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Top 11 Legal and Regulatory Tips for Boards of Directors in 2011

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The economic and regulatory landscape in 2011 poses unprecedented challenges for boards of directors of public companies. Directors face scrutiny from shareholders, Congress, regulators and the public along with continued legal, legislative and regulatory developments. Directors need to remain informed and be prepared to respond at an accelerated pace. To assist boards in preparing for and addressing the changes ahead, below are 11 legal and regulatory tips for public company boards to consider in 2011:

1. Understand the company's business and industry and be active in the strategic planning process. Beyond the director orientation provided when a director joins a board, directors should continuously expand their knowledge about the company's business and industry. They should review external information sources, such as analyst reports and industry publications. Directors also should monitor and receive regular briefings on the company's strategic planning process and understand how legal and regulatory developments may impact the company's strategic plans.

2. Engage in regular risk oversight. Increased government enforcement activity and the globalization of litigation underscore the need for boards to play an active oversight role with respect to company risk assessment and risk management processes. Board oversight of risk includes understanding the company's key risks, concurring with the company's risk appetite, understanding the programs management has established to assess and manage risks and actively monitoring the company's assessment of risks in light of these risk management programs.

3. Encourage robust compliance programs that have adequate resources. New incentives and protections for whistleblowers in the Dodd-Frank Wall Street Reform and Consumer Protection Act likely will result in an increase in whistleblowers reporting directly to the Securities and Exchange Commission and bypassing company internal procedures. At the same time, the internationalization of anti-corruption efforts continued in 2010 with numerous countries implementing anti-graft legislation and unprecedented cross-border cooperation between U.S. and foreign regulators. As a result, boards should set the "tone at the top," see that management reinforces a culture of integrity and accountability and regularly ask whether the company's compliance programs are actually effective at preventing and detecting violations of law. Boards similarly should see that management has implemented compliance programs responsive to a wide-range of risks and inquire as to whether the company provides sufficient training regarding the company's compliance programs, including its code of conduct.

4. Engage in ongoing succession planning. The recent departures of several high-profile chief executive officers and shareholder focus on leadership development underscore the need for boards to have in place and at least annually review both an emergency and a long-term chief executive officer succession plan. Boards also should inquire about succession plans for the company's other senior executive officers, emphasize the importance of management development of potential leaders and get to know potential internal chief executive officer successors.

5. Focus on shareholder engagement early and often. Institutional investors continue to push for greater engagement with directors. In addition, the Dodd-Frank Act, with its requirement for a shareholder advisory vote on compensation (so-called "say on pay"), puts more power in the hands of shareholders. As a result, boards should be attentive to their companies' engagement with shareholders. More than in the past, directors may need to play a greater role in reaching out to shareholders. Initiating dialogue before a major issue arises helps build relationships that can be critical in the future.

6. Be attuned to evolving executive compensation practices. Boards and compensation committees should evaluate their companies' compensation practices and policies in light of new requirements to hold a say on pay vote in 2011. They also should be aware of the evolving executive compensation practices that institutional investors and proxy advisory firms frown upon (such as tax gross-ups) and those that they advocate, such as "hold-through-retirement" provisions.

7. Be prepared for contentious director elections. Proxy advisory firms increasingly make negative voting recommendations on individual director nominees as a result of disfavored policy decisions like adoption of shareholder rights plans (so-called poison pills) without shareholder approval. At the same time, boards continue to face campaigns by activist investors seeking minority board representation (so-called "short-slate" campaigns), and there have been numerous recent high profile takeover attempts. This summer, a court ruling is expected on a challenge to the SEC's controversial "proxy access" rules, which would allow shareholders to include their director nominees in company proxy materials in certain situations.

8. Consider the board's composition and leadership structure. SEC disclosure requirements implemented in 2010 regarding a director nominee's qualifications and experience to serve on the board and board diversity reinforce the need for nominating committees to engage in a meaningful annual assessment of board needs and evaluations of directors. Boards also face rising shareholder pressure to increase board diversity – for example, women hold only 15.7% of board seats at Fortune 500 companies. Moreover, the recent appointments of independent board chairmen at several large public companies undergoing chief executive officer transitions reinforce the need to regularly assess the board's leadership structure.

9. Expect greater scrutiny of director relationships. Institutional investors, and the proxy advisory firms on which they rely, are concerned about directors serving on too many boards (so-called "over-boarding"). In addition, interlocking director relationships are restricted by Clayton Act rules and are the subject of shareholder criticism. The Dodd-Frank Act will expand this scrutiny by, for example, requiring the SEC to adopt heightened independence standards for compensation committee members similar to those currently applicable to audit committees.

10. Pay attention to the details when considering transformational transactions. The recent uptick in shareholder litigation directed at boards approving mergers and acquisitions reinforces the

need for boards to exercise independent judgment when considering material transactions, see that appropriate processes are followed and documented, and select experienced and (in some situations) independent advisers.

11. Be an active learner. Directors face significant challenges in keeping abreast of the ever-changing business, legal and regulatory landscape. They should look both to management and outside sources for information on key developments. Among developments to monitor include rules implementing the Dodd-Frank Act, possible U.S. corporate tax reform, the movement towards international financial reporting standards, increased shareholder focus on sustainability and data privacy issues.

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