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## **WHAT PRIVATE EQUITY FIRM DIRECTORS NEED TO KNOW**

**11:15 AM**

Paul Broude, Foley & Lardner LLP

Sean Eagle, American Capital Strategies

Jim Reddinger, UBS Securities, LLC

Allen (Sandy) Williams, Foley & Lardner LLP



**PAUL D. BROUDE**  
PARTNER  
FOLEY & LARDNER LLP

Paul Broude is a partner in Foley's Transactional & Securities and Private Equity & Venture Capital Practices, and the Emerging Technologies and Life Sciences Industry Teams. He represents a wide range of publicly and privately held companies, entrepreneurs and private equity funds in technology and other business ventures.

Mr. Broude's experience includes:

- Representing issuers, investment banking firms and private equity investors in equity and debt financings
- Representing buyers and sellers in merger and acquisition transactions, including acquisitions of publicly held companies
- Representing management groups and boards of directors in "going private" transactions
- Representing private equity firms in fund formation, investing, compliance issues and day-to-day matters
- Structuring and negotiating licensing arrangements and strategic partnerships

Mr. Broude is a frequent speaker on issues related to emerging businesses, including financing alternatives, securities issues, mergers and acquisitions, and domestic and international licensing and joint venture arrangements.

Mr. Broude is a graduate of the Harvard Law School (J.D., *cum laude*, 1982) and Brandeis University (B.A. *magna cum laude*, 1979).

In 2004, Mr. Broude was named a *Massachusetts Super Lawyer*. Mr. Broude also serves as a director, and was the founding chairman of, the Friends of the Charlestown Navy Yard.



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**SEAN EAGLE**  
PRINCIPAL  
AMERICAN CAPITAL  
STRATEGIES

Sean Eagle joined American Capital Strategies in 2001 as an Associate in the Washington, D.C. office. He began his career as an audit associate in the Washington, D.C. office of Deloitte & Touche, focusing on the financial services industry. He subsequently joined ePlus, a provider of Internet-based, business-to-business supply chain management solutions, as a business analyst. Upon graduating from business school, Mr. Eagle worked as an associate in the Financial Institutions Group of Goldman Sachs. He has served on the Board of Directors for Western WATS, Financial Asset Management Systems and Affordable Care. He has also served as an observer on the Board of Directors for Hopkins Manufacturing, BondDesk Group and Tanenbaum-Harber/Thesco Benefits. Mr. Eagle received an M.B.A. in finance from the Wharton School of the University of Pennsylvania, where he was a Palmer Scholar. He received a Bachelor of Science in Commerce, with distinction, from the McIntire School of the University of Virginia.



**JAMES REDDINGER**  
EXECUTIVE DIRECTOR  
UBS SECURITIES LLC

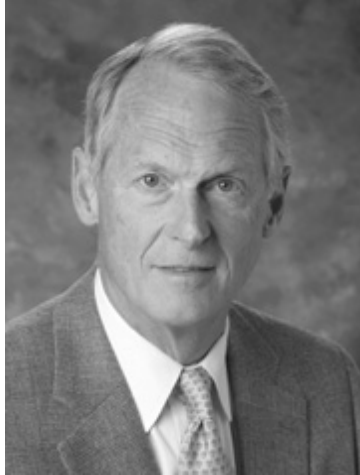
James C. Reddinger is a Director in UBS' Chicago Investment Banking office. Mr. Reddinger covers a wide variety of Midwest regional and diversified industrial companies and has significant capital raising and strategic transaction execution experience..

Mr. Reddinger's corporate finance transaction experience includes high yield debt, investment grade debt, and equity as well as private placements and bank financings. Selected recent corporate finance executions include: high yield notes for United Rentals, Jacuzzi Brands, Fedders North America, B/E Aerospace, H&E Equipment, and Trimas; common equity for Chicago Bridge & Iron, United Rentals, and B/E Aerospace; investment grade notes for Deere & Co., Cargill, and Goodyear Tire and Rubber; and private placements for Spartech Corporation, International Education, University Access, and ECollege. Mr. Reddinger has also structured a number of leveraged and investment grade bank facilities.

Mr. Reddinger's M&A transaction experience includes corporate acquisitions, divestitures, and hostile defense advisory. Selected recent M&A transactions include: Illinois Tool Work's divestiture of its consumer products businesses (Pecor, West Bend and Florida Tile); United Rentals' acquisition of National Equipment Services' Trench Shoring Business; Edgewater Technology's divestiture of its ClinForce, Strategic Legal Resources, and Staffmark businesses, and; Deere & Co.'s acquisition of Timberjack

Prior to joining UBS, Mr. Reddinger worked at Credit Suisse First Boston for six years, most recently as a Vice President in its Global Industrial and Services Group. Mr. Reddinger was previously a Research Associate with Furash & Company, a strategic consulting firm

Mr. Reddinger received an A.B. cum laude in Philosophy from Harvard University and an M.B.A from the J.L. Kellogg Graduate School of Management at Northwestern University.



