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Chapter IV

US BOARDS: KEY CHALLENGES AND RESPONSIBILITIES

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The current economic and political situation requires corporations and their boards to have bold visions for future growth with long-term investments, to make proactive efforts to modulate the pressures for short-term stock price increases and to take advantage of the valuable insights gained in navigating the global financial crisis and ensuing recession. Many boards have been playing defense rather than offense these last few years, as tough economic conditions have prompted crisis management dilemmas, short-term survival strategies and other challenges. The uncertainty around the European economic situation and lingering high unemployment rates continue to batter the equity markets, hampering the performance of individual stocks. Boards have also been dealing with ever-increasing layers of corporate governance requirements and demands from activist shareholders that shift decision-making power from boards to shareholders. In addition, pressures for short-term increases in stock prices

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have been constant; equity markets today feature an investor mindset that too often measures success on the basis of myopic benchmarks. In this environment, the need for boardroom resolve and commitment to long-term growth is critical not only for companies, but also for the vitality of the global economy.

Considerable attention has been devoted to searching for lessons learned from the global financial crisis and ways to improve board functioning. This exercise has not been in vain. Some of the "lessons learned" include a renewed focus on risk management, a better understanding of the challenges faced by highly complex, global businesses, and a re-thinking of the experience and skill sets needed for an effective board, leading to a re-examination of whether the trend towards boards with only one non-independent director makes sense. The conflicts of interest of proxy advisory firms and the shortcomings of their governance checklists are being scrutinized by regulators in Europe, the United States and elsewhere. In addition, companies today are increasingly engaged in dialogue with their institutional shareholder base in order to establish long-term relationships. Perhaps one of the most valuable "lessons learned" is that boards need to focus on what works, without the undue distraction of reform for reform's sake and standardized mandates that pay lip-service to "best practices" but add little if any real value.

The core purpose of corporate governance is to build long-term sustainable growth in corporate and shareholder value. It is up to each company's board to determine the unique boardroom dynamic, culture and personalities that shape its effectiveness, as well as the specific challenges it must address in successfully steering the company forward. It is naïve at best, and value-destructive at worst, to assume that the optimal structure for any one company should be prescribed for all companies. The details of a particular governance structure – such as whether the chairman and CEO positions should be separated, and whether a CEO should participate in the search for new directors (as opined on by Institutional Shareholder Services (ISS) when it recommended against the re-election of Hewlett-Packard's nominating committee members) – are best determined by the directors themselves, who are ultimately responsible for ensuring a successful corporate governance structure.

A solid grasp on corporate governance trends is important for the boards of companies that wish to undertake cross-border merger and acquisition activity. An understanding of corporate governance issues can inform an acquiror's approach to due diligence. Examples of potentially significant issues include anti-corruption violations, the soundness of risk management oversight, corporate social responsibility issues and executive compensation practices viewed as excessive or inappropriate. Strategic and legal advice relating to local laws and practice, the fiduciary duties of a target's board of directors and potential takeover defenses, is another essential element of a successful transaction process, including by enabling a bidder to anticipate and rapidly react to target demands or defensive measures.

The discussion below addresses certain topics that we believe are important in developing an understanding of the current corporate governance environment. Although corporate governance practices vary across jurisdictions, there are some common themes. For example, executive compensation, risk management and short-termist pressures have generally been scrutinized in political, regulatory and shareholder relations arenas across both Europe and the United States. While the discussion below has a particular focus on US regulations and governance trends, we believe many of these issues have global relevance in determining a corporate governance profile that facilitates the creation of long-term value. There is, however, no "one-size-fits-all" solution and board procedures should be fine-tuned to reflect the specific circumstances of the company as well as the legal requirements in relevant jurisdictions. In addition, we highlight certain issues of relevance to the cross-border M&A market, with a focus on potential acquisitions of US-based companies.

4.1. Key issues facing boards in 2012

4.1.1. Underlying Causes of Short-Termism

Although short-termism has been an issue of concern for many years, it has gained new notoriety as one of the root causes of the financial crisis. While the initial political reaction would have exacerbated the problems of short-termism through legislation designed to shift even more power to institutional activists and hedge funds, many observers are now recognizing that a core lesson of the financial crisis is the need to try to combat short-termism. In a speech reflecting on her tenure as Chairman of the US Federal Deposit Insurance Corporation, Sheila Bair suggested that "the overarching lesson of the [financial] crisis is the pervasive short-term thinking that helped to bring it about."[1]

This more measured consideration of the causes of the financial crisis has spurred a flurry of reviews, studies and widespread debate about the ways in which short-termism is impacting corporate performance and equity market functioning. In the UK, for example, the Kay Review[2] was launched in 2011 to examine, among other things, the incentives, motivations and timescales of participants in the equity markets and how these affect the long-term performance of companies.

A notable theme to emerge from these studies is the pervasiveness of short-termist pressures in today's global equity markets. As corporate governance laws and best practices have evolved to enhance the power of activist shareholders, these pressures have become more acute. The trade-off between short- and long-term growth is particularly evident when hedge funds and other activist shareholders press boards for stock buybacks, special dividends, spin-offs and other corporate transactions. On a more day-to-day basis, another source of short-termism is the practice of issuing quarterly earnings guidance. In the United

1 Sheila Bair, Federal Deposit Insurance Corporation Chairman, Remarks to the National Press Club (June 24, 2011), available a http://www.fdic.gov/news/news/speeches/chairman/spjun2411.html.

2 The terms of reference for the Kay Review are available at http://www.bis.gov.uk/assets/biscore/business-law/docs/k/11–1015-kay-review-terms-of-reference.

States, this practice began in the early 1990s in response to demands from institutional investors and research analysts for increased discipline and corporate transparency. As Daniel Vasella, Chairman of Novartis AG, remarked back in 2002, the "tyranny of quarterly earnings" is "a mindset that can hamper or even destroy long-term performance for shareholders."[1]

Short-term investment objectives and expectations are not limited to arbitrageurs who specialize in trading strategies designed to take advantage of market volatility. Even the investors who have traditionally represented the more "patient capital" sources have shortened their investment horizons, and a green paper issued in May 2011 by the European Union estimated that turnover on the major equity exchanges is running at 150% of aggregate market capitalization per year, which implies an average holding period of eight months.[2] Some of the potential causes of this trend include incentive structures of fees and commissions that encourage asset managers to seek short-term profits, actuarial and mark-to-market valuation rules that effectively place lower bounds on intermediate returns, advances in high-frequency and automated trading, and lack of transparency about the investment strategies and performance of fiduciary duties by managers. As noted in a paper published in 2011 by the Millstein Center for Corporate Governance and Performance and The Committee for Economic Development, "[e]ven though institutional investors own more than seventy percent of the largest 1,000 companies in the United States, there is far less known about many of them than about the public companies in which they invest."[3]

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1 Daniel Vasella and Clifton Leaf, "Temptation is All Around Us," Fortune (November 18, 2002), available at http://money.cnn.com/magazines/fortune/fortune_archive/2002/11/18/332268/index.htm.

