

# Back to School: Basics in Board Governance

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# The Importance of Good Corporate Governance

- ◆ Why is board governance important?
  - ◆ Basic system by which a corporation is governed and managed
    - ◆ Affects how a company sets and achieves corporate objectives, how it assesses and deals with risk, and how it optimizes performance
    - ◆ Adding value through efficiency, providing accountability, and limiting liability
  - ◆ No hard, fast rules, just guidelines



## What is a Board of Directors Level Decision?

- ◆ Where is the role of the Board of Directors defined?
- ◆ How does a Board of Directors act?
- ◆ What decisions should the Board of Directors make?
- ◆ How does the Board of Directors influence the Corporation?



# What is a Board of Directors Level Decision?

- ◆ The Board of Directors oversees the business of the Corporation.
  - ◆ Selecting top management
  - ◆ Succession planning
  - ◆ Providing general direction and guidance with respect to the Corporation's strategy and management's conduct of the business
- ◆ The Board exercises its powers by acting together through meetings, committees, or by written consent.



# What is a Board of Directors Level Decision?

- ◆ The Board has a legitimate role to play in the following areas:
  - ◆ Examining the markets, technologies and talents needed in the industry and helping shape Company strategy
  - ◆ Monitoring organizational results compared to plans
  - ◆ Assuring that financial results are reported with integrity
  - ◆ Managing risk
  - ◆ Evaluating executive performance and ensuring that a succession plan is in place
  - ◆ Setting policy on how to act as a Board



# What is a Board of Directors Level Decision?

- ◆ General Oversight Responsibility
  - ◆ Risk Management
  - ◆ Legal Compliance
  - ◆ Quality of Disclosure
  - ◆ Safety, Health, Environmental
  - ◆ Political Activity
  - ◆ Crisis Management



# What is a Board of Directors Level Decision?

- ◆ Risk Management
  - ◆ Oversee Corporation's programs for identifying financial, industry and business risks
  - ◆ Typical programs include:
    - ◆ Crisis management
    - ◆ Information technology security
    - ◆ Insurance arrangements
    - ◆ Compliance programs
    - ◆ Facility security
    - ◆ Protection of confidential information
    - ◆ Intellectual property



# What is a Board of Directors Level Decision?

- ◆ Legal Compliance
  - ◆ Oversee management's activities in ensuring compliance with all applicable laws
  - ◆ Corporation should have a well designed and implemented program to ensure compliance
  - ◆ Corporate policies:
    - ◆ Code of business conduct
    - ◆ Anti-discrimination and employment laws
    - ◆ Environmental, health and safety laws
    - ◆ Anti-bribery laws
    - ◆ Anti-trust and competition laws
    - ◆ Securities laws and insider trading



# What is a Board of Directors Level Decision?

- ◆ Quality of Disclosure
  - ◆ Disclosure documents must fairly present material information about the Corporation and its business, financial condition, results and prospects
  - ◆ Management is responsible for drafting disclosure documents
- ◆ Employee Safety, Health and Environmental Protection, Product Safety
- ◆ Political Activity
- ◆ Crisis Management



# Fiduciary Duties

- ◆ Director must discharge the director's duties in good faith, with the care of a prudent person, and in a manner the director reasonably believes to be in the best interests of the corporation.
- ◆ 2 Basic Duties:
  - ◆ Duty of Care
    - ◆ Act with the care that a person in a like position would reasonably believe appropriate under similar circumstances
  - ◆ Duty of Loyalty
    - ◆ Act in the best interest of the company, avoid self-interested transactions
- ◆ Business Judgment Rule
  - ◆ Offers protection to directors for decisions made in accordance with fiduciary duties



# Fiduciary Duties

- ◆ Other duties:
  - ◆ Duty of Disclosure
  - ◆ Duty of Confidentiality
  - ◆ Special Duties
    - ◆ Company for Sale: Duty of “extra care” (Revlon Duties)
      - ◆ Directors may not consider the interests of non-shareholders
      - ◆ Have a narrow duty to maximize shareholder value
    - ◆ Company in Distress: Expanding constituency
      - ◆ Upon insolvency, or entry into the “zone of insolvency,” owe fiduciary duties to the entire corporate enterprise
      - ◆ Includes creditors as well as shareholders
    - ◆ Not in lieu of other duties