**ALLEN W. WILLIAMS JR.**  
PARTNER  
FOLEY & LARDNER LLP

Allen (Sandy) Williams is a partner with Foley & Lardner LLP, where he is chair of the Energy Industry Team and the former chair of its Regulatory Department. He is also a member of the firm's Transactional & Securities Practice and its Energy Regulation Practice. Mr. Williams has been substantially involved in energy industry matters since 1972. Since 1985, Mr. Williams has concentrated his practice in the developing area of energy industry regulation.

Mr. Williams has lectured on utility law at the University of Wisconsin Law School and has been involved throughout the development of the complex statutory and regulatory environment in various states that has spawned the independent power industry and is changing the architecture of the electric energy market.

Mr. Williams received his undergraduate degree, *cum laude*, in economics from Harvard University in 1966. In 1970, he received his law degree and his MBA from Columbia University. At Columbia University, he was a member of the board of editors of the *Columbia Law Review* and was a Samuel Bronfman fellow of the Business School. He acted as legal counsel to Wisconsin Governor Patrick J. Lucey from 1971 to 1973.

Mr. Williams is listed in the current edition of *The Best Lawyers of America*.

A frequently requested speaker on various energy issues, Mr. Williams has recently appeared on MSNBC News, MSNBC's "Hardball with Chris Matthews," FOX News "Special Report with Brit Hume," Bloomberg News, and CSPAN, talking about various issues related to the collapse of Enron and its potential implications for the energy industry and financial markets.

# THE SIXTH ANNUAL NATIONAL DIRECTORS INSTITUTE

## Duties of Directors

Paul D. Broude, Partner  
Foley & Lardner LLP

Sean Eagle, Principal  
American Capital Strategies, Ltd.

James Reddinger, Executive Director,  
UBS Investment Bank

Allen (Sandy) W. Williams, Jr., Partner  
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## Overview

- Board Responsibilities
- Pitfalls for Private Equity Portfolio Boards
- Protective Measures
- Sarbanes-Oxley

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## Board Responsibilities

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## Board Responsibilities

- Board of Directors is Responsible for Managing the Business and Affairs of Its Company
  - Approving Leases, Contracts or Other Material Agreements
  - Approving Fundamental Operating Financial and Corporate Plans, Strategies and Objectives
  - Authorizing Sale of Company Assets and Other Strategic Transactions

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## Board Responsibilities

- Managing the Business and Affairs of Its Company (*continued*)
  - Evaluating Performance of the Company and its Management
  - Selecting, Evaluating and Fixing Compensation of Corporate Officers
  - Reviewing and Approving Management Plans
  - Adopting Policies of Corporate Conduct

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## Board Responsibilities

- Evaluating the Overall Effectiveness of the Board Itself
  - How Well the Board Carries Out Its Functions
  - How Well Prepared the Directors Are to Fulfill Their Obligations

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## Board Responsibilities

- The Directors Owe Certain Fiduciary Duties to Their Company
  - Duty of Care
  - Duty of Loyalty

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## Board Responsibilities

- Duty of Care:
  - Requires Directors to Keep Themselves Informed About the Affairs of the Company and be Assured that They Have All Reasonably Available Information When Making Decisions
  - Directors are Expected to Act on an Informed Basis, in Good Faith, with the Care an Ordinary Prudent Person in a Like Position Would Exercise and in a Manner the Directors Believe to be in the Best Interests of the Company

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## Board Responsibilities

- Duty of Loyalty
  - Requires Directors to Uphold Their Fiduciary Duties to the Company and its Stockholders by Placing the Company's Interests Ahead of Their Own
  - Directors Should Not Use Their Corporate Position to Make a Personal Profit or Gain or for Other Personal Advantage
  - Two Specific Considerations:
    - Conflict of Interests
    - Corporate Opportunity

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## Board Responsibilities

- Business Judgment Rule
  - Qualifies the Duty of Care
  - Protects Disinterested Directors from Personal Liability to the Company and Its Shareholders, Even if a Corporate Decision the Director Approved Turns Out to be Unwise or Unsuccessful

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## Board Responsibilities

- Business Judgment Rule (*continued*)
  - A Court Will Not Substitute Its Judgment for that of a Director, if the Director:
    - Acted in Good Faith
    - Was Reasonably Well Informed; and
    - Rationally Believed the Action Taken Was in the Best Interests of the Company

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## Pitfalls For Private Equity Portfolio Board

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## Pitfalls For Private Equity Portfolio Board

- Being Too Involved vs. Not Being Involved Enough
  - Avoid Managing Portfolio Company's Day-to-Day Operations
  - Remain Actively Involved in Decision Making

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## Pitfalls For Private Equity Portfolio Board

