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## The Board Leadership Advisor: Practical Advice for Troubling Times—What Boards Should be Doing Right Now

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Public company boards have faced unprecedented challenges in recent years, and it appears that they will be subjected to new burdens over the coming months. Just as the failure of Penn Central in 1970 and the collapses of Enron and WorldCom earlier this decade led to fundamental changes in the U.S. corporate governance model, the corporate failures of 2008 are resulting in significant changes in the way that boards, management and shareholders govern U.S. public companies. Moreover, Congress, regulatory agencies and the stock exchanges are currently reviewing the U.S. corporate governance model and considering numerous proposals that would impose new and significant requirements on public company boards. Accordingly, as much as corporate boards have been challenged in recent times, they must be prepared for even more changes going forward.

Corporate boards are reacting to these challenges in a variety of ways. Boards are working harder, they are evaluating and prioritizing the issues that require their attention, and new best practices are beginning to emerge. Many directors and other corporate stakeholders are hopeful that if boards are successful in improving their own practices, they may be able to avoid another substantial re-regulation of public companies, in the style of the Sarbanes-Oxley Act of 2002.

In June 2008, King & Spalding and Tapestry Networks brought together a group of lead directors, presiding directors and non-executive chairmen from many of America's leading companies to create the Lead Director Network (the LDN). The LDN conducts private discussions about how to improve the performance of the members' corporations and earn the trust of their shareholders through more effective board leadership. The LDN held its first five meetings during the darkest days of the financial crisis, from July 2008 through November 2009. In June 2009, King & Spalding also formed the Southeast Board Leadership Network and this group has held its first two meetings. Together, the meetings of these networks



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have provided King & Spalding with many unique insights into how directors of some of the nation's preeminent companies are addressing the challenges of the financial crisis.

Based on insights afforded by meetings with board leaders and other corporate governance initiatives undertaken by King & Spalding, this memorandum highlights some of the important actions that public company boards should consider in an effort to address the new realities of corporate governance. Beyond the changes that are affecting corporate governance, public companies are likely to face additional significant regulatory changes that will affect matters such as their approaches to healthcare and sustainability, the manner in which they are taxed and their relations with employees. In future advisories for public company directors, we will address these types of subjects and also provide updates on developments in corporate governance.

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1. **Board Involvement in Corporate Strategy.** Over the past year, companies have been forced to adapt their corporate strategies to rapidly changing and unforeseen circumstances. Strategy has become a far more dynamic undertaking than ever before, as external events have caused companies and their boards to review and adapt their strategies on a continuous basis. There has been an increased focus on aligning all corporate functions with the company's strategy, which has resulted in the board's involvement in strategic planning becoming an ongoing and iterative process, rather than an episodic or periodic process. In response to these developments, boards should:

- **Corporate Functions Supporting Strategy:** Consider how various corporate functions support the company's strategy. The company's approaches to items such as financial and cash management, human resources, executive compensation, board composition, and risk management should all be measured against the company's strategy. To the extent that the company's strategy has changed over the past year, boards should consider whether corporate functions have been appropriately reshaped to support the execution of that strategy.
- **Board Input into Corporate Strategy:** Confirm that the board has effective processes to provide ongoing input into the company's strategy, through regular briefings and discussions with senior management, and opportunities to set the agenda for board meetings.

*For additional information on this topic, Board members may wish to review "ViewPoints: The Board's Role in Corporate Strategy" and "In Crisis or Calm: The Role of the Lead Director in Corporate Strategy."<sup>1</sup>*

2. **Risk Management Oversight.** Boards are placing an increased emphasis on risk management in response to accusations that boards "missed" the risks that led to or exacerbated the financial crisis and corporate failures of 2008. While the execution of the risk management function remains the responsibility of management, boards must be vigilant in overseeing this function. Moreover, there have



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been proposals calling for board level, stand-alone risk committees as well as for increased disclosure relating to how board leadership structure and compensation policies address risk. In response to these developments, boards should:

- **Consistent Views of Risk:** Determine how individual directors and members of senior management would rank the most important risks the company is facing and then review any discrepancies between the lists. The board should also ensure that it has effectively communicated to management its view of the company’s “risk appetite,” and whether the company’s actual risk profile adheres to the board’s risk appetite.
- **Board’s Involvement in Risk Management:** Evaluate whether the board is appropriately engaged in risk management, in view of the role of the full board, the role of the audit committee, and the role of other standing or special committees focusing specifically on risk oversight. The board should also determine whether establishing a risk committee is appropriate for the company and whether the roles or composition of any of the other committees should be changed in light of this determination.
- **Risk Spectrum:** Determine whether the board is striking the right balance in focusing on more traditional risks (such as financial, accounting and legal risks) and other less conventional risks that may threaten the company. The board should also evaluate whether it is effective in its oversight of technical or quantitative risk management processes, as well as its assessment of risk through other less analytical approaches (for example, high level board discussions focusing on major external events and forces that could adversely affect the company). In addition to using risk management “defensively” to protect the company, the board should consider whether the company is properly positioned to take risks for the sake of growth and development.
- **Role of Key Corporate Functions:** Just as the board considers how key corporate functions support its strategy (as described above), the board should consider how major corporate functions support its approach to risk management. This determination may be especially pertinent as new, proposed SEC rules would require disclosure of how executive compensation and board leadership may affect the company’s risk management.
- **Organizational Structure and Reporting; Role of Internal Audit:** Consider whether the company’s internal structure and reporting lines support effective risk management. For example, the reporting lines to and from the chief risk officer and the director of internal audit is one area that should be scrutinized. In addition, the board should determine whether the company’s internal audit function plays the right role in risk management or whether this function should be upgraded.
- **Proper Corporate Culture:** Ensure that risk management is appropriately embedded in corporate culture, starting in the boardroom and extending throughout the company. While the “tone at the top” is appropriately emphasized, the “tone at the bottom” is often of equal importance to risk management practices.



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*For additional information on this topic, Board members may wish to review “ViewPoints: The Board’s Role in Risk Management”, “The Board’s Role In Risk Management — Lessons Learned From The Financial Crisis” and “Boards of Directors and Risk Committees.”<sup>2</sup>*

3. **Fraud Detection and Prevention; FCPA Compliance.** Companies expect to see increased levels of fraud in periods of deep recession. Officers may be under increased pressure to meet operational and financial targets, employees often have difficulties with their personal finances, and internal controls and safeguards may have been weakened by budget cuts. While observed levels of corporate fraud have risen relatively little in 2009, the combination of financial pressure and temptation are virtually certain to have produced ongoing but as yet undetected fraud. With the increased importance of operations in developing markets, corporate executives are also concerned about a possible rise in violations of the Foreign Corrupt Practices Act (the FCPA), while observers also expect an increase in enforcement actions and fines under the FCPA and under analogous foreign anti-corruption regimes. In response to these situations, boards should:
- **Evaluate Current Programs:** Evaluate the quality of current anti-fraud and anti-corruption programs and consider whether changes in the company or the current business environment necessitate additional or improved programs. The board should ensure that the company maintains written anti-fraud and anti-corruption policies that are clear and up to date, and that any such policies are the subject of periodic training and strict, well-documented enforcement efforts.
  - **Consider Appointing Senior Officer as “Czar”:** Consider appointing a senior officer (e.g., general counsel or director of internal audit) as the anti-fraud / anti-corruption compliance czar, with such officer having direct access to the board or an appropriate board committee. If the company has a czar in place, the board should confirm that such officer is performing well, with the right reporting structure, both above and below the czar.
  - **Monitor Pending Legislation:** If the company provides any type of financing—whether to consumers or other businesses—the board should pay close attention to financial regulation bills pending in Congress, as there will likely be new regulations governing the terms and safety of financial products. Congress may create new agencies, with very broad and loosely defined powers and missions, coupled with new regulatory and reporting regimes. Companies should be mindful of the fact that any mishap resulting from any such new regulations or regimes may become a new category of “fraud.”
  - **Consider the Relationship between Anti-Fraud / Anti-Corruption Programs and Executive Compensation Program:** As with other key corporate functions, the board should consider including anti-fraud and anti-corruption compliance metrics in compensation determinations for senior management.