2 European Commission, Green Paper: The EU Corporate Governance Framework (May 4, 2011) at p.12, available at http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_en.pdf.

3 Ben W. Heineman, Jr. and Stephen Davis, Millstein Center for Corporate Governance and Performance and Committee for Economic Development, "Are Institutional Investors Part of the Problem or Part of the Solution?," available at http://millstein.som.yale.edu/sites/millstein.som.yale.edu/files/80235_CED_WEB.pdf.

In today's environment, boards of directors should guide the company's strategy to achieve long-term value creation instead of responding to undue pressures for short-term increases in stock prices. Directors must critically evaluate activist agendas – notwithstanding the threat of proxy contests, withhold-the-vote campaigns and other pressure tactics – to determine for themselves what will further the best interests of the company and its constituents. The company's long-term strategy should be formulated initially by management and then developed fully in an interactive dialogue with the board, with reassessments as economic conditions develop.

4.1.2. Regulatory Reforms Aimed at Proxy Advisory Firms

In the United States, ISS and Glass, Lewis & Co. enjoy a virtual duopoly, with ISS estimated to control approximately 61% of the proxy advisory market and Glass, Lewis & Co. estimated to control approximately 37%. Both firms also maintain a significant presence overseas, including offices throughout Europe and Asia. Together and individually they have tremendous influence in directly shaping not only the corporate governance profiles of public companies, but also the composition of boards and board committees, executive compensation policies and even transformative mergers and other transactions that require a shareholder vote. In order to comply with their fiduciary duty to vote the shares they manage, many institutional investors in the United States, who often do not want to expend the resources to make informed voting decisions, have essentially abdicated their voting responsibilities to the proxy advisory firms. Whether this should be viewed as a legitimate way of fulfilling their duties, as well as whether it is really in the institutional investors' interest to follow this approach, are both issues that are worthy of continuing examination. A similar re-thinking of the proper role and regulation of proxy advisory firms has likewise gained traction in Europe and elsewhere.

Another concern surrounding proxy advisors is their inherent conflict of interest in advising both investors and companies. For example, these firms routinely advise investors on how to vote their shares while also advising companies on how to obtain a favorable vote recommendation and governance rating that will lead to investor support. The US Government Accountability Office has been prompted twice by Congress to examine this issue, and, the SEC has noted that failure to adequately disclose and manage such conflicts could be misleading to shareholders and impair their ability to vote on an informed basis.

A third issue is the lack of adequate accountability for informational accuracy in the development and application of proxy advisory voting standards. The credibility and accuracy of proxy advisory firms' analysis have been strained by, among other things, the sheer volume of voting recommendations they issue each year, the relatively narrow window in each year's proxy season during which they must review proxy statements, and pressures to cut costs and increase their profitability. In a recent survey of chief Human Resources officers conducted by the HR Policy Association, 53% of respondents said that a proxy advisory firm had made one or more mistakes in a final published report on their companies' compensation programs. A related issue is the lack of transparency in the analytical models of proxy advisors, which makes it difficult for companies to identify inaccuracies, as well as their "one-size-fits-all" approach to determining governance ratings and voting recommendations.

A variety of potential reforms are being considered. In France, for example, the French Autorité des Marchés Financiers (AMF) issued proposed practice recommendations in 2011 that address establishing and implementing voting policies, issuing voting recommendations, communicating with listed companies and preventing conflicts of interest.[1] In a 2011 green paper on corporate governance, the European Commission cited concerns about the influence of proxy advisors and requested feedback on potential reforms to address conflicts of interest and improve transparency. In the United States, the SEC suggested in November 2011 that it will soon be following up on its "proxy plumbing" con-

1 Autorité des Marchés Financiers, AMF Recommendation No. 2011-06 of 18 March 2011 on proxy advisory firms, available at http://www.amf-france.org/documents/general/9915_1.pdf.

cept release to address conflicts of interest and concerns about inaccurate information generated by proxy advisors.[1] In addition, in October of 2010, the US Department of Labor (DOL) proposed amendments to its ERISA rules that would subject proxy advisors to a wide range of fiduciary duties and obligations under ERISA, including a prohibition against engaging in self-dealing transactions.[2] Another proposal that could significantly impact the US proxy advisory industry is a re-thinking of the SEC and DOL positions that investment advisors have an affirmative fiduciary duty to vote all portfolio shares on all matters; this could liberate institutional investors to take a more case-by-case approach to voting and substantially reduce the volume of voting matters that are effectively deferred to ISS and other proxy advisors.

4.1.3. CEO Succession Planning

As companies begin to rebound from the economic recession, the CEO turnover rate in the United States has increased sharply over the last year, with high-profile turnovers at companies such as Hewlett-Packard, PG&E, Yahoo, Apple, Costco and Sara Lee. According to a study by Crist / Kolder, 2011 has featured the highest rate of CEO turnover at Fortune 500 and S&P 500 companies since 2005, whereas the rate for 2010 was the lowest rate in 15 years. Recent surveys have indicated that, although CEO succession planning is ranked by boards as one of their highest priorities, it is also an area that many directors believe merits increased consideration. For example, 32% of the directors surveyed in 2011 for a report by PricewaterhouseCoopers indicated this is a major area of focus, and an additional 59% suggested that additional time should be spent on succession planning in the upcoming year. A recent *Corporate Board Member* survey of directors reported that 43% of those

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1 Mary L. Schapiro, US Securities and Exchange Commission Chairman, Remarks to The Corporate Counsel.Net: Say-on-Pay Workshop Conference (November 2, 2011), available at http://sec.gov/news/speech/2011/spch110211mls.htm.

2 Definition of the Term "Fiduciary," 75 Fed. Reg. 65263 (proposed October 22, 2010).

polled believed CEO succession was the responsibility for which their board was least effective.

