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Fiduciary game rules and the governance nature in the company

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ABSTRACT

The author considers features of relationships between the fiduciary (management, board of director) and shareholders (beneficiaries). The nature of fiduciary relations is connected with «a critical resource» (assets) of the beneficiary. In the company economic interests of various participants (shareholders, management) face. Delegation discretion the shareholder to the management will allow to build together with the shareholder effective economic strategy of the company, under condition of execution of fiduciary duties. The management possesses administrative immunity within the limits of application of the business judgment rule. Actions of the management at transaction fulfilment should have real character, possess economic sense, a rationality and to promote achievement of economic benefit in the form of increase to shareholder value. The special attention is given to the fiduciary nature of interaction. Imposing of fiduciary duties on the management allows the beneficiary to protect the company from destruction of shareholder value. The shareholder should specify such game rules that the management was unable break them or, at least, cost of their infringement would be above reception of personal benefit. Fiduciary principles allow to soften the conflict between management and the shareholder. Besides, the fiduciary mechanism possesses a preventive element, keeping the company from destruction. The given obligation of loyalty protects resources of the shareholder from wrongful acts from the management. Fiduciary principles allow to balance economic interests between a management and shareholders.

KEYWORDS:

fiduciary relationships, Critical Resource Theory, beneficiary, shareholder, fiduciary, management, discretion, loyalty, resources.

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1. INTRODUCTION

The owner of the organization's property (assets) is endowed with specific powers (including managerial discretion), due to which it is possible to ensure the maximum efficiency of the company's economic activity and the rational use of property both independently and by the appointed (selected) manager, who is entrusted with the management of the organization on behalf of the owner ensuring the integrity and security of property. One of the necessary conditions for the successful cooperation of the owner with the person managing his property is confidence in the relationship between them (Resolution of the Constitutional Court, 2005].

The fiduciary institute involves the separation of managerial rights of managers and the control rights of the assets' owners.

Fiduciary relations between the management and the owners are built through legal fiction – a legal entity. Since the legal entity is a product of legal technology (legal fiction) the will of the legal entity is expressed by the owners (owners of assets) by forming a group or sole expression of the will. Regardless of the external attributes of the legal entity (company) the latter acts through its manager based on fiduciary principles in the interests of its owners who have shares (a share in the authorized capital). In this case we are talking about an agent problem between the owner-principal and the manager-agent, as a result of which the latter, using his powers, can derive illegal benefits from the assets entrusted to him.

The mechanism of corporate governance implies unequal opportunities of shareholders (owner) to influence the decisions made by the head of the company depending on the share of participation (block of shares). Each shareholder (owner) has the right to compensation for losses suffered by the company through unlawful actions of the managerial body. The owner (shareholder) has the right to file an indirect claim for recovery of losses suffered by the company by making transactions in violation of corporate law (paragraph 37 of the Resolution of the Plenum of the Supreme Arbitration Court, 2003).

The legal goal of fiduciary transactions is the transfer of managerial authority of carrying out actions in the interests of the owner (beneficiary). The subject of fiduciary relations includes the actual and legally significant actions implemented in the interests of the beneficiary (Resolution of the Thirteenth Arbitration Court of Appeal, 2013].

The fiduciary nature of the relations of owners is associated with the redistribution of "shareholder value" within the company among them (we are talking about the owner's role and control in the company depending on the share of participation (block of shares). The peculiarity of fiduciary relations is as follows. The manager (fiduciary) performs actions (transactions) within the framework of the managerial authority delegated to him regarding the critical resource – the assets (property) of the company owned by the beneficiary. The owner (participant, shareholder) delegates to the manager not only fiduciary responsibilities (due diligence, loyalty), but also managerial discretion (the right to make decisions in business at his own discretion).

The conformity of the company's performance to the goals for the achievement of which it was created depends on the quality of management (The appeal definition of the Supreme Court of the Russian Federation, 2013]. The stated goal of the company is to achieve corporate benefits: increase in market capitalization, profits, improvement in the quality of corporate governance, increase in investment attractiveness, acquiring competitive advantages (Resolution of the Constitutional Court of the Russian Federation, 2004].