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4. **Communications with the CEO and Senior Management; Succession Planning.** Directors agree that the relationship between the board and the CEO is of vital importance to any public company. Many board leaders report that, over the past year, they have conferred with their CEOs almost daily. In many instances, the relationship between the board and the CEO has deteriorated quickly, with the financial crisis precipitating an unprecedented number of departures by senior executive officers. Although departures of many senior officers have come unexpectedly, many board members are not completely satisfied with their work in succession planning. Accordingly, boards should:
- **Communications with CEO:** Evaluate whether the board has effective mechanisms in place for developing the CEO, providing the CEO with ongoing feedback and communicating expectations regarding the company's performance. In addition, the board should consider how board members communicate with the CEO and members of senior management between board meetings, and ensure that it provides meaningful counsel without interfering with management's decision making.
  - **Proper Succession Planning:** Consider whether the board has implemented effective succession planning, including succession plans for both emergencies and for the company's long-term senior management. The board should consider how deep and how wide succession planning should be for various functions, and determine whether the company is likely to have suitable internal candidates for senior management positions or whether some form of external search may be appropriate.
5. **Information About the Company's Business.** Directors believe that one of the most important ways in which they can improve their performance is by receiving better information about their companies. Changing business and economic conditions have made it even more critical for directors to receive timely information, with a particular focus on strategy and risks. Having good access to management and receiving high quality information are vital channels that enable directors to carry out their duties. In view of these factors, directors should:
- **Understand Business Model and Practices:** Be certain that directors fully understand the company and how it may have changed over the past year, including matters such as the company's business model, long-term strategy, risk profile, competitive position and industry.
  - **Review Current Pool of Information:** Directors should ask themselves whether there are additional or different types of information that they should be receiving—either from senior management or outside advisors—in order to carry out their duties effectively. Additional resources may be especially important in considering large transactions or in crisis situations.
  - **Access to Management:** Consider whether directors have open access to employees at appropriate levels of the company and whether they are using this access effectively.

*For additional information on this topic, Board members may wish to review "Beacon in the Storm: Responsibilities of the Lead Director in M&A Transactions."<sup>3</sup>*



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6. **Executive Compensation.** Misalignment of incentives for senior management of financial institutions has been cited as one of the principal causes of the financial crisis. As a result, the executive compensation practices of all public companies are being scrutinized with increased rigor. The media and Congress are paying unprecedented attention to compensation practices at public companies, as executives have faced pay cuts and “clawbacks” that could not have been predicted. Boards face increasing challenges in setting executive compensation, as corporate performance may be below expectations, commonly-used pay practices have come under scrutiny and market volatility has rendered the use of equity compensation plans a hazardous endeavor. In view of these pressures, boards should:
- **Trends in Executive Compensation:** Understand the broad trends that are affecting the structure of executive compensation—for example, the rebalancing between amounts of guaranteed compensation and “at risk” compensation, and the use of full value equity awards rather than stock options—and consider how the company’s compensation practices measure up against favored and disfavored approaches.
  - **Say-On-Pay:** Consider how the company’s current compensation practices would fare in a say-on-pay vote, how the company might achieve a better result and whether the company should voluntarily adopt a say-on-pay policy, even in advance of these votes becoming mandatory. The board may also want to consider alternatives to say-on-pay, such as direct engagement with institutional stockholders concerning the company’s compensation programs.
  - **Disfavored (and Favored) Pay Policies:** Determine whether the company utilizes any of the compensation practices that have been found most troublesome by investors and regulators—for example, gross-ups for federal excise taxes on change-of-control payments or the use of certain perquisites—and consider whether these practices should be amended or eliminated. In addition, the board should consider the benefits of adopting new pay practices that may be favored by investors and whether the company should adopt new spending policies, covering perks and other expenditures for executive officers.
  - **Relationship to Risk:** In preparing for rules likely to be adopted by the SEC, directors should consider what approach the board (or the compensation committee) would use to determine how the company’s executive compensation policies may expose the company to unwarranted risks. The board should also determine whether the company has incentive practices that can lead to excessive or inappropriate risk taking by officers or employees.
  - **Tools for Reviewing Executive Compensation:** In addition to reviewing a “tally sheet” on annual compensation for senior officers, directors should consider whether the compensation committee should be using newer types of tools to get a perspective on executive compensation. For example, a “wealth accumulation analysis” is one such tool that may allow the board to consider the wealth senior officers have accumulated over their careers with the company.