There is no job that is more important for the board than selecting the company's CEO and planning for his or her succession. The board bears the ultimate responsibility for this task, and a protracted delay in finding a suitable replacement can detract significantly from the stability of the company and its ability to react quickly and decisively to evolving challenges. The integrity and dedication of the CEO is vital to enabling the board to meet all of its responsibilities and, in large measure, the fate of each of the board and the CEO is in the hands of the other.

While there are no prescribed procedures for succession planning, it should be a top priority that is addressed on a regular rather than ad hoc basis. Boards should be involved in identifying talented leaders and developing an expanded pipeline of qualified internal and external candidates, and directors should seek first-hand exposure to the company's most promising executives at board meetings, board dinners and other observation opportunities. Although succession planning can be a sensitive topic, boards should address this challenge head-on by developing a profile for future CEOs and other key executives that is tailored to the needs of the company, and by working with the incumbent CEO to establish policies and procedures for the development and evaluation of internal candidates.

4.1.4. A Balanced Board

One of the realizations to emerge from the financial crisis is the extent to which director independence has been emphasized, sometimes at the expense of expertise, and objectivity and collegiality in boardrooms became viewed as mutually exclusive qualities. The staggering losses of financial institutions resulting from highly engineered credit instruments, and the magnitude and complexity of risk management failures, demonstrated a simple truth: directors who meet today's stringent standards of independence may be relatively inexperienced in the company's business and lack real expertise and understanding of relevant industries. As stated in a 2009 study published by Professor Jay W. Lorsch and other members of the Harvard Business

School's Corporate Governance Initiative, "[a]s a practical matter it is difficult, if not impossible, to find directors who possess deep knowledge of a company's process, products and industries but who can also be considered independent."

It is a simple but often forgotten fact that the single most important factor in determining the effectiveness of a corporate board is the talent of its members. Unfortunately, the personal and professional qualities that are often the most valuable are difficult to legislate in categorical terms, and efforts to mandate objectivity have accordingly relied on independence criteria that are imperfect and even arbitrary proxies for objectivity. What is needed is a balanced board that has the right mix of industry and financial expertise, objectivity, diversity of perspectives and business backgrounds, and that also reflects an assiduous emphasis on qualities such as integrity, character, commitment, judgment, energy, competence and professionalism.

The challenges of recruiting and retaining world-class directors are complicated by the significant workload and time commitment required for board service today. In addition, the reputational risks of withhold-the-vote campaigns, majority voting standards, criticism of executive compensation policies and significant product failure or other risk management crises have increased the reluctance of qualified individuals to serve on public company boards. The potential cost and financial risk from litigation and regulatory investigations also likely deter many well-qualified and objective board candidates.

Another area in which meeting recruiting goals is difficult relates to gender and other diversity. Despite efforts to improve gender ratios, only about 16% of directors on S&P 500 boards are women.[1] In Europe, several countries have proposed and in some cases adopted reforms ranging from non-binding "best practice" recommendations issued by regulators, "comply or explain" obligations where gender diversity falls below a specified threshold, quotas requiring boards to consist of certain minimum percentages of men and women, and consideration of gender

1 Spencer Stuart 2011 Board Index, p. 8, available at: http://content.spencerstuart.com/sswebsite/pdf/lib/SSBI_2011_final.pdf.

diversity of boards in awarding public subsidies and state administration contracts to companies.[1]

4.1.5. The Problem of Underperforming Directors

One of the most sensitive tasks that boards face is finding ways to address the problem of underperforming directors. The responsibilities and time commitments required for board service today, as well as the complexity of risk management, financial reporting and the host of other issues that directors must oversee, have raised the bar for effective board service. In addition, in some cases, significant behavioral or personality issues may undermine board functioning, impede candid discussions or lead to balkanization of boardroom dynamics. A 2011 study by Stanford's Rock Center and Heidrick & Struggles has reported that more than half of the directors surveyed believed that board turnover was too low.

While there is usually no easy way to induce an underperforming director to resign, the lead director or independent chairman is typically the best person to address the situation. In some cases, it may be productive to suggest additional training and tutorials to help get a director up to speed; in other situations, an over-extended director may be asked to trim other time commitments in order to devote more attention to board matters, or to choose between cutting back other commitments or leaving the board. Many boards have found it helpful to retain an independent consultant to evaluate the performance of directors as well as the board as a whole and suggest ways for restructuring board and board committee composition.

4.1.6. Say on Pay

In the United States, companies subject to domestic proxy rules are now required to put their executive compensation policies to an advisory vote at their annual meetings. The average vote results in the 2011 US proxy season were overwhelmingly positive, with companies receiving an average of 92.1% say on pay support from shareholders

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1 European Commission, Commission Staff Working Paper – The Gender Balance in Business Leadership (Mar. 3, 2011), available at: http://www.eurosfaire.prd.fr/7pc/doc/1299060046_sec_2011_0246_en.pdf.

and only 38 of the Russell 3000 companies failing to receive shareholder endorsement of their pay programs, according to ISS data.[1] However, ISS's policy updates for the 2012 proxy season create a risk that in the future, a say on pay vote with majority but less than 70% support will be viewed effectively as a "lost" vote.

In October 2011, the Delaware Court of Chancery dismissed a wide-ranging shareholder challenge to compensation practices at Goldman Sachs and strongly reaffirmed the principle that Delaware courts will respect the executive compensation decisions of directors who make such decisions in good faith.[2] In particular, the court noted that "[t] he decision as to how much compensation is appropriate to retain and incentivize employees, both individually and in the aggregate, is a core function of a board of directors exercising its business judgment."[3] Recognizing that boards set compensation in part as a function of encouraging appropriate risk-taking by employees, the court reasoned that even when risk-taking leads to substantial losses, "there should be no finding of waste... any other rule would deter corporate boards from the optimal rational acceptance of risk."[4]

Boards and compensation committees should bear in mind the heightened media, populist and shareholder sensitivity to pay packages that could be deemed "excessive." At the same time, however, directors should not lose sight of the underlying goal of executive compensation: to attract, retain and incentivize highly qualified individuals. In the final analysis, the ability to recruit and retain world-class executives is essential to the long-term success of the company.

1 Institutional Shareholder Services, 2011 US Postseason Report, September 29, 2011.

2 In re: the Goldman Sachs Group Shareholder Litigation, Civil Action No. 5215-VCG (Del.Ch. Oct. 12, 2011), available at http://courts.delaware.gov/opinions/download.aspx?ID=161650.