A distinctive feature of fiduciary relations is loyalty, which must protect the economic interests of the owner

from the illegal behavior of the trustee (opportunism). Some authors associate fiduciary relationships with the obligation of the manager's loyalty (Miller, 2013; Smith, 2002]. In other words, in the context of fiduciary relations the obligation to maintain loyalty implies that the director is not entitled on his own behalf and in his own interests or in the interests of third parties to perform transactions that are homogeneous with those that make up the subject of the company's activity, and to participate in another homogeneous (with similar types of activity) organization or perform the responsibilities of director there.

The fiduciary mechanism protects the owner from unjustified risks and the manager's behavior related to the use of the company's assets in the personal interests of the manager (opportunism on his part), and excludes separatist actions by unscrupulous participants.

DeMott evaluates fiduciary relationships on an ad hoc basis (to resolve a specific situation), when relations between the parties are associated with certain legitimate expectations of one party with respect to the other (DeMott D., 2015].

We made an attempt to resolve the agent conflict between the owner and the manager using the fiduciary mechanism and the critical resource theory in order to prevent the destruction of shareholder value. The article is multidisciplinary in nature, since it covers not only the elements of corporate governance that are part of corporate finance as a science, but also of corporate law. The fiduciary mechanism is considered as a tool to reduce the risk of transactions on the part of management in personal interests.

The paper considers fiduciary duties imposed on the manager. They make it possible to assess the circumstances of making managerial decisions in the company, when it is impossible to take into account all the circumstances that may occur in the future. We will try to get insight into the essence of fiduciary relations between stakeholders in a company, which is a kind of a "black box with resources and its internal structure is a secret" (Demsetz, 1997].

2. RESOLVING THE PROBLEM OF INCOMPLETE CONTRACTS THROUGH THE FIDUCIARY MECHANISM

The problem of incomplete contracts is that the parties (the owner of assets and the owner), due to limited rationality, cannot foresee in practice all the circumstances of their relationship, namely, to take into account in advance all possible situations that may arise in the course of the manager's performance of his duties, or the occurrence of these circumstances is so unlikely that the parties do not take them into account, etc. (Hart, 1995). The Nobel laureate Oliver Hart made the greatest contribution to the development of the theory of incomplete contracts, in which it is impossible to accurately determine the rights and obligations of the parties in unforeseen situations (Hart, 2001).

Failure to observe due diligence and carefulness (fiduciary duties) on the part of the governing body, deliberate stealing of money and gaining personal gain that result in the loss of the company's assets indicate abuse by the manager acting against the interests of the company and its owners. If inaction on the part of the manager led to the loss of the company's property, this fact cannot be considered a normal condition of civil circulation or ordinary business risk. In this case the manager also violates fiduciary duties and bears civil liability (Resolution of the Nineteenth Arbitration Court of Appeal, 2015]. When determining the interests of the company one should take into account the relevant provisions of the constituent documents and decisions of the owners (for example, on determining priority areas of business activities, approval of strategies and business plans, etc.).

The financial interest may include any direct or indirect financial (material) interest, benefit, share, bonus, other privileges and advantages that a person can receive directly or through his representative, nominee holder, relative as a result of such transaction. Restrictions related to financial interest can be written in the statute. They are aimed at preventing the implementation of the will of the manager, which does not coincide with the will of the owner (Resolution of the Ninth Arbitration Court of Appeal, 2010]. The charter defines the model of behavior of the company's manager when making certain transactions, including transactions with financial interest. Finally, through the corporate statute the company's owners can limit managerial discretion and thereby protect the organization from destruction of the company's value (Definition of the Constitutional Court of the Russian Federation, 2011]. Otherwise, acting within the framework of broad discretion, the manager may make a loss-making transaction (for example, replacing critical liquid resources by non-liquid resources), which does not meet the interests of not only the company, but also its owners.

He is forbidden to conduct transactions with himself (a ban on concluding a transaction through a nominee purchaser, with a close relative, with a legal entity where he or his relatives are participants, work in managerial positions, etc.) and otherwise be enriched by transactions, if the information regarding the interest of the manager or representative who concludes such a transaction, including the peculiarities of what benefits he will receive, directly or indirectly or what losses the company incurs, is not fully disclosed [Definition of the Supreme Arbitration Court of the Russian Federation, 2011].

In addition, the manager is obliged to make decisions taking into account all available information, in the absence of a conflict of interests, taking into account the equal treatment of the company's shareholders, within the ordinary entrepreneurial risk, taking into account the desire to achieve sustainable and successful development of the company [Letter of the Bank of Russia, 2014, p. 2.6.1, 126].