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7. **Focus on Election of Directors and Shareholder Voting.** Several factors are likely to increase the influence of institutional investors and proxy advisory firms in upcoming shareholder votes, with a corresponding loss of certainty that board nominees and company proposals will receive traditional levels of support. Factors increasing the power of institutional investors include the loss of broker discretionary voting, increased company adoption of majority voting and the use of voting by e-proxies. In response to these developments, directors should:
- **Understanding How Shareholders Will Vote:** Understand the composition of the company’s shareholder base, and how voting for directors may be affected by recent and pending regulatory changes. As part of this analysis, directors should evaluate whether the company’s shareholders might be expected to use “proxy access,” if such a proposal were adopted by the SEC.
  - **Understanding Broader Issues in the Shareholder Base:** In addition to assessing how shareholders are likely to vote in director elections, boards should understand broader issues that may be of concern to shareholders. Key issues to consider as part of this analysis include whether the largest shareholders fully understand and support the company’s strategy, and whether there are hedge funds or other activists that may raise particular issues in the near-term.
  - **“Withhold” Campaigns:** Consider the factors that led to “withhold” campaigns for public companies during the 2009 proxy season and determine whether the board or particular directors could be subject to such campaigns. For example, related-party transactions with directors, poor meeting attendance by directors or specific pay practices were often factors that led to “withhold” campaigns. If the board concludes that its nominees could be at risk of a withhold campaign in upcoming elections, it should devise a plan to increase the likelihood of its nominees being elected with strong support.
8. **Board Engagement in Communications and Investor Relations.** Looking beyond director elections and shareholder voting, it has become increasingly important for boards to understand the perspectives of shareholders and to provide them with meaningful information about the company. Understanding the company’s shareholder base may significantly influence board decision-making—for example, by influencing approaches to executive compensation and corporate governance matters. Ensuring that shareholders understand the company’s strategy and performance, and have visibility into board decision-making, may earn the support of shareholders. Companies are using new types of events and media to provide information to shareholders and independent directors are increasingly taking an important role in these communications. In view of these trends, boards should:
- **Knowledge of Shareholder Base:** Understand the company’s dialog with shareholders and ensure that investors have a good understanding of the company’s business model and strategy. If the board is unsure whether shareholders have a good grasp of the company’s business and strategy, it should evaluate whether changes to its disclosure practices can increase shareholder understanding.