- Conflicts of Interests
  - Between Private Equity Firm's Interests and Portfolio Company's Interests
    - Acquisition Decisions
    - Executive Compensation
    - Management Fees and Other Arrangements
    - Valuation and Terms of Additional Financing Provided By Private Equity Firm
  - Between the Various Discrete Funds Managed in Parallel by The Private Fund Manager

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## Pitfalls For Private Equity Portfolio Board

- Conflicts of Interests (*continued*)
  - Between Various Portfolio Company's Interests
    - Acquisition Decisions
    - Commercial Transactions Between Different Companies Represented by a Director

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## Pitfalls For Private Equity Portfolio Board

- Blurring the Line Between Private Equity Firm and Portfolio Board – Piercing the Corporate Veil
  - Using Portfolio Company as a Façade for the Operation of the Corporate Parent or Related Company
  - Failure to Keep Separate Corporate Records for Portfolio Company and Private Equity Firm
  - Failure to Adhere to Corporate Formalities
    - Board Meetings
    - Authorizing Resolutions
    - Electing Directors

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## Pitfalls For Private Equity Portfolio Board

- Inappropriate Disclosure of Material, Non-public Information – Violation of Regulation FD
- Inappropriate Use of Material, Non-public Information – Insider Trading

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## Pitfalls For Private Equity Portfolio Board

- Changing Fiduciary Duties in the “Zone of Insolvency”
  - Duties Change When Portfolio Company Nears Insolvency
    - Duties Run to Company’s Creditors
    - Ordinary, Routine Corporate Decisions Become Subject to Additional Scrutiny

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## Protective Measures

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## Protective Measures

- Document Decision Making and Corporate Approval Process Carefully
  - Board Minutes
    - Must be More than Mark-up of Last Year's Minutes
    - Balance Between No Record of Deliberations and Keeping Transcripts
    - Reflect Substance and Process of Meeting

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## Protective Measures

- Use Independent Directors
  - Conflicts of Interests
  - Executive Compensation
- Use Outside Experts
  - Mergers/Acquisitions
  - Executive Compensation
  - Other Substantial Transactions

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## Protective Measures

- Know Where Your Duties Lie
  - When Acting as Partner/Manager of Private Equity Firm
  - When Acting as Director of Portfolio Company
  - When Serving on Multiple Boards Simultaneously
  - When Portfolio Company is in “Zone of Insolvency”

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## Protective Measures

- Avoid “Deputization” Issues
  - Look Out for Interests of All Shareholders, Rather than Serving on the Board as a Representative or “Deputy” of the Private Equity Firm
  - Carefully Consider the Kinds of Communication You Have with Colleagues at the Private Equity Firm – Avoid the Appearance of Deputization

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## Protective Measures

- Time and Effort
  - Ensure You Have Adequate Time to Fulfill Your Obligations
    - Attending Meetings
    - Communication Between Meetings
    - Reviewing Materials
    - Carefully Considering Decisions
  - Put Forth the Time and Effort Required
    - Experts Estimate between 150-200 hours annually

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## Protective Measures

- Process
  - The Legal System Will Judge You Based on the Soundness of the Process You Undertook
    - Whether Independent Directors Approved Related-Party Transactions
    - How Many Meetings the Board Held to Discuss an Issue
    - How Much Time the Board Spent Discussing Certain Issues

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## Protective Measures

- Process (*continued*)
  - What Materials Were Reviewed
  - Whether the Board Received Required Materials Sufficiently in Advance of Board Meetings
  - How Many Questions the Directors Asked

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## Protective Measures

- Specific Concerns
  - Piercing the Corporate Veil
    - Maintain Corporate Records Appropriately
    - Follow Corporate Formalities
    - Ensure Directors and Officers Act on Behalf of the Company They are Serving
  - Management's Failure to Raise Issues
    - Create a Whistle-Blower System for Employees

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## Protective Measures

- Specific Concerns (*continued*)
  - Regulation FD
    - Create and Follow Certain Procedures for Disclosing to Others Within the Private Equity, Information You May Learn as Director of a Portfolio Company
    - Adhere to Such Procedures in Every Instance

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## Protective Measures

- Specific Concerns (*continued*)
  - Insider Trading
    - Create and Follow Certain Procedures to Ensure that Partners and Employees of Private Equity Firm Do Not Intentionally or Accidentally Decide to Buy or Sell Shares of Public Portfolio Company's Stock While Possessing Material, Non-Public Information
    - Adhere to Such Procedures in Every Instance

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## Sarbanes-Oxley

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# THE SIXTH ANNUAL NATIONAL DIRECTORS INSTITUTE

## Sarbanes-Oxley

- Why Adhere to Sarbanes-Oxley (“SOX”)?
  - Risk Management
  - May be Required in Future
    - By Public Companies Doing Business with Private Companies
    - By Law

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## Sarbanes-Oxley

- Why Adhere to SOX? *(continued)*
  - Importance to Exit Strategy
    - Going Public
    - Sales to Third Parties

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## Questions?

Paul D. Broude, Partner  
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