While performing his responsibilities the head of the organization must act reasonably and in good faith in order to prevent the deterioration of the company's financial condition, the commission of unlawful actions in managing business activities [Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation, 2013]. In exercising his rights and fulfilling the duties specified in the statute the manager should exercise diligence and discretion that should be expected from a good leader in a similar situation under similar circumstances [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation, 2012].

Good faith and reasonableness mean a person's behavior that is characteristic for the caring owner or conscientious businessman. Accordingly, in order to determine dishonesty and unreasonableness in the actions (inaction) of a particular person, his behavior must be compared with the real circumstances of the case, including the nature of the duties assigned to him and the terms of the turnover and the requirements of care and prudence that any reasonable person and conscientious participant in the turnover must demonstrate. The manager cannot be found guilty of causing losses to the company if he acted on the basis of the usual conditions of business turnover or within reasonable business risk.

In any case, the company is endowed with resources and the presence of managerial discretion delegated to the authorized representative – the executive in order to put into practice an economic strategy that improves efficiency and creates competitive advantages, and, ultimately, corporate benefits for its participants.

The nature of fiduciary relationships is inherently similar to the nature of resources (Smith, 2016], since the beneficiary (owner) delegates authority in relation to the management of the company's resources to an authorized representative (manager).

On the one hand, the fiduciary mechanism makes it possible to mitigate the risks associated with incomplete contracts and, on the other hand, imposes restrictions on the manager associated with transactions in relation to a limited resource for personal interests.

The need to avoid excessive rigidity and to ensure applicability in the widest range of situations leads to the fact that the formulation of laws allows for different interpretations. The interpretation and application of such regulations depends on law enforcement practice. There will always be a need to clarify doubtful points and adapt them to changing circumstances.

In determining the nature of fiduciary relations the law enforcer tries to solve the problems of incomplete contract (negative consequences that may arise in the future). The company's management (management, board of directors) a priori assumed fiduciary obligations to act exclusively in the interests of shareholders and the company.

A law enforcement practice is an integral part of corporate governance. A company can use judicial practice to develop a criterion of suspicious transactions (not in the interests of the company) or transactions in its own interests (transactions with interest) and document it as an internal standard (conditional classification of transactions for interest).

Using the conditional classification of suspicious transactions the owner can evaluate the fairness of transactions (disclose their features) and immunize against judicial control (to spell out the features of individual transactions in internal documents that make it possible to exclude the material liability of the manager – to spell out the model of expected behavior in a given situation of a reasonable and conscientious manager. Participating in certain transactions the manager must take all measures so as not to harm the company's property and in determining what action should be taken to exercise the degree of care and diligence required of him by the nature of his participation in the transaction).

The peculiarities of the relationship between the trustee and the owner are considered by using the legal analysis, in particular with a focus on law enforcement practices (the wording of laws is not always accurate, it is a logical consequence of the principle according to which laws should have a general application).

Fiduciary responsibilities are a legal preventive tool with the help of which the manager will act in the best interests of the company and with due diligence and prudence, including all necessary actions that an ordinary respectable person will use in such circumstances, and not from a position of financial interest.

3. THE FIDUCIARY PRINCIPLES AND THE CRITICAL RESOURCE THEORY

A critical resource is a broad concept that includes not only money, real estate or land, but also specific property such as confidential information of a trustee (management) and beneficiary (owner), human capital, intellectual

capital. Confidential information may relate to the actions regarding competitors; it is a key critical resource in fiduciary relationships. Upon receiving it a participant (shareholder) may turn out to be a competitor of the company or an affiliate of a competitor), is able to use it for personal interests and harm the commercial interests of the organization and its owners (Resolution of the Fifteenth Arbitration Court of Appeal, 2015].

According to the theory of the critical resource the trustee performs an action with respect to the critical resource (assets) belonging to the beneficiary at his own discretion (managerial discretion). These legal relationships identify fiduciary relations (trust) by using the criterion of loyalty. It is the obligation of loyalty that protects the beneficiaries from unlawful behavior of trustees (Smith, 2002). The obligation of loyalty is dictated by the situation when the manager, using the resources of the owner, at his discretion (bypassing the decisions of the owner or without obtaining approval), acts in personal (selfish) interests or the interests of entities affiliated with a trustee (Resolution of the Arbitration Court of the Moscow District, 2016].