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- Communications Strategy; Channels and Events: Consider whether there are useful roles for board leaders or individual directors to play in communicating with investors and other members of the public. Moreover, boards should evaluate whether the company is using the appropriate range of media and events to communicate with investors, or whether new channels should be developed.
9. **Board Leadership.** Historically, the prevailing board leadership model of U.S. public companies has had the board led by a combined CEO/Chairman, whereas many non-U.S. models separate the CEO and Chairman roles. Over the past decade, however, more U.S. boards have appointed an independent Chairman, and boards that have not done so have increasingly appointed a leader for their independent directors (often called a “lead” or “presiding” director). Recent corporate failures have led to increased demands by some for the separation of the CEO and Chairman roles or the appointment of other independent board leaders. In view of these concerns, boards should:
- Review Board Leadership Structure: For companies with a combined CEO/Chairman, the independent directors should evaluate whether the appointment of a “lead” or “presiding” director would contribute to board performance or whether the company would benefit by having an independent board chairman. Boards that have appointed an independent Chairman or a lead director should consider whether the responsibilities of the position should be expanded. Regardless of titles, directors should consider who would provide leadership for the board—or even the company—in a crisis situation.
  - Rationale for Board Leadership Structure: Consider how the board will describe and defend its leadership structure, whether in response to SEC disclosure requirements or in response to inquiries from investors and other stakeholders.
  - Continuous Board Improvement: Regardless of the formal board leadership structure, independent directors should ensure that individual directors are taking responsibility for matters such as the development of a high performing board, building a productive relationship with senior management, supporting effective communication with shareholders and supporting management in any crisis scenario.

*For additional information on this topic, Board members may wish to review “ViewPoints: The Role and Value of the Lead Director,” “The Changing Role of the Lead Director,” “The Evolution of the U.S. Public Company Governance Model” and “Corporate Governance After the Financial Fallout.”<sup>4</sup>*

10. **Improving Board Performance; Board Development and Management.** Regulators, the media and investors have placed a portion of the blame for the financial crisis on poor corporate governance, and particularly poor performance by public company boards. In addition to shoring up areas that have received particular attention—for example, shortcomings in the oversight of risk management or in structuring executive compensation—many boards are considering how they can improve their performance, more generally. In view of SEC proposals for enhanced disclosure, there is increased



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scrutiny on the composition of boards and the qualifications of individual directors. In view of these trends, corporate boards should:

- **Board Composition and Individual Qualifications:** Evaluate board and committee composition, in terms of setting the right cultural tone for the company, alignment with corporate strategy and risk management, and having the most important skill sets, appropriate diversity, and the right combination of newer and long-serving directors. In addition, boards should consider how the company will describe the qualifications of each director in its 2010 proxy statement.
- **Performance Processes and Metrics:** Review the processes and metrics the board uses to assess its performance and the performance of individual directors. The board should also determine how board members, senior management and outside advisors may contribute to improved board performance.
- **Director Education:** Consider the types of educational programs that might be beneficial for directors. For example, programs covering changes in corporate governance or the capital markets or programs focusing on the company's business, industry and markets may be especially pertinent in the current environment.
- **Executive Sessions:** Discuss whether the independent directors are using executive sessions effectively, for example, by having sessions before and after meetings of the full board, having the right persons present for various portions of the session and effectively communicating the key points of executive sessions to senior management.
- **Board Compensation Practices:** Consider whether board compensation practices are appropriate, in view of factors such as changes in the structure of executive compensation, the increased workloads and time commitments undertaken by directors, public backlash against excessive executive compensation and volatile conditions in the equity markets.

*For additional information on this topic, Board members may wish to review "Key Issues in Board Self-Evaluations."*<sup>5</sup>

11. **Directors and Officers (D&O) Insurance.** The question of adequacy of a company's directors and officers insurance has emerged as an important issue in the face of recent court decisions holding directors personally liable for company losses where insurance was inadequate. Earlier this year, in a settlement that surpassed the amounts paid in the WorldCom and Enron cases, a federal court preliminarily approved a \$55.95 million settlement, the largest ever-recorded payment to resolve securities claims against outside directors. In view of these developments, boards should:

- **D&O Insurance Policy Review:** Undertake a comprehensive review of the company's D&O insurance to confirm that the company and its directors are adequately protected in the worsening litigation and regulatory environment, and that policies include favorable terms that certain carriers



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are willing to include in D&O policies. In addition, it will be important to understand any “gaps” in coverage, in the context of overall corporate strategy. Prior to any major corporate transactions or event that may result in stock price fluctuation, it will be prudent to review relevant coverage issues.