# Board Confidentiality and Duty of Disclosure

- ◆ Board Confidentiality
  - ◆ Directors have a duty to keep confidential all matters involving the Corporation that have not been disclosed to the public
  - ◆ The Corporation should have a written policy
  - ◆ An individual director is not normally authorized to be a spokesperson for the Corporation and should not respond to inquiries



# Board Confidentiality and Duty of Disclosure

- ◆ **Duty of Disclosure**
  - ◆ Directors are fiduciaries and have an obligation to take reasonable steps to ensure that shareholders have all material information relevant to a shareholder decision
  - ◆ Directors have the duty to inform other directors about known information that is relevant to Board decisions



# Board Composition

- ◆ How does one join a board?
- ◆ Best Practices
  - ◆ Qualifications
    - ◆ Ethics
    - ◆ Experience and expertise
    - ◆ Conflicts
    - ◆ Time
    - ◆ Personality
  - ◆ Independence
    - ◆ Checks and balances
    - ◆ Independent judgment
    - ◆ Different viewpoints
    - ◆ Ratification
  - ◆ Size



# Board Committees

- ◆ Role of Board Committees
  - ◆ Delegation of specific oversight functions
  - ◆ Efficiency and expertise
- ◆ Authority of Board Committees
  - ◆ Can exercise the full authority of the Board, except:
    - ◆ declaring or authorizing dividends (exceptions)
    - ◆ approving, adopting or recommending any action that needs shareholder approval\*
    - ◆ filling board or board committee vacancies
    - ◆ amending articles without shareholder approval
    - ◆ adopting, amending and/or repealing the bylaws\*
    - ◆ approving any merger or share exchange
    - ◆ authorizing the issuance of stock, or determining the rights and preferences for a series of stock (exceptions)

\* Delaware law prohibits



# Board Committees

- ◆ Required?
  - ◆ Only for public companies
- ◆ Recommended?



# Board Materials and Keeping Minutes

- ◆ What materials should the Board receive?
  - ◆ Driven by agenda
  - ◆ General information that provides insight into the Company's overall effectiveness and direction
  - ◆ Not detailed operational data – do not encourage the Board to micromanage
  - ◆ Sensitive material should be handed out at the meeting



## Board Materials and Keeping Minutes

- ◆ All meetings of the Board of Directors, and Committees, should be memorialized in minutes kept by the Corporation
  - ◆ Minutes are important legal documents
  - ◆ An experienced individual with good judgment should take minutes



# Keeping Minutes

- ◆ Minutes, at a minimum, should contain:
  - ◆ The date and time of the meeting and a list of attendees
  - ◆ The topics discussed
  - ◆ Any matters put to a vote and the outcome
  - ◆ Whether any Directors or other attendees abstained or were absent from any portion
  - ◆ The material terms and rationale of any decisions approved by the Board
  - ◆ The name of the recorder
  - ◆ The time of adjournment



# Keeping Minutes

- ◆ What level of detail?
  - ◆ Reasonable minds may differ
  - ◆ Liability standard
    - ◆ Minutes should contain sufficient detail to support Director's indemnity protection
    - ◆ Enough documentation to demonstrate that the Directors acted in good faith and considered the pertinent information reasonably available to them
    - ◆ Minutes should show the deliberative process, including alternatives considered
  - ◆ Consider requiring Directors to retain any personal notes only until the official meeting minutes have been approved



## Proxy Voting and Board Meetings

- ◆ Can I give my proxy to a fellow director to vote at the board meeting?
- ◆ Easy answer: NO
- ◆ Many options available if it is difficult to get board members together for a meeting:
  - ◆ Telephonic meetings
  - ◆ Web meetings
  - ◆ Unanimous written consent



# Hot Issues Facing Boards

- ◆ Executive Compensation – Section 409A
  - ◆ Current deadline for compliance is December 31, 2008, although delay is possible
  - ◆ Employers need to ensure that all non-qualified deferred compensation arrangements are in strict compliance in order to avoid penalties



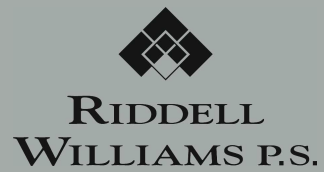
## Hot Issues Facing Boards

- ◆ **Accountability Issues – Constituency Statutes**
  - ◆ Should the Board be responsible to constituencies other than the shareholders?



## Hot Issues Facing Boards

- ◆ Difficult times call for directors to take a leadership role
- ◆ Part of risk management duties



# Questions?

Please contact us any time with additional questions.

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