If the company's management (board of directors) has not shown due care and discretion, has not taken all necessary measures for the proper performance of its duties, has taken actions aimed at obtaining personal gain (for example, obtaining unreasonable benefits), contrary to the established procedure and expression of will of the authorized body, it has shown its personal interest and violated fiduciary responsibilities. Its actions led to a decrease in the money supply (in our case – a critical resource) in order to derive personal profit, that is, it preferred personal interests to the detriment of the interests of the company. In fact, every act of misappropriation can be considered a violation of the fiduciary duty of loyalty.

The owner is obliged to control the activities of management and not neglect the principles of effective corporate governance including direct actions in managing the company. The person who made the investment (participant, shareholder) has a completely understandable desire to know about the fate of his investments (either directly or with the help of an appropriate consultant), namely to receive information about the activities of the legal entity, to control his profit entitlements. If an investor invested his money and suddenly stopped receiving invitations to general meetings, then he will inevitably become anxious, because his financial interests are directly affected. A sharp decline in the value of assets – a critical resource (through poor management) is considered as a deprivation of the owner of his property, although formally the participant is not deprived of his shares. In such circumstances he has the right (obligation) to seek clarification of the company and the registration authority in order to obtain legal protection of his interests (Presidium of the Supreme Arbitration Court of the Russian Federation, 2013].

The legal essence of corporate relations in joint-stock companies (whether public or non-public) and limited liability companies (for example, regarding the coordination of transactions with interested parties, obtaining information about the company) has much in common. The essence of corporate relations regarding decision-making by the general meeting of participants (shareholders) is the exercise by the participants (shareholders) of the company of their rights to manage the company and maximize profits from continuing business activities.

For limited liability companies and joint-stock companies common approaches should be applied in the regulation of corporate relations (Decree of the Constitutional Court of the Russian Federation, 2014]. The legal structure of the company as a form of collective entrepreneurship implies that owners, acquiring stakes (shares) in the authorized capital of the company and using their property in order to receive income as part of the profit from the activities of the company, are vested with certain rights that allow them to participate in the management of the affairs of the company, to get information about its activities, to take part in the distribution of profits, in case of liquidation, to receive a part of the assets remaining after settlements with creditors, or their value, and to realize other rights stipulated by the legislation and constituent documents of the organization. Having chosen this form of exercising the right to freely use their abilities and property for entrepreneurial and other economic activities not prohibited by law such as the creation of a commercial organization and participation in its activities with its capital, the owners of the company consciously and independently make strategic economic decisions (including delegating management discretion to an authorized person) and taking upon themselves the burden of caring for their own well-being, as a result of which they bear the risk of economic inefficiency of the company's activities (Resolution of the Constitutional Court of the Russian Federation, 2010].

In the company's activities a collision of different participants (shareholders, management) is possible. The owners have autonomy and broad discretion in making business decisions. Transferring their managerial powers to an authorized representative, they, in fact, grant the latter his managerial immunity as part of the rule of business decision. At the same time, fiduciary duties are imposed on the manager, as a trustee, to act in the interests of the company and its shareholders (owners).

Opportunism is interpreted as a personal interest, which is the essence of the internal structure of the company (Williamson, 1979). Opportunism is associated with the problem of incomplete contract, when it is impossible for the parties to stipulate the conditions in the agreement, if it will not be possible to foresee events that may occur in the future. Due to the complexity of the agreement between the interested parties (between the trustee and the benefi-

ciary) a window is created for adventurous behavior (since it is impossible to take into account all the circumstances in the contractual relationship, in particular between the owner and the manager, which may occur in the future; the so-called incomplete contract problem), when the actions of one participant (owner, manager) related to obtaining personal gain (the ability to influence managerial decisions) are equally selfish for another party to the agreement (Grossman, Hart, 1986].

In the case of incomplete contracts we use the mechanism of expected damage, which was developed by the European Court of Human Rights. The beneficiary party is put in a situation in which he would have been if the agent had executed the contract. The purpose of compensation should be to create such conditions for the beneficiary in which he would had been if there had been no violation.

