ASSOCIATION OF CORPORATE COUNSEL

TITLE: **Navigating Your Board Through the Straits of Economic Peril**

DATE: **December 16th, 2008**

PRESENTED BY: **ACC Compliance and Ethics Committee**

SPONSORED BY: **Foley & Lardner LLP**

FACULTY: **Steve Barth**, Partner, Foley & Lardner LLP
Lee Cusenbary, General Counsel, Mission Pharmacal Company

MODERATOR: **Robert F. Roach**, University Compliance Officer, New York University, and Secretary of ACC's Compliance and Ethics Committee

******

Operator: Welcome to this ACC webcast. Bob, please go ahead.

Bob Roach: All right. Good afternoon everyone. Welcome to the webcast on navigating your board through the straits of economic peril. I'd like to welcome you today. My name is Bob Roach, and I am the Chief Ethics and Compliance Officer at New York University.

We have a very distinguished panel today. With us is Steven Barth. Steve is a partner at Foley & Lardner and a member of their transactional and securities practice. Steve is a frequent speaker on acquisition issues, financing transactions, SEC and corporate governance matters, and he practices in the area of mergers, acquisitions, leverage recapitalizations and buyouts, venture capital and private equity fund formation and portfolio company management.

He has extensive experience both corporate securities law, reporting compliance and governance, as well as extensive experience in counseling mid-market and closely held firms. Steve is the program chair for Foley's National Directors' Institute, and speaks quite frequently on governance matters, which is of particular interest today.

With us also is Lee Cusenbary. Lee is general counsel for Mission Pharmacal Company in San Antonio, Texas. Prior to going in-house with Mission, Lee was a partner in the transaction health care section of the law firm of Cox, Smith & Matthews in San Antonio, and Lee is the former president of the award winning south central Texas chapter of the ACC.

And I think of particular interest to people is Steve has for the last three years written, produced and directed a widely discussed regional ACC ethics conference called ethics follies, which is a fully produced musical of ethics program, where you can see thirty singing and dancing judges, attorneys and corporate executives, which is worth the visit. You can check him out on www.ethicsfollies.com, and he also has a weekly blog at www.ethicsfolliesblogspot.com.

Also, at the end of the presentation, we'll have some opportunities for questions, and you'll see a box on your left hand side where you can type in your questions and press send, and we will get those questions. And finally, there is an opportunity for you to give feedback.

There's a webcast evaluation that is in the link box, so we'd ask you to fill that out at the end of the presentation. So, just as a brief introduction, we have a very important webcast today. Both

Steve and Lee are going to cover some very significant issues for dealing with the current economic crisis, including risk oversight and management, evaluating your management team with an emphasis on integrity and ethics, issues involving liquidity and credit assessment and cost containment, and the very important topic of, or topics of executive compensation and communications. So with that overview, I'm going to turn it over to Steve to begin our discussion. Steve, go ahead.

Steven Barth: Great, thank you Bob, very much. As most of you know far too well, we are living in unprecedented times. Which has been causing many management teams and boards to say, is the world flat or is it round? We don't quite know anymore.

And as one investment banker just told me last week, this is a new renaissance period of corporate finance. We need to be like Rene Descartes, he told me, in thinking about how to deal with today's unprecedented economic conditions, when short term T bills are at 0%, you can clearly see that thinking the way we have thought for the last 20 plus years in the board room and in the C suites needs to be reevaluated.

So, there is really no normal way of dealing with today's economic crisis in the boardroom, and I think that's a very important perspective for you all to have as corporate counsel, in advising your management teams and your boards. Certainly, the perception is, in the marketplace and in the public, that undue risk taking was one of the main causes for the credit crisis that has now led into economic recession that we're dealing with, and I think you probably all would agree that you don't want to be reading in the newspaper that terrible headline, "Where was the board?"

So in order to make sure that you don't read that headline in the paper, I think all companies need to be reevaluating their risk oversight, not only in the C suite, but also certainly at the board room level. And whether that's in the boardroom as a whole, or whether that's focused in your audit committee or your compensation committee or your governance committee, I think is a matter for each individual company to decide.

In fact, there's a fairly significant issue that is being batted about in many corporate board rooms right now, as to whether risk oversight has now become such an important priority, priority one, that it should be handled by the board as a whole, rather than just on an individual committee basis. Other companies are saying, no, we view it, we continue to view that issue as priority one. In fact, we think it is so important that we don't think a single current standing committee should be tasked with that test, with those tasks. We think that we should create our own risk management committee that's sole purpose is risk management assessment and oversight.

Lee Cusenbary: And Steve, I'd add, I'd add that part of that big picture review of deciding where you're going to go with your company with regard to a standing board risk management committee is to look at what your motivators are, whether it's the mortgage loan crisis or other issues that have happened in our recent economy. It seems as though, if you look back at it, you learn a lesson of where were the motivators? What motivated a group or a company to make choices that they made?

