

## WSGR ALERT

JANUARY 2011

# TENSIONS IN THE BOARDROOM IN 2011: A PERSPECTIVE FROM WILSON SONSINI GOODRICH & ROSATI

The report of the New York Stock Exchange Commission on Corporate Governance issued last year stated it succinctly: "The first decade of the 21st century has seen more changes in the governance landscape than at any time since perhaps the Great Depression."<sup>1</sup> In a recent General Counsel Series presentation, firm chairman Larry Sonsini noted that as we look back on 2010 and move forward into 2011, there appear to be seven tensions that boards of directors of public companies in the United States will need to continue to address:

- **The need for directors to be sensitive to shareholder activism, to the vocal minority, and to the agenda of certain institutional shareholders.** Recent reforms such as majority voting in director elections and amendments to NYSE Rule 452 to eliminate the ability of brokers to vote shares without instruction in uncontested elections of directors have served to assist shareholder activist agendas, including in the following areas:
  - Short-term performance and returns
  - Attention to the balance sheet and asset management
  - Evaluation of strategic alternatives
  - Executive compensation
  - Decline of defensive measures
- **Tension in the boardroom between long-term value creation and short-term value creation or short-term returns.** The first corporate governance

principle set forth in the report states: "The board's fundamental objective should be to build long-term sustainable growth in shareholder value for the corporation, and the board is accountable to shareholders for its performance in achieving this objective." Excessive focus on short-term returns can lead to loss of entrepreneurial risk, potentially to the detriment of long-term value creation.

- **Greater emphasis on shareholder communication and shareholder contact.** Shareholders are seeking more transparency with respect to companies' long-term strategic plans and increased access to the lead directors. At the same time, directors seem to be more involved in director elections, including in "roadshows" to institutional investors, to counter the increasing influence of proxy advisory firms.
- **Tension regarding when and how to use structural defensive measures.** The last decade has seen a decline in the adoption of poison pills, fewer staggered boards, and more shareholder access to proxy solicitation. Boards need the ability, however, to use defensive measures when appropriate and in response to real "threats" to seeking long-term value.
- **The need to mold executive compensation to enterprise performance.** Compensation committees will continue to be under

greater scrutiny, and new "say-on-pay" requirements run the risk of permitting shareholder activists to substitute their judgment for that of the board's. The danger that boards face in this area is the temptation for less risk taking, more short-termism, and a "one shoe fits all" mentality. In addition, rules to be adopted this year requiring adoption of company policies to "claw back" executive compensation will create further tension between management and the board.

- **The need to bring management more into corporate governance.** As set forth in the report, management has a critical role in governance, including: providing information to the board; communicating the company's long-term plan; and ensuring a high degree of integrity and ethics in the organization. In addition, management should play a significant role in establishing compensation models to align with appropriate risk taking and risk management. There needs to be a "constructive tension" between the board and management, however, as the two groups work together to build long-term sustainable growth in shareholder value for the corporation.
- **The federalization of corporate law and board fiduciary law and board fiduciary duties—and a "one shoe fits all" mentality.** The Dodd-Frank Act is merely the latest example of the

<sup>1</sup> The report of the New York Stock Exchange Commission on Corporate Governance is available at <http://www.nyse.com/pdfs/CCGReport.pdf>.

*Continued on page 2...*

## ***Tensions in the Boardroom in 2011 . . .***

*Continued from page 1...*

federal government extending its reach into the boardroom. If this trend continues, it could lead to a loss of flexibility and a "one shoe fits all" mentality that dilutes creative board decision making. We continue to believe that state corporate law principles (e.g., Delaware) tend to work best.

Larry W. Sonsini

Larry Sonsini is chairman of the New York Stock Exchange's Commission on Corporate Governance, which was formed in 2009 and issued its final report in fall 2010.



Wilson Sonsini Goodrich & Rosati  
PROFESSIONAL CORPORATION

This WSGR Alert was sent to our clients and interested parties via email on January 10, 2011. To receive future WSGR Alerts and newsletters via email, please contact

Marketing at [wsgr\\_resource@wsgr.com](mailto:wsgr_resource@wsgr.com)  
and ask to be added to our mailing list.

This communication is provided for your information only and is not intended to constitute professional advice as to any particular situation. We would be pleased to provide you with specific advice about particular situations, if desired. Do not hesitate to contact us.

650 Page Mill Road  
Palo Alto, CA 94304-1050  
Tel: (650) 493-9300 Fax: (650) 493-6811  
email: [wsgr\\_resource@wsgr.com](mailto:wsgr_resource@wsgr.com)

[www.wsgr.com](http://www.wsgr.com)

© 2011 Wilson Sonsini Goodrich & Rosati,  
Professional Corporation  
All rights reserved.