An important condition for assessing the expected damage is how it can be foreseen. Only under this condition the parties to the contract will be able to determine the legal and financial consequences of violation of contractual obligations, to decide which is preferable for them: to suffer additional losses arising from the observance of their contractual obligations, or to violate their obligations under the contract and to pay the other party the monetary compensation stipulated by the contract. Therefore, the expected damage should be assessed in such a way that the parties could calculate their financial losses in case of breach of the contract.

A game model is created in which the owner (beneficiary) models the potential situation of opportunism on the part of management (violation of fiduciary duty), and then formulates this in the agreement (describes the situation unfavorable for the trustee, since the "expected" damage exceeds the benefits that the management can receive in case of conducting a transaction in personal interests). In this case we are talking not only about the damage to the company, which can be caused by the manager, but also about deviations from the model of behavior of the trustee, which can be spelled out in the agreement.

The liability is excluded if the actions and the end result in the form of losses are related to the situation in the economy, the needs of society and other significant factors (unfavorable market conditions, financial crisis, natural disasters and other events, etc.). For example, it is possible to assess the likelihood of a decrease in the value of assets for a certain period of time during which the beneficiary would pay taxes or the likelihood of a rapid deterioration in the company's financial position over the modelled time period.

The manager has certain autonomy in making decisions in the business sphere and is protected by the rule of business decisions in case of making business miscalculations due to the risky nature of the activity (Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation, 2011]. However, the contractual relationship between the owner and the manager does not allow to resolve some misunderstandings to protect the assets of the owner from unlawful behavior of the management body.

The Russian law enforcer makes sure that the actions of the manager (trustee) are real, the transaction in relation to the assets (critical resource of the owner) has a real economic sense, reasonableness and contributes to the achievement of the economic effect in the form of an increase in "shareholder value" (Resolution of the Ninth Arbitration Court of Appeal, 2016].

In fiduciary relationships there are both contractual features and assets – resources (Merrill T., Smith H., 2001). The trustee manages the assets by virtue of discretionary management powers in the interests of the owner (beneficiary). Moreover, the beneficiary is not such if the formal owner, from a practical point of view, has very limited rights exercised in relation to the income in question, to a greater extent acts as a fiduciary (trustee) or administrator in the interest of stakeholders (Resolution of the Ninth Arbitration Court of Appeal, 2013].

The contractual construction (the relationship between the owner and the manager) between the participants can look quite complicated in the legal sense. In addition, the assets that are the property of the beneficiary cannot always be clearly identified.

Human capital is a knowledge that is expressed in skills and know-how, in connections and social networks, in creativity and motivation, in the ability to destroy and create, which contribute to the growth of production and labor productivity (Lobel, 2015). The process of formation and accumulation of human capital requires significant efforts and costs from the person and the whole society. The accumulated human capital is the main multicomponent factor in the formation and development of innovative economy – a knowledge economy that operates in the market environment with targeted state support.

Intellectual capital is one of the main factors in determining the value of business and its competitiveness. The way to achieve the growth of these indicators is in satisfying customer needs based on continuous improvement of the company's management focused on the accumulation and effective use of the key categories of intellectual resources, such as: staff qualifications, information technology and management structure.

For example, regarding the intangible assets the owner has legitimate or legal expectations confirmed by the availability of documents. In this case the concept of "property" is not limited to the existing property and also covers assets, including claims, in respect of which the beneficiary can claim that he has a reasonable and "legitimate

expectation" that he will be able to effectively exercise property rights, and not merely hope for the recognition by the property law, which was impossible to effectively implement and could not be regarded as property – an asset. Regarding the right of claim, in the absence of documentary justification for the occurrence of indebtedness there is only hope for the recognition of property law, which cannot be regarded as property. By submitting an application for the registration of intangible asset the company has the right to expect that its application will be considered while the company has a "legitimate expectation" of the right to register its intangible asset (for example, a trademark), which is property.

The fact of the legal connection of the beneficiary (shareholder) with the assets of the company or the manager who manages this property makes it possible to identify the presence of fiduciary relationships. Often, the beneficiary influences the decisions of the trustee (in fact, controls the management) using the legal personality of the company as a corporate tool in their own interests, creating companies (a specific corporate structure) that are interconnected (Definition of the Supreme Court of the Russian Federation, 2016].