I would agree that the last few weeks and months have seen some incredible Ponzi schemes and other things that we just are shocked by, whether it's the Governor of Illinois or whatever news story you're reading, it seems as though the big picture's missed, which is on a board level or an audit committee level, are we really looking to see where our motivators, and are there regulations that keep us in check for that particular area of our company, our individual company.

Steven Barth: That's a great point, Lee, and I think that is exactly where risk oversight starts. It's evaluating your company's strategic plan, your strategic initiatives, doing the prototypical SWOT analysis, looking at those threats that come out of that SWOT analysis, assuming those are the risks that should be evaluated. And then taking into account, just as Lee said, what are the goals and objectives, what are the threats and risks that are associated with those goals and objectives.

And what should the board be doing, and what should your senior management team be doing to monitor those key risks and threats, and to mitigate them as appropriate. And I think you have to be doing that at various different levels within your company, again, depending upon the relative size and complexity of your company. Certainly, as a company as a whole, but also, I think, the board or the designated committee, or maybe both, need to drill down into your particular business segments, the geographic segments of your business.

As we all know, there are many different ways of doing business around the world, many different mores and customs and practices that you know while they you know may be standard custom and practice in Brazil or China or Africa, they may not comport with your overall compliance obligations here in the United States. And I think that has to be drilled down and well understood by the board or its designated committee, and understanding the risks of dealing in other countries, what that poses to the company as a whole.

The board, and this seems very simplistic, but I find that there is a failure at many board levels not to understand the key macro economic and business drivers of the business. Again, going back to Lee's point. What is driving the business, and what are the threats to those key elements that drive the business' success, on a macro level basis. And then drilling down unto a micro level inside of the company, about how those macro drivers and risk impact the micro aspects of your business. All of that needs to be understood by the board and your delegated committee.

Lee Cusenbary: And Steve, I'll just add that it's interesting too when you have bad economic times like we're in right now, it's ironic that the emphasis becomes the bottom line. Where, in a lot of ethical companies that have been very careful to implement ethics training for their executives and for their boards and they have a code of conduct in place, you try to de-emphasis the bottom line, all though you have goals, of course, you don't obsess over meeting numbers when it's going to put you in peril, regulatory peril, that is.

So, this is a difficult time for boards because what you're dealing with is a pressure to do well in a bad economic environment, and yet not lose sight of your code of conduct and what you're there to do, which is turn out a quality service or product.

Steven Barth: Right, great point. All right, so how does the board or its delegated committee that's tasked with risk oversight go about doing this? And I think some of the key elements are working very closely with the chief risk officer, whether that's a specifically designated position or not. Clearly the general counsel as well as internal audit, and I think what may be missing historically in this risk oversight responsibility is making sure that your board or the designated committee takes well account of outside resources and sources of information.

Everything from rating agencies to equity analysts, having some independent advice and guidance, I think, is critical to duty of care compliance at the board level. And to be obtaining that advice from independent financial advisors or outside counsel, or most importantly, I think, independent industry experts who understand, again, the macro economic drivers of the industry, how they impact the business, and providing that advice and guidance to the board and the designated committee, I think, is a very important elements of not showing up in the headlines of "Where was the board?"

Remember here the lessons of Caremark and remember them well, you've got to ensure that your company has adequate reporting and information systems, and know what is being said about the company externally, certainly as well as internally. That if there are press accounts or other outside resources that have a viewpoint on the company and its relative risk profile, you as a board or a delegated risk management committee need to fully understand what is being said about the company, and then ask some tough questions of your management team as to how you're dealing with those risk profiles that have been identified.

A key part of all of this and I think is to identify early warning signs as to where the company is going and ask how it is getting there. It's important to have those insights and visibility into those early warning signs, and again, not only looking at and dealing with your internal resources, but your external sources as well. It comes as no shock to you that a lot of attention should be being paid right now to your balance sheet safety and soundness, and to the contingent liabilities that may not be reflected on the facing page of your balance sheet, but are underlying your balance sheet as well, and we'll get into those in a little bit more detail in a minute.

Again, close coordination here, I think, with all of your internal resources, I failed to mention before, your disclosure committee, if you are a public company, I think you as a board or a delegated risk management committee need to fully understand what is going on at the disclosure committee level. You need to understand who is on that disclosure committee.

You as a management team and you as corporate counsel need to be really understanding who is on that disclosure committee. Does it include all of the key players who have their finger on the pulse of the company, who understand both the macro and micro economic drivers and the threats to the company? Are they a part of the disclosure committee, or is the disclosure committee really something on paper that everybody thought they had to put down in order to comply with Sarbanes-Oxley, but you really aren't using it.

If you're not using your disclosure committee, if it's not very active and very engaged, then I think you are contributing to the risk profile of your company. You're contributing to that potential headline in the paper of "Where was the board?" So revisit your disclosure committee, I think that's going to be a renewed emphasis as we go forward in these challenging economic times.

Lee Cusenbary: And Steve, let me add about the disclosures. A lot of things that we read in the paper and the media right now would lead us to believe that some people don't have the same idea of what self-interest or self-promotion or dealing with things that should be disclosed that are not.