3 Id. at 38.

4 Id. at 49 (quoting Aronson v. Lewis, 473 A. 2d 805 (Del. 1984)).

4.1.7. Defending Against Hostile Acquirors and Other Activists

Despite the uncertain economic outlook and evidence of a slowdown in the latter half of the year, global M&A deal volume for 2011 is projected to finish roughly on par with 2010. Hostile deal activity in particular appears to be on an upswing as companies seek to deploy cash reserves or take advantage of depressed equity values. Hedge funds and other activists have been citing poor stock price performance and stalled growth as evidence of management failures in an effort to bolster their demands for spinoffs and other corporate restructurings. With cash currently accounting for approximately 7.1% of corporate assets – (115)
the highest percentage in nearly half a century – activists have been pressing companies to deploy capital in stock buybacks, dividends, acquisitions and other transactions to spur short-term gains for investors. In addition, although the number of proxy fights declined sharply in 2011, activist pressure continued and many activist demands for board seats were settled before they ripened into a proxy fight.

Healthy companies as well as companies with financial difficulties are increasingly vulnerable to hostile approaches and other activism due to recent corporate governance trends. In particular, many companies have dismantled their staggered board structures, adopted majority voting standards, let their shareholder rights plan lapse and made other changes in response to activist demands and the threat of "withhold" or "against" vote recommendations by ISS. In 2011, for example, the number of proposals seeking to allow shareholders of US public companies to act by written consent more than doubled as compared to 2010. Nelson Peltz of Trian Fund Management has predicted that recent corporate governance changes will enable activists to make investments in the heretofore "untouchables" – companies with market capitalizations over US$ 50 billion.[1]

1 See Miles Weiss, Peltz Says Governance Changes Put "Untouchables" Within Reach, Bloomberg (April 4, 2011), available at: http://www.bloomberg.com/news/2011–04–04/peltz-says-governance-changes-makes-50-billion-companies-easier-targets.html.

Boards can and should be prepared to reject inadequate offers and other demands that are not in the best interests of their companies. In the *Airgas* case decided in 2011, the Delaware Court of Chancery reaffirmed the principle that a steadfast board, confident in management's long-term business plan, can block opportunistic bids.[1] The board of Airgas had rejected a hostile all cash, fully financed offer made by Air Products, and Air Products had launched a proxy contest to replace the members of Airgas' staggered board and sought to force the Airgas board to redeem its shareholder rights plan. In upholding the validity of the shareholder rights plan, the court concluded that "the power to defeat an inadequate hostile tender offer ultimately lies with the board of directors."[2] Shortly thereafter, Air Products terminated its 16-month pursuit of Airgas. As of December 2011, Airgas' shares were trading well above Air Products' "best and final" bid.

In response to widespread criticism over certain takeover practices in recent years (including the prominent battle between Cadbury and Kraft Foods), the UK Panel on Takeovers and Mergers promulgated amendments to the UK Takeover Code designed to strengthen the defenses available to UK-listed companies facing hostile bids. The amendments, which took effect in September 2011, implement numerous requirements for potential bidders to publicly disclose their identities and intentions towards the target.[3]

Advance planning is the cornerstone of good takeover defense. Boards must be prepared to act quickly to resist attacks and/or maximize shareholder value in the event a transaction is ultimately consummated. Boards should periodically review their takeover defenses and areas of potential exposure, taking into account changes in the legal,

1 Air Products and Chemicals v. Airgas et al, Civil Action No. 5249-CC (Del.Ch. February 15, 2011), available at http://courts.delaware.gov/opinions/download.aspx?ID=150850.

2 Id. at 3.

3 See The Takeover Panel, Implementation of Amendments to the Takeover Code and Transitional Arrangements (July 21, 2011), available at http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/transitionalarrangements.pdf.

regulatory and financial environments. As part of this process, boards should identify and maintain dialogue with their critical response team (including financial, legal and other advisors), review the takeover defenses that are available, continually monitor their shareholder base, and pay attention to investor relations to develop an understanding of shareholder perspectives on the company.

4.1.8. Crisis Management

The upheaval and volatility precipitated by the financial crisis has tested the crisis management skills of many directors, with situations ranging from the unexpected departures of CEOs and other senior executives, rapid deterioration of business conditions, impending liquidity shortfalls, risk management failures or major disasters, public uproar over executive compensation packages and many other challenges. Boards should be carefully attuned to the risk profiles and vulnerabilities of their companies, with a view toward anticipating potential crises.

Once a crisis starts to unfold, boards should be proactive in taking the reins. The first decision a board must make is whether the CEO should lead the company through the crisis. If the CEO is part of the problem or is otherwise compromised or conflicted, someone else – often one of the other directors – should take a leadership role. If the CEO is not compromised or conflicted, the CEO should lead the company's response to the crisis.

Each crisis is different and it is difficult to give general advice that will be relevant to any particular crisis without knowing the facts involved. That said, in most instances when a crisis arises, the directors are best advised to manage through it as a collegial body working in unison. While there may be an impulse to resign from the board upon the discovery of a crisis, directors are best served in most instances if they stay on the board until the crisis has been fully vetted and brought under control. Trusted and experienced advisors can be helpful in assisting the board to gather information and evaluate options, but directors should maintain control and not cede the job of crisis management to outside advisors.

In some cases, boards appear either to have overreacted, or to have placed matters in the hands of lawyers, accountants and other outside experts, and thereby lost control of the situation to those outsiders. In particular, the proliferation of independent investigations by special committees (or by audit committees), each with its own counsel and perhaps forensic accountants and other advisors, can be time-consuming and distracting, can sour relationships between independent directors and management, and in extreme cases can result in the lawyers for the special committee hijacking the company and monopolizing the attention of directors and senior management.

4.2. Key roles and responsibilities of boards

The most effective boards tend to be those that take the time to go beyond the generally prescribed "best practices" and craft bespoke procedures and structures that are calibrated to the specific needs of the company. In many respects, the process is about finding the right balance in the absence of bright lines, including a balance between the board's monitoring and advisory functions, and a balance between a "hands on" approach to oversight and more direct engagement in the management of the company.

While the board has always had a dual role as a resource for and advisor of management, on the one hand, and as the monitoring representative of the shareholders on the other, politicians, regulators and activist shareholders have been pushing to tip this balance more and more in favor of the board's monitoring role. The monitoring role has also gained increasing prominence as a result of the emphasis on effective risk management. A combination of the monitoring and advisory roles is, however, necessary for a board to be truly effective, and each board must find the right balance.