In addition, the beneficiary must be proactive in relation to the activities of the trustee: to receive information about the activities of the company, to verify the validity of transactions, to control the income, – all this is related to his financial interest.

The leitmotif of fiduciary relations between the participants should be the principle of goal-setting – coordination of the will of the parties. The will of the beneficiary is a priority in decision-making by those persons who are endowed with managerial discretion.

In case of violation of fiduciary duties the manager is liable, and the beneficiary has the right to compensation for damage. In this case a number of features must be taken into account. If the trustee acted within the framework of the company's economic strategy (the priority area of activities), for example, sold an asset that was not profitable and could become unprofitable, then his actions are considered reasonable and conscientious. Moreover, if the manager within his competence has committed acts that may be associated with negative consequences for the company as a result of business failures, such actions are not grounds for bringing a trustee to civil responsibility, because he acted within the economic development strategy of the company. In other words, if the manager performs his fiduciary duties in good faith, he is protected by the business judgment rule. However, situations may arise when the management, hiding behind the business judgment rule, makes transactions in its personal interests, substituting its miscalculations with the risk of economic activity.

An abstract model of the manager's expected behavior is used to assess the manager's guilt. Participating in the civil circulation he has to take all the necessary measures in order not to harm the property of the company. In determining what measures should be taken he should demonstrate the degree of care and discretion (auxiliary fiduciary duties) that are required of him by the nature of his participation in the circulation. However, there are situations when the director is forced to take appropriate measures in an unusual situation that cannot be taken into account. In such situations the manager's actions do not go beyond the usual risk if he accepts personal responsibility for the performance of duties, provided that his actions exceed the expected behavior from an abstract conscientious director, for example, he gives guarantees on his own behalf, pledges his own shares in the authorized capital (Resolution of the Arbitration Court of the Moscow District, 2018].

The violation of the fiduciary duty of loyalty by the director is manifested in his unscrupulous and unreasonable actions (inactions), which led to losses. Unscrupulous actions (inactions) of the director are considered proven if he acted in the event of a conflict of personal interests (interests of affiliates of the director) and interests of the legal entity, including the situations if the legal entity had a real interest in making a transaction, except those cases when information about a conflict of interest was disclosed in advance and the actions of the director were approved in the manner prescribed by law.

A violation of the fiduciary duty by the trustee occurs when the manager creates a company by analogy with the corporate structure of the main organization with identical types of activities (creating a direct competitor) in an obvious conflict of interest. Therefore, the manager (trustee) by using a critical resource – the company's assets (business reputation, financial, labor and other resources) in personal interests causes losses to the company and its owners (Resolution of the Arbitration Court of the Far Eastern District, 2016].

An effective motivation helps to reduce the risk of making transactions by the managers in their personal interests. A legal entity consists of separate, but nevertheless related groups of persons, including owners and managers. In order to serve the interests of the company (to create a contribution to the final result of the company) each participant must have a personal interest. The mechanism of motivation should take into account the interests of stakeholders. The initiator of introduction of the motivation program should be the owner. The motivation program should be based on the principle of team production. Participants are encouraged to focus on the organization's important long-term goals: attraction and retention of the organization's leading employees with exceptional knowledge and experience. The remuneration should be directly related to the results of the legal entity's activities and professionalism

of its employees. The incentive is set in order to increase the company's production and financial performance by increasing the interest of employees in improving the production process, for example, the task is to achieve a certain share price in a certain period of time. Such programs of long-term motivation of participants are common in the business practice of large companies, which indicates their effectiveness. Such a mechanism of motivating the interests of different participants will improve labor efficiency and retain valuable management staff.

Let us consider the features of such incentive programs in practice. The goal of incentive program is to maintain the long-term success of companies by encouraging management and employees so that they focus on important long-term goals while attracting and retaining their executives and employees with exceptional knowledge and experience (Chugunova, 2015].

The remuneration that is paid according to the motivation program is directly related to the results of the company and the professionalism of its employees. It was established with the aim of increasing production and financial performance by raising the interest of employees in improving the production process. Such employee motivation programs are common in the business practice of large companies, both Russian and foreign, which indicates their effectiveness. Among large Russian holdings similar programs are available at COMSTAR, Lukoil, Alfa Capital, AFK-Sistema, Norilsk Nickel and others.