- **Severability Provisions:** Consider negotiating with insurers for “severability” provisions to carve back coverage for outside directors in the event officer conduct triggers fraud, criminal conduct or illegal profit exclusions. These exclusions should include a “final adjudication” requirement, ensuring they are not triggered until after a court determines that insured persons engaged in the excluded conduct.
- **DIC Coverage:** Consider “non-rescindable” Side-A only excess “difference in conditions” coverage to ensure that directors have sufficient insurance in the event indemnification is unavailable from the company, the underlying limits are eroded by company claims or the underlying insurers deny coverage to the directors.

*For additional information on this topic, Board members may wish to review “Client Alert: Is Your D&O Coverage Adequate.”<sup>6</sup>*

12. **Legislative and Regulatory Developments.** From healthcare and climate change legislation, to new rules that will affect organized labor and corporate taxation, public companies are facing a wave of potential legislative and regulatory actions that may reshape many facets of the American business environment. In addition to these items that will affect how they do business, public companies are also likely to face significant changes that will affect their corporate governance practices. In view of this rapidly changing regulatory environment, boards should:

- **Appropriate Board Updates; Contingency Planning:** Be certain that directors are receiving timely and thorough updates on pending legislative and regulatory developments, and that the company is developing contingency plans for changes that seem most likely. The board should be prepared to act quickly in response to changes that may become effective on short notice.
- **Cross-Corporate Alignment:** Ensure that the board is aligned with senior management on key policy issues and that communications by senior officers and directors with shareholders and other members of the public accurately reflect company positions, rather than personal sentiments.
- **Legislative Interaction; Ambassadors for the Company:** Consider whether there are circumstances in which it may be useful for board members to engage with legislators or regulators on issues that are most critical to the company. Even in the absence of such direct engagement with lawmakers, directors should consider how they may act as ambassadors for their own companies and promote the interests of public company boards by taking more visible public roles on key policy issues.

*For additional information on this topic, Board members may wish to review “ViewPoints: Responding to the Changing Regulatory and Legislative Environments.”<sup>7</sup>*



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<sup>1</sup> Available at: [http://www.kslaw.com/library/publication/LDN\\_ViewPoints\\_2.pdf](http://www.kslaw.com/library/publication/LDN_ViewPoints_2.pdf)  
<http://www.kslaw.com/Library/publication/NACDDirectorship.pdf>

<sup>2</sup> Available at: [http://www.kslaw.com/library/publication/LDN\\_ViewPoints\\_4.pdf](http://www.kslaw.com/library/publication/LDN_ViewPoints_4.pdf)  
<http://www.metrocorpcounsel.com/pdf/2009/September/18.pdf>  
Bates, "Boards of Directors and Risk Committees", *The Corporate Governance Advisor*, November/December 2009

<sup>3</sup> Available at: <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202426145703&slreturn=1&hbxlogin=1>

<sup>4</sup> Available at: [http://www.kslaw.com/library/pdf/LDN\\_ViewPoints\\_1.pdf](http://www.kslaw.com/library/pdf/LDN_ViewPoints_1.pdf)  
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<http://www.metrocorpcounsel.com/current.php?artType=view&artMonth=May&artYear=2009&EntryNo=9652>

<sup>5</sup> Available at: <http://www.metrocorpcounsel.com/pdf/2008/December/32.pdf>

<sup>6</sup> Available at: <http://www.kslaw.com/Library/publication/ca082709.pdf>

<sup>7</sup> Available at: [http://www.kslaw.com/library/publication/LDN\\_ViewPoints\\_3.pdf](http://www.kslaw.com/library/publication/LDN_ViewPoints_3.pdf)

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