Another key component of a board's efficacy is its ability to oversee management – by cultivating dialogue and transparency, asking the right questions, challenging assumptions, and monitoring the flow of information to the board in order to ensure a thorough understanding of the company – while at the same time maintaining its fundamental role of oversight rather than direct management of the company. The challenge is to advise and guide management without preempting management's responsibility for running the business.

Board procedures should be fine-tuned to reflect the specific circumstances and challenges facing the company, and each board should look to craft a modus operandi that works for that board. In principle, however, core board functions should include, in addition to those discussed above, the following:

4.2.1. Setting a Tone at the Top

One of the most important factors in ensuring that (119) a board functions effectively and is able to meet all of its responsibilities is having the right "tone at the top" of the corporation. The tone at the top shapes corporate culture and permeates the corporation's relationships with investors, employees, customers, suppliers, regulators, local communities and other constituents. The board should work with the CEO and senior management to actively cultivate a corporate culture that gives high priority to ethical standards, principles of fair dealing, professionalism, integrity, full compliance with legal requirements and ethically sound strategic goals. In addition, the board should set the standards of social responsibility of the company, including with respect to human rights, and monitor performance and compliance with those standards.

In setting the tone at the top, transparency and communication are key: the board's vision for the corporation, including its commitment to ethics and zero tolerance for compliance failures, should be set out in the annual report and communicated effectively throughout the organization. The company's code of conduct and ethics should be incorporated into the company's strategy and operations, with appropriate supplementary training programs for employees and regular compliance assessments.

4.2.2. Risk Management

The board's role is one of informed oversight rather than direct management of risk. The board cannot and should not be involved in the company's day-to-day risk management activities. The directors should determine the company's reasonable risk appetite (financial, safety, reputation, etc.), and satisfy themselves that the risk management processes designed and implemented by executives and risk managers are adapted to the company's strategy and are functioning as directed, and that necessary steps have been taken to foster a culture of risk-adjusted decision-making throughout the organization. Through its oversight role, the board can send a message to the company's management and employees that comprehensive corporate risk management is neither an impediment to the conduct of business nor a mere supplement to the company's overall compliance program, but is instead an integral component of the company's corporate strategy, culture and value-generation process. Where board committees are responsible for overseeing different areas of risk management, the work of these committees should be coordinated in a coherent manner so that the entire board can be satisfied as to the adequacy of the risk oversight function and the company's overall risk exposures are understood.

4.2.3. Director Education and Information

The financial crisis highlighted the complexity of many financial, risk management and other issues facing companies today, and there has accordingly been a renewed focus on the information and education programs provided to directors. To enable the board to effectively perform its monitoring functions, the board and management should together determine the information the board should receive and periodically reassess the board's information needs. The key is to provide useful and timely information without overloading the board with, for example, all information that the CEO and senior management receive. As a starting point, the board should receive financial information that readily enables it to understand results of operations, variations from budget, trends in the business and the corporation's performance relative to peers. In addition, the board should receive copies of significant security analysts' reports, press articles and other media reports on the corporation. By tracking these reports and articles, the board will avoid not only unpleasant surprises but also the possibility of being accused of ignoring problems that were known to others and that could have been known by the directors. The board should also promote lines of communication that will foster open and frank discussions with senior management, and management should be comfortable in informing the board or relevant committees of issues, developments and concerns.

In addition, boards should consider the desirability of an annual two- to three-day board retreat with the senior executives and, where appropriate, outside advisors, at which there is a full review of the corporation's financial statements and disclosure policies, risk profile, strategy
and long-range plans, budget, objectives and mission, succession planning and current developments in corporate governance. To the extent that directors lack the knowledge required for them to have a strong grasp of current industry and company-specific developments and specialized issues, companies should consider the usefulness of tutorials for directors, as a supplement to board and committee meetings. Training and tutorials should be tailored to the issues most relevant and important to the company and its business. Site visits may also be valuable for directors where physical inspection is important to more fully understand the business and operations of a company.

Companies should also provide comprehensive orientation for new directors. The annual retreat could satisfy a major portion of such an orientation. The content of orientation and training programs should be reviewed to make sure that such programs enable new directors to gain an understanding of the company's business quickly, and an overview of the company's risk profile should be incorporated into that training. If necessary, additional time and content should be devoted to educating new directors so that they have a full picture of the company.

4.2.4. Shareholder and Other Constituency Relations

Shareholder relations have become increasingly complicated as a result of activist trends, and each year they require greater attention by the board. The same is true for relations with creditors, employees, suppliers, customers and communities. Recent reforms such as the advent of say on pay votes are prompting a renewed focus on the proper role of direct dialogue between boards and shareholders, as well as on the benefits and disadvantages of more open, regular lines of communication. Some activists, for example, have been seeking direct dialogue not only with companies that have had operational or other performance issues, but also more generally with companies in which they invest. Towards the beginning of 2011, Walden Asset Management suggested that, in addition to quarterly earnings results calls, companies in the United States should have an annual conference call with institutional investors to discuss corporate governance and other matters in the proxy statement for the meeting.[1]

While the board should ensure that the company has an effective shareholder relations program, management should generally be the primary caretaker of shareholder and constituent relationships. However, where shareholders request direct communications with the board, it may be desirable for directors, in appropriate circumstances and following consultation with management, to accommodate such requests. In any event, management and the directors should speak with a unified voice to avoid confusion in the company's public posture, and they should work together toward the shared goal of avoiding contentious relationships with shareholders and other constituents.

4.2.5. Long-Term Strategy

Approval of the company's long-term strategy is a key board function and an integral part of its role as business and strategic advisor to management. Strategy, business plans and the annual budget should be formulated initially by management and then developed fully in an interactive dialogue with the board, with reassessments as economic conditions develop. As part of the strategic review, the board should also consider the company's vulnerabilities and other contingencies and determine

1 See Martin Lipton and James Cole, Jr., The "Fifth Analyst Call Request" (Jan. 6, 2011), available at http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.18247.11.pdf.

an appropriate risk appetite for the company. The board should oversee major capital expenditures, acquisitions and divestitures, and other major initiatives undertaken as part of the company's overall strategic plan.