The remuneration of the top manager, like any other employee, is remuneration for labor depending on qualification, complexity, quantity, quality and conditions of the performed work. It also includes compensation payments and incentive payments. A compensation package for managers usually includes the base (constant) and variable parts of annual salaries and bonuses, a package of social benefits, as well as options tied to the growth of the company's value.

There is another classification of the compensation package for managers: constant, conditionally variable and absolutely variable parts. The constant part depends on the position held and changes very rarely (for example, when changing job responsibilities or being transferred to another position). The amount of payment is calculated depending on the category (grade) of the position on the salary scale.

The conditionally variable part depends on the diligence of the employee, i.e. on his motivation to do his job. The maximum possible value is set for this type of payments (as a rule, as a percentage of the salary) as well as the criteria for assessing diligence. Depending on the applied efforts and the obtained results during the estimated period of time an employee can get from 0 to 100% of a conditionally variable part (but not more).

The absolutely variable part depends only on the results of the work performed in excess of permanent responsibilities while this work required considerable labor. For example, a bonus may be given for participating in a project aimed at automation and reduction of costs. Each time the amount of payments for this part is specially calculated and, as a rule, factored into the project budget.

The main difference between the motivational schemes applied to managers and the methods of stimulating other employees is a greater share of the variable part of remuneration in the total amount of payments, as well as a longer period for which bonuses are paid (Akmaeva, Epifanova, 2018].

One can use the following tools in long-term incentive programs: payments for achieving key performance indicators (remuneration in case of achievement/exceeding of certain indicators is paid out at the end of the program period), real participation in ownership (acquisition of the company's shares).

The company's management buys the company's shares at a lower price or receives them as a bonus in order to obtain future income through an increase in payments on securities (dividends) and increase in the company's value (in the case of the sale of securities) with a restriction of their sale after a certain period of time. During the period of the program's duration managers have all the rights of the company's owners and receive dividends. If the stock price drops managers are insured for the sum of shares.

The choice of a long-term incentive program (motivation) or a combination of such programs depends on a number of factors, which include the size and form of ownership of the organization, strategic goals of owners and shareholders. An important condition and key to the effectiveness of the incentive system is its competitiveness, compliance with the internal strategy and corporate culture of the organization (Tsypurko, 2014].

It should be noted that the nature of fiduciary relations is associated with a critical resource (assets) of the beneficial owner. Under the conditions of transfer of managerial discretion over the assets to the manager the owner must limit managerial powers and reduce the risk of misconduct on the part of management. Otherwise, the trustees could make transactions with a critical resource in their own interests.

In the context of the problem of incomplete contract the beneficiary can stipulate in the contract with the trustee that his fiduciary duties should be aimed at implementing an economic strategy that maximizes the shareholder value of the company, improves the quality of corporate governance, creates competitive advantages, etc. In contractual relationships provisions should be made for the following: if the manager acts within the framework of the company's strategy with possible negative consequences

(business miscalculations), then his liability is excluded (he is under the immunity of the business judgment rule). If the manager ignores his fiduciary duties in making business decisions, the agreement developed by the European Court of Human Rights can specify the features of the expected damage. The fiduciary principles are a tool designed to protect the company from poor (unprofessional) management. In addition, the fiduciary institute provides participants (management and owners) with a "road map" in implementing the economic development strategy of the company (coordinating long-term interests of shareholders and management bodies). The fiduciary principles solve the problem of incomplete contract. To a certain extent the fiduciary duty allows the owner to be protected from opportunism of the manager, obliges the latter not to make transactions with financial interest, which may lead to civil liability. Finally, the fiduciary mechanism makes it possible to reduce the gap between the interests of management and participants preventing the destruction of shareholder value.

4. CONCLUSION

We have tried to build a certain model-algorithm taking into account law enforcement practices, which make it possible to limit the risks associated with the loss of the company's property (part of assets) as a result of violations of fiduciary principles by the management and to improve the quality of corporate governance.

Basically, the fiduciary mechanism is the company's internal standard designed to protect a critical resource (to prevent the destruction of assets or deterioration in the quality of corporate governance). Fiduciary relations between participants (owners and management) make it possible to balance the company's economic interests, on the one hand, and the circle of people whose rights are affected by managerial decisions. Fiduciary principles make it possible to achieve stability in corporate relations, eliminating the risks of incomplete contracts and improving the quality of the company's management.

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