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Navigating Your Board Through the Straits of Economic Peril

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Association of Corporate Counsel
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Introductions

- Moderator:

Robert F. Roach,
NYU University Compliance Officer

- Panelists:

Steven R. Barth, Partner Foley & Lardner
Lee Cusenbary, General Counsel for Mission
Pharmaceutical Company in San Antonio, Texas

Overview of Today's Webcast by Robert F. Roach

Priority One – Risk Oversight

- Is the world flat or round?
- There is no “normal” any more.

Priority One – Risk Oversight

- In the Boardroom, Audit Committee, Compensation Committee and Governance Committee
 - Renewed and refocused Enterprise Risk Assessment
 - Company
 - Segments / divisions / subsidiaries
 - Industry
 - Create Standing Board Risk Management Committee
 - Or, delegate to Audit Committee / Governance Committee
 - Create “Chief Risk Officer”

Priority One – Risk Oversight

- In the Boardroom, Audit Committee, Compensation Committee and Governance Committee
 - Close coordination with risk management officer, general counsel and internal audit
 - Rating agencies
 - Equity analysts
 - Independent financial advisors
 - Independent outside counsel
 - Independent industry expert
 - Remember the lessons of *Caremark*
 - Visibility to see early warning signs / pulse of the company and industry
 - Attention to balance sheet soundness / contingent liabilities

Priority One – Risk Oversight

- Enhanced Risk Management and Disclosure / Internal Controls
 - Risk management officer coordination
 - Disclosure committee coordination
 - Internal audit coordination
 - Obtain / review independent advice / views
 - Independent counsel
 - Independent financial advisor
 - Rating agencies
 - Equity analysts
 - Industry experts

Priority One – Risk Oversight

- Enhanced Risk Management and Disclosure / Internal Controls
 - Disclosure controls review
 - Internal controls review
 - Accounting policies/transparency review
 - Mark-to-market review
 - Off balance sheet risks review
 - Contingent liability review
 - Judgmental reserves
 - Tax
 - Litigation
 - Environmental

CEO and Management Team Evaluation and Succession Planning

- Do you have the right “team” to weather the storm?
- “Tone at the top” more important than ever
- Emphasis on integrity, ethics and transparency
- Communications skills
 - External
 - Internal

Liquidity/Credit Facilities Assessments

- Liquidity maximization/preservation
 - Access to credit and liquidity sources
 - Prudent uses of liquidity and capital resources
 - Matching of assets and liabilities (short-term funding for long-term assets)
- Credit facility analysis/covenant default avoidance
 - Default trigger analysis and stress testing
 - Avoid “voluntary” renegotiations

Liquidity/Credit Facilities Assessments

- Dividend policy
- Corporate stock repurchase program
- Capital expenditures
- Acquisitions / divestitures
- Investment policies

Cost Containment Strategies

- Rings-of-fire defense (Plans A, B and C already in place)
- SG&A analysis
- COGS analysis
- Personnel analysis
- Facilities analysis

Executive Compensation Review

- Evaluate whether executive compensation philosophy and plans “encourage unnecessary or excessive risk that could threaten the value of the company”
 - Assess compensation philosophy and plans against Company’s enterprise risk management framework
 - Evaluate bonus plans/equity incentive plans
 - Are financial performance goals balanced between long-term and short-term performance
 - Are targets easy or hard
 - What risks are encouraged

Executive Compensation Review

- What level of non-performance financial goals are tied to corporate integrity or risk mitigation
- How much discretion is inherent in bonus plans (or strictly formula driven)
- Is equity compensation component tied to long-term shareholder value creation
 - What % of total comp
 - Performance based or time based
 - Options / SARs now considered “bad” (especially if time-based vesting only)
 - Hold-til-retirement (HTR)
 - No repricing of underwater options/SARs
 - Equity grant burn rate

Executive Compensation Review

- Long-term “at risk” stock ownership requirements
 - What “counts” towards ownership guidelines (options, SARs, restricted stock, performance shares)
 - Policy against using company stock as collateral
 - Policy against hedging
- Compensation consultant engagement terms/oversight
- Compensation peer group
- CEO compensation to average worker compensation multiple smell test
- Internal pay disparity between CEO and other NEOs

Executive Compensation Review

- Pension plans (SERP) (especially sweeteners like extra service years or inclusion of variable pay)
- Executive employment contract review
 - A new focus on the definition of “cause”
 - Automatic renewals
- Claw backs

Executive Compensation Review

- Hot Button Executive Compensation Issues
 - “Say-on-pay”
 - Golden parachutes
 - Especially tax gross-ups
 - Single triggers
 - New focus on the definition of “change in control”
 - Golden coffins
 - Pay-for-failure severance arrangements

Executive Compensation Review

- Perks (planes, trains and automobiles)
- Rule 10b5-1 selling plans
- Rock star CEO contracts
- Compensation in a down market – the scrutiny will be more intense than ever

Strategic Planning

- Long-term fundamentals vs. quarterly expectations
- “Smart growth”
- Balance sheet integrity
- Conservative capitalization

Shareholder Communication

- Proactive
 - Website
 - Roadshows
 - Webcasted investor conferences / post investor presentations
 - Shareholder “council”
 - Shareholder “blogs”
- Transparent
- Responses to shareholder initiatives/proposals/criticisms
- Earnings guidance
- A new era of MD&A

Hot Button Corporate Governance Issues

- Majority voting
- Separate chairman
- Staggered board
- Social responsibility
- Poison pills
- Say on pay
- Proxy access

Questions?



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