Pressures to focus unduly on short-term stock price performance present real challenges to maintaining long-term growth strategies, and the board's ability to craft a strategic vision and manage these pressures is essential to the overall best interests of the company. In addition, the board should consider all of the company's constituencies – including shareholders, employees, creditors, customers and local communities – in determining how best to position the company for long-term health, growth and value, which will inure to the benefit of all of these constituencies. An important aspect of this is determining how best to communicate clearly the company's long-term strategy, as well as appropriate milestones and measurements of progress with respect to that long-term strategy, in order to establish credibility with shareholders and other constituencies.

4.2.6. Monitoring Performance and Compliance

While the United States corporation laws literally provide that the business of the corporation is to be managed by or under the direction of the board of directors, it is clear that the board's function is not actually to manage, but rather to oversee the management of the company. The role of the board as strategic and business advisor to management as noted above is part of this oversight. The other part is monitoring the performance of the company and management, including monitoring customary economic metrics as well as compliance with laws and regulations. The board does not have a duty under US law to ferret out compliance problems, but it is required to determine that the company has implemented appropriate monitoring systems, and it must take appropriate action when it becomes aware of a problem and believes that management is not properly dealing with it. The board must be sensitive to "red flags" and "yellow flags" and should investigate as warranted. In the United States, internal reporting programs have lately been an area of particular focus in light of the potentially significant awards that the SEC will now pay to whistleblowers in certain circumstances.[1] The board should also monitor government relations policies and practices and matters affecting the public persona and reputation of the company, as well as the "tone at the top" of the company, which, as discussed above, shapes corporate culture and permeates the company's relationships with its constituents.

4.2.7. The Chairman or Lead Director Position

The principal rationale cited in support of separating the CEO and chairman positions is that separation will enhance the accountability of the CEO to the board and strengthen the board's independence from management. However, the extent to which this holds true for any given board will vary depending on the specific circumstances and dynamic of the company's leadership structure. In some cases, a cohesive board may find it is most effective when acting as a unified whole, rather than designating an independent chairman to serve as the focal point of board leadership. Furthermore, to be effective, a chairman must have legitimacy and credibility both with the other directors and with management, and in this regard, it is often useful to have a level of industry expertise, familiarity with the company's business and leadership skills that may make the CEO the best candidate for the chairman position.

Although, in the United States, activist shareholders and proxy advisors have continued to advocate for an independent chairman as a matter of universal policy, the National Association of Corporate Directors has noted an uptick in 2011 in companies who reported a combined chairman/CEO role, with 57.5% of directors surveyed

1 See Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34–64545 (May 25, 2011), available at http://sec.gov/rules/final/2011/34–64545.pdf. Whistleblowers who voluntarily provide the SEC with original information about a violation of securities laws that leads to a successful enforcement action brought by the SEC and that results in monetary sanctions exceeding $1 million will be eligible to receive bounties ranging from 10% to 30% of the total monetary sanctions collected in successful SEC and related actions.

reporting that their companies had a combined position as compared to 54.3% last year. In addition, the Wall Street Journal has reported that the number of executive chairmen of Fortune 500 companies who used to be CEOs of such companies increased to 35 in 2011, as compared to 17 in 2008.[1]

Companies that do not have an independent chairman should have a lead director or a presiding director to supplement the chairman's role by, for example: (1) presiding at board meetings at which the chairman is not present, including executive sessions of independent directors, (2) serving as a liaison between the chairman and the other independent directors, (3) approving information sent to the board, (4) approving meeting agendas and meeting schedules of the board to assure there is sufficient time for discussion of all agenda items, (5) having the ability to call meetings of the independent directors and (6) if requested by major shareholders, being available for consultation and direct communication with major shareholders where appropriate. The specific contours of a lead director's role should be determined based on the needs of the company.

Each board should determine the chairman and/or lead director structure that works best for it, bearing in mind that effective board leadership is a critical factor in any board's functioning. Whichever option is selected, US proxy rules require public companies to disclose whether they have separated the two roles, and their reasoning for the structure they have chosen. Companies that have a combined chairman/CEO position are also required to disclose whether or not they have a lead independent director, and the specific role such director plays in the leadership of the company.

4.3. Board committees

The NYSE requires a listed company to have an audit committee, a compensation committee and a nominating and governance committee, each composed solely of independent directors. The London Stock Exchange imposes

1 Joann S. Lublin, "When Former CEOs Hang Around," The Wall Street Journal, September 26, 2011.

a similar requirement with respect to audit committees and compensation committees, and the Hong Kong Stock Exchange requires an audit committee composed solely of independent directors. The Dodd-Frank Act requires certain financial companies (including all bank holding companies with total assets of US$ 10 billion or more) to have separate risk committees. The SEC requires disclosures intended to prevent "interlocking" compensation committees between public companies as well as disclosures regarding the financial expertise of audit committee members. All companies should carefully consider which directors satisfy the requirements for service on committees, and questionnaires may be used to determine and document both independence and qualifications.

The requirement that a committee be composed of only independent directors does not mean that the CEO and other executives should be excluded from all discussions or work of the committee. Indeed, it would be virtually impossible for committees to function effectively without the participation of the CEO. Compensation matters, including the CEO's compensation, as well as governance and director nomination matters, should be discussed with the CEO. While the committee is tasked with making the recommendation to the board, there is no restriction on full discussion with the CEO or on the CEO informing the board of any disagreement the CEO has with the committee.

The committees should have the authority to retain consultants and advisors. However, committees should be careful to exercise their own independent judgment and not to over-rely on consultants. A corporation's own general counsel or CFO can often provide more pertinent advice and insight than that available from outside sources.

In addition to the core committees, boards may wish to establish additional standing committees to meet ongoing governance needs appropriate to the company's particular business or industry, such as a compliance committee, a health and safety committee or a committee on social responsibility. Boards may also use special committees from time to time to deal with conflict transactions (such as a management buyout) or other major corporate events (such as shareholder litigation or a hostile takeover bid) or to address particular investigations or projects. While the use of special committees is appropriate and useful in many circumstances, such committees are also often used in situations where it might be best to keep the matter before either the full board or all of the non-executive members of the full board. Special committees can sometimes become divisive in sensitive situations, and there is a risk that the special committee and its outside advisors may take a matter in a direction that would be different than that desired by the full board.

The work of the board will be facilitated by establishing the appropriate relationship between the board as a whole and each of its committees. The board should take care to oversee the coordination and staffing of its committees to ensure that the work of the committees is neither duplicated nor ignored by the board as a whole. In a regulatory environment where audit, compensation, and nominating and governance committees must be composed solely of independent directors, and where those committees are tasked with ever increasing responsibilities, it is particularly important that boards avoid balkanization and keep the full board, as well as management, apprised of significant actions.

