Duty of Candor: The Essential Tool for Corporate Oversight

Yu-Hung Chen

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Keywords: fiduciary duty, duty of care, duty of loyalty, duty of candor, duty of disclosure, material information, germane facts, complete candor, corporate governance, internal corporate governance mechanism, corporate managers, supervisors, independent directors, audit committee, oversight function, injunction, mergers and acquisitions.

*Yu-Hung Chen, graduate student of National Cheng Kung University Dept. of Law.

The Author deeply indebted to Professor Chun-Jen Chen for his advices and help to correct the errors in this article. Also thanks for two anonymous commentators who made invaluable advices to various draft of this article. Any improper expressed or errors perpetrated herein are solely those of the Author.
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摘要

长久以来，公司内部治理机制因资讯问题而不彰。传统上，公司法仅要求公司经营者依法行事，造成了其对於资讯揭露之消极回应，然而倘若经营者不愿提供充分资讯，任何相对应之监控机制设计皆属枉然。当一善意且尽责之公司经营者，在进行商业决策、追求达成公司之最佳利益时，依其注意义务本即负有充分蒐集资讯之责，然而，部分依法须交由公司股东决定之事项，於进行股东表决程序之同时，最基本的资讯要求却不受重视，因此股东们在资讯不充分，甚或是被误导之投票状况下投票，时有所闻，相类似之情况，亦常见於在有利害关系衝突之事項上。相對於此，在美國法上，经由一连串之判决背认，上位之忠实义务下，尚有一独立之下位义务－坦诚义务，藉之消彌既存之资讯管道缺陷。该义务可区分為两大部分：揭露義務與完全坦誠義務，分别适用在不同之情形與公司内部組織間，而揭露義務多與證券交易法之資訊公開要求相结合。因此若欲引进此一新确立之独立義務类型，当以我国公司法第二十三条第一项之忠实义务条款为基础较为妥適。唯有忠实义务乃存在於公司与公司负责人二者间，但如前所述，本法却有诸多重要事项，仍需交予股东代公司进行决定，故可推得在此类事项上，公司负责人
對於股東亦負有公正義務，故本文認美國法下對於坦誠義務之分類方式殊值參考。此外，為求可發揮各內部治理組織之預期效用，亦宜肯認公司內部組織間，互負坦誠義務，換言之，公司經營者對於監察人或審計委員會負有坦誠義務，而公司經營者彼此間，尤於一般董事對於獨立董事，或是因有利害衝突而需迴避投票之董事，對於其他董事間，亦當負有該義務。

當公司經營者，對於某一事項須以股東之意見為依時，公司經營者當揭露相關之重要資訊，而所謂之重要資訊，亦即公司經營者現所掌有，且為一理性股東認屬重要者。此外，當公司經營者僅例行而直接地對公司股東公開消息時，當確保資訊之正確與真實。另一方面，坦誠義務雖屬改善監控機制之關鍵工具，然為求公司監察，與「經營與所有分離」概念下專業經營，二者間之衡平，公司經營者所負擔之坦誠義務，在揭露之事項上當有所限縮，本文以為，此時宜以現行證券交易法第十四條之三與第十四條之五所定之事項為依，且應為公平與充分之揭露，亦即包含已可見或未浮現之財務上或非財務利益關係；而對於違反坦誠義務之救濟措施，則可藉由向法院請求定暫時關係假處分以保護現狀，避免更重大之傷害。
Abstract

For the long time, the internal corporate governance mechanisms are severely impaired because of information access. Traditionally, the corporate law only asks corporate managers to follow the duties and causes their passive response of information disclosure. Without sufficient information from corporate managers, any oversight mechanism is in vain. Besides, in order to achieve the best interest of the corporation, faithful and diligent corporate managers should collect sufficient information before their business decisions. However, when the corporate law delegates the power to shareholders to decide in certain events, it seems to neglect the basic demand of information. Shareholders may make misled votes because of information lack, especially in the conflict-of-interest events. On the contrary, in the US, through a series of cases, the court recognized the fiduciary duty of candor to be an independent and affirmative one which effectively cured the information access defects.

The duty of candor derived from fiduciary duty, and its context could be divided into duty of disclosure and obligation of complete candor which apply to different events and governance bodies. And the duty of disclosure usually corresponds to disclosure demand of the securities regulation. Hence, the best basis for duty of candor in Taiwan is Article 23, Paragraph 1 of the Company Act. Although the fiduciary duty exists between a corporation and the person-in-charge of corporation, the Act still assigns shareholders to use their votes to make decisions on behalf of the corporation for certain events. It's reasonable to conclude that in many cases actually the one whom corporate managers owe duty of candor to is shareholders. Since the corporate managers, the supervisors, and the audit committee all owe fiduciary duty to their corporation, they should own duty of candor to shareholders, too. Besides, in order to have the expected function of
every corporate governance body, it’s necessary to recognize the duty of candor existing among bodies. Here, this article contends the categorizations of duty of candor in the US should be adopted into Taiwan's corporate jurisprudence. When corporate managers seek to shareholders actions, they need to disclose material information to shareholders. The definition of material information is what corporate managers possess and a rational shareholder might think to be important. Otherwise, while corporate managers communicate publicly and directly with shareholders, they should guarantee the accuracy and veridicality of information. When corporate managers communicate with shareholders directly and publicly, they shall ensure the accuracy of information.

On the other hand, duty of candor is an essential tool to improve the oversight function, and the corporate managers owe duty of candor to supervisors and audit committee. However, to balance the oversight function and the demand under the “separation of control and ownership”, professional management, the objects of duty of candor should be limited to these matters which are listed on Articles 14-3 and 14-5 of the Securities and Exchange Act. Here, the demand of disclosure should be fairly and fully. It means all of the financial or non-financial interest whether it showed or uncovered through the meetings. And the major remedies for the breach of duty of candor are court’s injunction to avoid the further actions or damage and protect the status quo.