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## Duties of a Bankruptcy Officeholder Under KSA's Bankruptcy Law

As more companies take advantage of financial reorganization under the KSA Bankruptcy Law (the **Law**), bankruptcy trustees, called "Officeholders," will notice an open question for reorganizing companies: Is the Officeholder a rubber stamp for the debtor's management—or does the Officeholder owe a duty to exercise independent judgment? While the Law offers no explicit provisions governing this question, separate provisions of the Law and implementing regulations, when read together, give Officeholders, judges, and lawyers some guidance.

### THE LAW

Law Article 69(1) provides that in a Chapter Four Reorganization, the Debtor "shall continue to manage its business and activities during the period of the Financial Restructuring Procedure *under the Officeholder's supervision*." While the precise standard of care governing "the Officeholder's supervision" is not set forth in the Law or the Bankruptcy Law Implementing Regulations (the **Regulations**), the Officeholder's duties can be inferred from other statutory provisions.

The Law prescribes for a wide range of Officeholder duties. Some are ministerial, such as inviting creditors to submit claims or announcing voting deadlines (see Articles 56 and 77). Some are analytical, such as expressing an opinion to the Court as to whether a reorganization proposal carries a likelihood of approval (Article 75(3)). Some duties require the Officeholder to act as advocate (as when asking the Court to remove current management under Article 69(2)). Central to the reorganization process, under Article 70 a reorganizing debtor must obtain written approval from the Officeholder to prepare a reorganization proposal, obtain funding, repay debts, buy insurance, retain a lawyer or accountant, or affect a sale outside the ordinary course of business, among other things.



## THE CODE OF PROFESSIONAL CONDUCT

The Code of Professional Conduct for Officeholders and Experts does not specifically prescribe the level of independent judgement required of Officeholders. However, Article (1) of the Code of Professional Conduct sets forth the goal of “enhancing confidence in the bankruptcy procedures.” Article (3) requires the Officeholder to exercise objectivity, transparency, professional competence and due diligence. Article (7) requires the Officeholder to adopt policies to define relationships with other parties, become familiar with the debtor’s business, learn about relevant sectors and subject matter, obtain the necessary expertise and knowledge about the debtor’s business, and deploy a sufficient number of competent personnel to perform services relevant to the reorganization. Article (8)(a) prohibits Officeholders from accepting gifts from parties, and Article (9)(a) requires Officeholders to avoid “being involved in a financial relationship with the debtor.” While these provisions do not expressly provide that an Officeholder must exercise independent judgment when carrying out the Officeholder’s statutory and regulatory duties, the emphasis on objectivity, independence, transparency, and professional competence all imply that an Officeholder must be capable of and willing to exercise independent judgment, and not merely act as a rubber stamp for the debtor or its management.

## EXERCISING “DUE CARE”

Article 57 provides the general gloss for the Officeholder’s activities: “The Officeholder shall supervise the activity of the Debtor during the Financial Restructuring Procedure period to verify the fairness of the Procedure, and implement the Plan in such way as to ensure speed of performance and provide the necessary protection to the interests of those affected by the procedure in accordance with the provisions of the Law.” This implies a duty to work for the benefit of affected stakeholders. Articles 70(3) and 85(3) provide that the Officeholder’s powers must be exercised with “due care.”

“Due care” is not defined in the Law or the Code of Professional Conduct, but Article 50(3) of the Law provides one clue to its meaning: “The Officeholder must exercise the necessary duty of care to safeguard the interest of Creditors.” Moreover, under Regulations Article 92, Officeholders must comply with “all applicable laws, regulations and rules.” Taken together, Law Article 50(3) and Regulations Article 92 suggest that the applicable standard of “due care” is a fiduciary duty similar to standards of care governing auditing, accounting, and law firms.

In countries such as the United States, trustees owe fiduciary duties to their creditors, and audit firms are required to evidence a reasonable level of skepticism when presented with information by management. *See, e.g., In re Cendant Corp. Securities Litigation*, 130 F.Supp. 2d 585, 607 (D.N.J. 2001). This seems a workable framework for the execution of an Officeholder’s duties. Given the Law’s charge to Officeholders—“to safeguard the interest of the creditors”—and the objectivity, transparency, and competence goals set forth in the Code of Professional Conduct, an argument can be made that the Law does not permit an Officeholder to act as a mere rubber stamp; Officeholders must exercise independent judgment.



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