4.4. Board procedures

4.4.1. Executive Sessions

The NYSE requires listed companies to hold regular executive sessions of either non-management directors or independent directors and, if those sessions include directors who do not qualify as independent under the NYSE standards, the NYSE recommends that companies also schedule an executive session of independent directors at least once a year.

Each board should determine the frequency and agenda for executive sessions, rather than simply following the trend toward scheduling regular executive sessions at every board meeting. Executive sessions provide an opportunity for meaningful review of management performance and succession planning, and can serve as a safety valve to deal with problems. They should not be used as a forum for revisiting matters already considered by the full board, and should not usurp functions that are properly the province of the full board. Boards should be careful that the use of executive sessions does not have a corrosive effect on board collegiality and relations with the CEO.

4.4.2. Charters, Codes, Guidelines and Checklists

The SEC and the NYSE have imposed various requirements on corporations relating to the adoption and/or disclosure of a code of ethics, corporate governance guidelines, policies and procedures for reviewing related party transactions and charters for audit, compensation and nominating committees. There is no end to the number of recommended checklists designed to assist corporations in complying with these requirements. All of these are to some extent useful in assisting the board and committees in performing their functions and in monitoring compliance, but care should be taken to ensure that procedures and policies are tailored to the specific needs of the company and are limited to what is truly necessary and feasible to accomplish in actual practice. If a charter or checklist requires review or other action and the board or committee has not taken that action, the failure may be considered evidence of a lack of due care.

Charters and checklists should be carefully reviewed each year to prune unnecessary items and to add items that will in fact help directors in discharging their duties. One update that may be warranted in light of recent developments is an expansion of corporate compliance policies to cover not only bribery of government officials, but also bribery of private individuals. The 2011 implementation of the UK Bribery Act and increased evidence of cross-border cooperation in corruption investigations further heighten the critical need to establish and monitor global anti-corruption practices, in addition to a continued focus on the US Foreign Corrupt Practices Act (FCPA). The UK Bribery Act differs in scope from the FCPA, as it applies domestically as well as overseas and is not limited to bribery of government officials.[1] In addition, it lacks the FCPA's exception for facilitating or "grease" payments. Perhaps most significantly, the UK Bribery Act establishes a strict liability, corporate-level offense of "failing to prevent bribery" in circumstances where a person associated with the entity pays for the purpose of obtaining or retaining business or a business advantage.[2] This offense may be defended by a showing that the company "had in place adequate procedures designed to prevent persons associated with [it] from undertaking such conduct."[3]

4.4.3. Confidentiality and Communications by Directors

Confidentiality is essential for an effective board process and for the protection of the corporation and its stockholders. A board should function as a collegial body, and directors should respect the confidentiality of all discussions that take place in the boardroom. Moreover, directors generally owe a broad legal duty of confidentiality to the corporation with respect to information they learn about the corporation in the course of their duties.

Maintaining confidentiality is also essential for the protection of individual directors, since directors can be responsible for any misleading statements that are attributable to them. Even when a director believes the subject matter of his or her statements is within the public domain, it is good practice for individual directors to avoid commenting on matters concerning the corporation. A director who receives an inquiry with respect to the corporation may or may not have all of the relevant information, and his or her response could involve the corporation, as well as the director, in a disclosure violation.

Directors should respect the role of the CEO as the chief spokesperson for the corporation, and they should generally not engage in discussions with outsiders concerning corporate business unless specifically requested to do

1 Bribery Act 2010, 2010 Chapter 23 §1 (April 8, 2010); available at http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf.

2 Id. at §7.

3 Id. at §7 (2).

so by the CEO or the board. Activists have been focused on opening more direct lines of communication between shareholders and directors, and boards may determine that such dialogue is advantageous in some circumstances. Where external communication by the board is desirable, it is generally advantageous for one member of the board to be designated as the board's spokesperson. Where a board has a non-executive chairman or a lead director, under certain circumstances it may also be appropriate for that individual to speak on behalf of the corporation, particularly within the ambit of those directors' special roles. In the ordinary course, all such matters should be handled in close consultation with the CEO so as to avoid confusion in the corporation's public statements and posture.

4.4.4. Minutes

Careful and appropriate minutes should be kept of all board and committee meetings. Courts and regulators often raise questions about the amount and scope of attention that was paid to a matter when the minutes did not adequately support the recollection of the directors as to what transpired. The minutes should reflect the discussions and the time spent on significant issues, both in the meeting and prior to the meeting, and should indicate all those who were present at the meeting and the matters for which they were present or recused. Depending on the matters considered at executive sessions, it may be appropriate to have summary minutes or in some cases very extensive or even verbatim minutes of such sessions. Taking appropriate minutes is an art, and the secretary of the company and the general counsel should work with the directors (and outside counsel where appropriate) to ensure that the written record properly reflects the discussion and decisions taken by the board.

4.4.5. Board, Committee and CEO Evaluations

The NYSE requires the board and the audit, compensation and nominating and governance committees to conduct an annual self-evaluation to determine whether they are functioning effectively. The board should seek to conduct an objective assessment, with a view to continually enhancing board effectiveness. In addition, boards should take steps that will assure constituents (including regulators) that the CEO and senior management are being properly evaluated. Many consulting firms have published their recommended forms and procedures for conducting these evaluations and have established advisory services in which they meet with the board and committee members to lead them through the evaluation process. However, it is not required that the board receive outside assistance, and it is not required that multiple-choice questionnaires and/or essays be the means of evaluation. Many boards have found that a discussion with or without an outside consultant is the best way to conduct evaluations. It should be noted that documents and minutes created as part of the evaluation process are not privileged, and care should be taken to avoid damaging the collegiality of the board or creating ambiguous records that may be used in litigation against the corporation and the board.

4.4.6. Reliance on Advisors

In discharging their obligations, directors are entitled to rely on management and the advice of the company's outside advisors. The board should make sure that the company's legal counsel, both internal and external, and auditors, both internal and external, have direct access to the board or relevant board committee, if needed. However, the board should also guard against overuse of outside advisors. The parade of lawyers, accountants, consultants and auditors through board and committee meetings can have a demeaning effect. While it is salutary for boards to be well advised and outside experts may be necessary to deal with a crisis, over-reliance on experts tends to reduce boardroom collegiality, distract from the board's role as strategic advisor, and call into question who is in control – the directors or their army of advisors.

