

NACD Event Highlights

February 8, 2011 Breakfast Event

Corporate Governance Law – The Delaware Chancery Court Speaks

Major U.S. companies have a propensity to incorporate in Delaware, so rulings by the Delaware Court of Chancery have a disproportionately large impact on American corporate governance. Attendees at the NACD New England Chapter's February 8, 2011 Breakfast Event were treated to a fascinating Chancery Court insider's perspective on some of today's critical corporate legal trends and governance issues, along with a lively exchange of views on the implications for board best practices and decision-making.

Introducing the panel and managing questions from the floor was Stephen M. Honig, an NACD New England Chapter director and partner with the law firm of Duane Morris LLP. The three panelists brought viewpoints from the Delaware Chancery court bench and bar, as well as from the boardroom:

The Honorable J. Travis Laster was sworn in as Vice Chancellor and the newest member of the Delaware Court of Chancery on October 9, 2009. Prior to his appointment, he was one of the founding partners of Abrams & Laster LLP, a corporate law boutique specializing in high stakes litigation involving Delaware corporations and other business entities, and advising on transactional matters carrying a significant risk of litigation. Before forming Abrams & Laster, he was a director in the Corporate Department of Richards, Layton & Finger P.A. Before joining Richards, Layton & Finger, he clerked for the Honorable Jane R. Roth of the United States Court of Appeals for the Third Circuit.

Sandy Moose is a Senior Advisor of The Boston Consulting Group (BCG). She joined the firm in 1968 and was director since 1975 and a senior vice president since 1989 until her retirement in 2003. She led the New York office from 1988-1998 and served as chair of the East Coast region from 1994-1998. She was a principal founder of the firm's Financial Services practice. She currently is President of her own firm, Strategic Advisory Services, and serves on a number of corporate and not-for-profit boards, including Verizon Communications Inc., AES Corp., Natixis Advisor Funds, Loomis Sayles Funds, the Alfred P. Sloan Foundation and the Museum of Fine Arts in Boston.

John L. Reed is a partner in the Wilmington, Delaware office of the law Firm Edwards Angell Palmer & Dodge LLP. He maintains a national and international litigation and counseling practice that covers all facets of corporate law and governance. A former Deputy Attorney General, he has served as General Counsel to two Delaware cabinet secretaries. He has lectured and authored articles for the American Law Institute, National Business Institute, American Bar Association, Delaware State Bar Association, The Delaware Journal of Corporate Law, and Directors & Boards magazine, and has commented on CNBC on Delaware corporate law issues.

Drawing on his prior experience as a member of the bar, Vice Chancellor Travis kicked off the session by highlighting the differences between practicing corporate law in Delaware and life on the Chancery

Court bench. As practitioners, he said, attorneys learn from their clients what transpired in the boardroom and how decisions were made. Judges, on the other hand, must rely on proxy information – provided in most cases by lawyers – in evaluating board processes.

Vice Chancellor Travis went on to contrast the bar’s duty to represent client interests with the Delaware Chancery Court’s desire to be recognized as a jurisdiction that fairly balances the best interests of both equity capital and management. He also pointed to the unique responsibility borne by a judge to consider the potential unintended negative consequences of decisions made by a court that is sincerely trying to do the right thing.

Serving as moderator, Sandy Moose then posed a series of questions to panelists Travis and Reed, beginning with, “What are the major problems you see in today’s public company boards, and do these problems tend to be different for smaller companies than for larger companies?” The panelists agreed that large-company boards tend to adhere more closely to governance best practices, citing lack of director independence and failure to engage experienced legal counsel as frequent problems for smaller companies.

When asked to comment on the board’s duties related to enterprise-wide risk management and best practices in this area, Vice Chancellor Travis said that the Delaware Chancery Court is committed to focusing on the unique circumstances of each company with respect to risk management, rather than applying a one-size-fits-all standard. The key test in Delaware, which is not a strict liability state, he said, is whether directors can demonstrate a sincere effort to do their best in making decisions related to managing enterprise risk.

John Reed agreed that Delaware is a case-specific jurisdiction, spurring a lively discussion about the Delaware Supreme Court’s recent decision in *King v. VeriFone Holdings, Inc.* That ruling reversed a Court of Chancery decision dismissing a books and records suit, in effect rejecting a bright-line rule that would require stockholders seeking books and records to demand them first, before filing corresponding derivative litigation.

Sandy Moose then asked the panelists to comment on the Chancery Court’s stance regarding mergers and acquisitions as highlighted by the many recent Delaware rulings in the ongoing battle over the Air Products tender offer for Airgas. At the time of the NACDNE event, an imminent Chancery Court decision in the Airgas case was expected to shed additional light on whether the Airgas board would be allowed to use a poison pill to prevent shareholders from deciding if they want to sell the company, as well as the sale price.

While not commenting specifically on the Airgas case, Vice Chancellor Travis proposed applying a simple heuristic for thinking about the best interests of shareholders: “Imagine that someone who you love was the single owner of this entity – how would you act?” John Reed countered by saying that a court rarely knows more about a company than directors know, and therefore boards should not be limited in their ability to reject offers they believe to be inadequate.

Posing a fourth question to the panelists, Sandy Moose asked them to share their views on the typical practice of keeping board meeting minutes as sparse as possible. Vice Chancellor Travis argued against the “skeletal approach,” saying that board minutes should be significantly more extensive than just a detailed agenda. He advised directors to ensure that minutes accurately characterize the issues that were discussed, and be drafted promptly after the meetings take place. He pointed to instances where boards suddenly switch to producing detailed minutes from a longstanding preference for skeletal minutes as potential red flags for the Court.

John Reed urged moderation, saying there is room for debate as to how much detail is appropriate in board meeting minutes. He went on to raise the question of whether it is advisable to keep individual directors’ board meeting notes. The consensus was that director notes are unnecessary at best and potentially damaging at worst, as long as the board itself maintains appropriate meeting minutes.

The event concluded with an extensive series of attendee questions from the floor covering topics including:

- Evaluating director independence;
- The Chancery Court’s current thinking on board “Revlon Duties;” and
- Director responsibilities in M&A transactions involving privately held companies with significant venture capital representation on the board.

NACD New England Chapter Chief Operating Officer PJ Blankenhorn closed the February 8th session by reminding the audience about the Chapter’s next breakfast event: *M&A Today: Real-Time Decisions to Foster Growth and Value*. The event is scheduled for Tuesday, March 8 at the Newton Marriot Hotel.