this question for me, I assume it would be you; what is the role of an Independent Director?

V: Thank you, Miguel. Independent directors serve on boards of special purpose entities or other business entities to safeguard assets. Our main duty and responsibility as an Independent Director/Manager is to prevent otherwise solvent special purpose entities (SPEs) from seeking bankruptcy protection, particularly in instances when related or parent entities become insolvent. Additional duties involve other “Material Actions” as outlined in the governing document. The governing document could be an LLC Agreement, Certificate of Incorporation, or Bylaws. The most common “Material Actions” requiring our consent occur if the SPE intends to dissolve, liquidate, consolidate, merge or sell all of the assets of the entity. Other actions which may require our consent is if the company wishes to engage in any other business activity or to approve a proposed amendment to its governing document.

M: Then the existence of an Independent Director is advantageous to mitigate many transactional risks. Can you explain when and why an Independent Director is needed?

V: Commonly, the SPE structure is employed by lenders in an attempt to protect their loan collateral from becoming subject to the risks of bankruptcy. Part of this structure involves appointing an Independent Director. The risk of a voluntary bankruptcy is limited by this requirement.

Lenders also typically require the use of Independent Directors when the transaction or loan is in excess of \$15M. However, we have provided Independent Directors on loans as low as \$8M when the Rating Agency requests the lender to do so.

More generally, the SPE structure is utilized for one of three types of transactions: a property specific or large loan transaction, a pool transaction (e.g. a securitization), or a credit lease transaction. Also known as “bankruptcy remote” entities, SPEs have covenants and restrictions to protect the underlying SPE assets from bankruptcy, including the appointment of Independent Directors, managers or trustees. The hallmark of an SPE structure has been its bankruptcy remoteness — restrictions of its activities, including its ability to incur debt, dissolve or file for bankruptcy. To maintain the bankruptcy remoteness, secured creditors look to the independent director, manager or trustee as the objective or independent vote to prevent otherwise solvent SPE’s from seeking bankruptcy protection, particularly in instances when related or parent entities become insolvent.

SPE is not the only term used for a bankruptcy remote entity. Depending on the jurisdiction they can also go by the interchangeable terms SPV (special purpose vehicle) or FVC (financial vehicle corporation). Any of these types of entities are likely to require an Independent Director as part of their covenants.

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M: I imagine that there are industries that utilize the SPE structure and therefore Independent Directors more than others, is this true?

V: Yes, actually in the following order: Real Estate (office buildings, hotels, shopping centers and malls, resorts, senior housing, and military housing), Energy (wind farms and power plants), Financial Services (investment companies), and Transportation (rail and airline). These are industries where a business is undertaking something — building a hotel, buying more real estate, or something similar — that requires an SPE for protection. Of course this list isn't exhaustive and other industries can on occasion require an Independent Director as well.

M: That “short-list” seems to represent a wide range of industries that require the services of an Independent Director. When providing this service, how are these industries served differently?

V: While it's important for the Independent Director to have experience and insight into each of these industries, they are served in the same manner since the duties of the Independent Director do not vary based on the type of asset. An Independent Director's duties are defined by the SPE provisions outlined in the governing document of the entity. Independent directors should share their industry-specific knowledge, but focus on quality for all customers regardless of industry.

M: I would assume that it's important to look for certain attributes in an Independent Director. What differentiates providers and why are these qualities important?

V: Several characteristics differentiate Independent Directors:

- **Response time.** In the time-sensitive duties of an Independent Director, the entity wants to know appointment of the Independent Director and closing can take place quickly thereafter. The customer needs to be able to contact a provider that can appoint an Independent Director that same day — regardless of the number of entities involved in the transaction.
- **Trustworthiness** with a solid reputation. You have to consider how long the provider has offered Independent Directors. Look for a provider that has been doing this work a long time. When doing your due diligence on providers it is very important to find out how long the provider has offered Independent Director services.
- **Experience of the personnel.** Not all Independent Directors are created equally. It is important that the provider and its appointed employees have specific experience and knowledge handling bankruptcies. Find out the background of the providers employees. Do they have a legal, managerial, or real estate background, and what experience matches best with the needs of the SPE? Consider the breadth of the provider's capabilities. Can they also offer Process Agent

services? Since most Structured Finance transactions require many Contract and/or Loan Agreements, can it provide the Agent for Process for those agreements?

M: Thank you very much for sitting down with me and explaining the role of an Independent Director. Would you like to share any final thoughts?



“Several characteristics differentiate Independent Directors: response time, trustworthiness and experience.”

V: The customer should be as specific as they can in the questions they ask when choosing a provider. It's important to ask for the policies and procedures from the provider on the handling of a bankruptcy request from start to finish. Some questions to ask include: What documentation will be requested? Do they team with their own outside counsel for a second opinion – and is there an additional charge? Pricing is an important component. Find out if the provider charges per-director or per-entity? Do they charge for additional positions, such as a Springing Member? Are setup or execution fees involved? What about FedEx charges?

Also, be certain the provider meets and exceeds all Lender and Rating Agency requirements. You don't want to discover that the Lender and/or Rating Agency does not approve of the Independent Director you selected and instead suggests one of their approved vendors.

To optimize the value of an Independent Director appointment, all of these factors should be considered.

LEARN MORE

To learn more about CT's [Independent Director Services](#), visit us today or call (844) 701-2064 .

Biographies

Vic Duva is President of CT Corporation Staffing, Inc., a subsidiary of CT Corporation System and has over 30 years' experience in the industry working at CT, 12 of them as an Independent Director. As the largest independent director provider in the U.S., CT Corporation's Staffing Division is renowned for its high quality, customized services.

Miguel Ferreyra de Bone is the Head of US Operations and Business Development at Acrux Partners. Acrux is a global Environmental, Social, and Governance (ESG) advisory firm that focuses on how funds can integrate ESG into their investment practices, they also develop and coordinate Impact Investing opportunities in the LATAM region for their client funds. Additionally, Miguel engages in economic research with the Universidad del Salvador in Buenos Aires and contributes to *Ámbito Financiero*, the leading financial newspaper in Argentina, as an economist focused on Latin America.