4.4.7. Director Compensation

Director compensation is one of the more difficult issues on the corporate governance agenda, as the need to appropriately compensate directors for their time and efforts must be balanced against the risk that their compensation may raise an issue as to their independence. Over the last few years, the former factor has predominated, and director pay has increased significantly as more is expected of directors in terms of time commitment, responsibility and exposure to public scrutiny and potential liability.

The compensation committee or the nominating and governance committee should determine or recommend to the board the form and amount of director compensation with appropriate benchmarking against peer companies. It is legal and appropriate for basic directors' fees to be supplemented by additional amounts to chairs of committees and to members of committees that meet more frequently or for longer periods of time, including special committees formed to review major transactions or litigation. It is also appropriate to consider the level of time commitment required outside of meetings, including for members of audit and compensation committees who must frequently review substantial written material to be properly prepared for their meetings. The SEC's proxy disclosure rules call for tabular and narrative disclosure of all director compensation, including cash fees, equity awards, and deferred and other compensation.

While there has been a current trend, encouraged by institutional shareholders, to establish stock-based compensation programs for directors, the form of such programs should be carefully considered to ensure that they do not create the wrong types of incentives for directors. In the current environment, restricted stock grants, for example, may be preferable to option grants, since stock grants will align director and shareholder interests more directly and avoid the perception that option grants may encourage directors to support more aggressive risk taking on the part of management to maximize option values. Perquisite programs and company charitable donations to organizations with which a director is affiliated should be carefully scrutinized to make sure that they do not jeopardize a director's independence or create any potential appearance of impropriety.

4.4.8. Whistle-Blower Policies

In the United States, companies are required to establish procedures to enable employees to submit concerns, confidentially and anonymously, that they might have regarding the company's accounting, internal controls or auditing matters. In addition, companies are subject to potential civil and, in some cases, criminal liability if they can be shown to have taken retaliatory action against a whistleblower who is an employee. New rules adopted by the SEC in May 2011 create significant financial incentives for whistleblower employees to report suspected securities law violations directly to the SEC, potentially circumventing company compliance programs in the process. Under the new rules, the SEC will pay awards to whistleblowers who voluntarily provide the SEC with original information about a violation of securities laws that leads to a successful enforcement action brought by the SEC and results in monetary sanctions exceeding US$ 1 million.

In recent years – and particularly following the advent of the Sarbanes-Oxley Act in 2002 – many public companies have spent considerable time and effort to enhance the effectiveness of their internal compliance systems by, for example, creating a whistleblower hotline, cultivating a "tone at the top" that places a premium on legal compliance and ethics, establishing a "zero tolerance" policy for misconduct, promptly investigating reports of misconduct, and taking appropriate preventive and remedial measures. Such programs have become an integral part of good corporate governance and are essential for companies to effectively monitor and deter misconduct that has far-reaching consequences for the company, its shareholders and other stakeholders. The active participation of employees and others who are best positioned to detect wrongdoing and alert their company to early warning signs is an essential component of an effective compliance program. Under the new whistleblower rules, maintaining these policies remains as important as ever to continue to develop and promote a robust internal compliance program.

4.4.9. Major Transactions

Board consideration of major transactions, such as acquisitions, mergers, spin-offs, investments and financings, needs to be carefully structured so that the board receives the information necessary in order to make an informed and reasoned decision. If the corporation has the internal expertise to analyze the requisite data and present it in a manner that enables directors to consider the alternatives and assess the risks and rewards, the board is fully justified in relying on the management presentation without the advice of outside experts. However, while outside experts are not always necessary, it may be highly desirable for the board to retain experienced outside advisors (134) to assist with major transactions, particularly where there are complicated financial, legal or other issues or where it is useful for the board to obtain objective outside guidance.

There is generally no need for the board to create a special committee to deal with a major transaction, even a hostile takeover, and experience shows that a major transaction not involving a specific conflict of interest is usually best addressed by the full board. Management should build a strong foundation to support a major transaction, including an appropriate due diligence investigation. Unless for documented good reasons it is not practical, the board should have ample time to consider a major transaction including, in cases of complicated transactions and agreements, by means of a two-step process with the actual approval coming only after an initial presentation and the board having had time for review and reflection.

4.4.10. Related Party Transactions

Boards are generally not comfortable with related party transactions and today most companies avoid them. However, there is nothing inherently improper about transactions between a corporation and its major shareholders, officers or directors. Such transactions can be in the best interest of a corporation and its shareholders, offering efficiencies and other benefits that might not otherwise be available. It is entirely appropriate for an informed board, on a proper record, to approve such arrangements through its disinterested directors. As a matter of compliance and best practices, however, and particularly in the current environment, the board should give careful attention to all related party transactions, and these matters should be fairly disclosed to shareholders in a timely manner. The board should monitor potential conflicts of interest of management, directors, shareholders, external advisors and other service providers, including with respect to related party transactions. In addition, full disclosure of all material related-party transactions and full compliance with proxy, periodic reporting and financial footnote disclosure requirements are essential.

Boards should revisit their method for dealing with
related party transactions and seriously consider adopt- (135)
ing a formal written policy. The board, or an appropriate committee of directors who are both independent and disinterested with respect to the transaction under consideration, should evaluate each proposed related party transaction on both an initial and an ongoing basis and assure itself that all continuing related party transactions remain in the best interest of the corporation. The board or committee should have the authority to hire such outside financial, legal and other advisors as it deems appropriate. Management should cooperate fully in this review, and provide all relevant information to the directors. Directors too should be diligent in disclosing potential conflicts of interest to their colleagues. In this area, the appearance of a conflict, or failure to disclose, can be more harmful to the corporation's interests than the transaction itself.

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In sum, in the current financial and global environment, boards of major companies face multiple challenges, which require constant attention and careful balancing. First, the business must be optimized for the benefit of all relevant stakeholders; second, the unusually volatile economic, and in many cases political, environment that may directly impact the well-being of the company demands the exercise of expert judgment, including objective consideration of key risks and vulnerabilities; third, in most jurisdictions, the legal and regulatory landscape applicable to the board's exercise of its basic fiduciary duties has become complex. A board composed of well-qualified, attentive directors engaged in an open and constructive dialogue with senior management, and among the directors themselves, can avoid the "check the box" routine that can lead to a corporate failure, and skillfully lead the corporation through these challenges in the best interests of its shareholders and other constituencies.