They seem, we all seem to be assume that they understand what that means, and that comes down to board training and comprehension about what kind of things we're talking about here. And I think most attorneys and general counsel would assume that everyone has the same understanding they do of fiduciary duties and other obligations, and duties to disclose, but it never hurts to go through actual case studies and examples, and help them understand what's happened in other corporations, just to make it real to them.

Steven Barth: That's a great point, Lee. Right now there are a lot of examples to learn from, to use in your board room or at your C level suite to show what other companies have done, the mess that they are in now and what could have been done to prevent that at those companies, and using those as case studies for your own particular situation. So I think that's a great suggestion.

Drilling down a little bit more into some specific action steps, and I think this, whether this is at the audit committee level, which I think it is, it may also be overlapping into your risk management committee, if you have one. But certainly a close review, and here we're coming up to end of the year, so the timing is very good for doing this. The disclosure control review, along with your internal controls review, I think, needs to be enhanced and reevaluated again, with a magnifying glass.

I think, again, at your audit committee level, working with your internal audit team and your outside auditors, really understanding your accounting policies and the quality of your earnings and the quality of you balance sheet, quality is going to be mean a lot as we go forward. It has meant a lot, or the lack there of has meant a lot here as we've seen what's happened over the last six months in the banking and the financial services industry.

And I think this is clearly an area where people are saying, "Where was the board?" Where was the audit committee, why didn't they understand the quality or lack thereof behind our financial

statements?" Mark-to-market is obviously a huge issue. No one's quite sure as exactly where we're coming out on mark-to-market. I think the SEC has come out with some suggestions and some alternative ways to calculate mark-to-market, but I think you, clearly, as a board or an audit committee have to fully understand the ramifications and how your company, if mark-to-market is applicable, you have to know this inside and out.

You cannot be relying on your CFO or your controller just to be running mark-to-market. I think you have to clearly understand exactly how that's impacting your company, and how it may impact it in the future, and what that means to your balance sheet in the future if we continue to slide in our financial markets.

Off balance sheet review, boy, this has been a topic you know for the last several years. No more so than now, as we all know, but I think you have to have a very in-depth knowledge as an audit committee and a board level as well, of where your off balance sheet risks are.

Contingent liability review, I think, led by you as general counsel, corporate counsel, along with internal audit and your CFO. I think the audit committee and then the board as well needs to fully understand where your contingent liability risks are at. Everything, obviously, and you know no surprise here to any audit committee where your judgmental reserves are at, but also there is lots of additional focus and attention now on how you are booking your tax benefits and your tax liabilities. Watch out to where this is going on litigation from an accounting policy standpoint.

There have been proposals out there that I think are very, very troubling as to how litigation risks may need to be booked on a go forward basis, which I think are very, should be very concerning to all of us as attorneys. I don't know where that is going, but it is very troubling as to where FASB and PTAOB are going on those types of disclosures.

But you should be aware of those issues. Environmental, nothing new there, other than that's always an area where you should be fully understanding where your environmental risks are. Particularly as we head into a new focus on greening up America, and as we have the new administration taking office, and I think there is going to be much more emphasis on environmental liabilities. And so I think this is an area of risk for many companies.

Lee Cusenbary: And enforcement should be higher than ever, so that's a good point.

Steven Barth: That's right. Your pension plan liabilities and your, if you have defined benefit plans, certainly need to know what those liabilities are going to be looking like, as we have a much different market for valuing the assets of those funds. I think this is clearly an area that's on the radar screen for many, many audit committees and boards.

And then, obviously, as part of your drilling down in your risk oversight, your IT review seemingly systems are at the core of many issues that come up that pose risk to a company. And I think code of conduct, and we'll talk about this, and I know both Lee and Bob have strong feelings about code of conduct, as do I, and I think code of conduct needs to be revisit, because we do need to be reevaluating where we're at as companies, as to the tone at the top and the integrity of your entire organization. There's a code.

So, what needs to be done on that, Bob, nothing? All right, I'm going to bounce right by it, I'm not sure what you're supposed to punch in or whatever. But as a board, and I think this should be annually done as a matter of course anyway, but as we are in these non-normal economic times, I think the board has to evaluate whether it has the right management team to deal with a much different economic environment than we have enjoyed over the past you know decades. There are management teams that are set up for high level growth, hard charging growth, top line, maybe the bottom line follows, maybe it doesn't.

Very entrepreneurial, in a risk orientated management teams. Many cultures and company's cultures are built around that entrepreneurial spirit, and certainly that is what has been a main driver of our economy and our economic system. I think we just need to ask ourselves, are those management teams still the right management teams in tremendously recessed economic times, and those are really tough, tough questions; far beyond my pay grade to try to figure out. But part of that analysis are these 360 reviews, which I'm sure many companies do already, whether those 360 reviews of the management team are shared with the board, I don't know that that is the best practice.

I think it is catching on at many companies, but I think as part of an independent assessment done by the board or the governance committee of the management team, I think 360 reviews are catching a lot of wind in their sails. Tone at the top, more important than ever in these times, with an emphasis on integrity, ethics, and transparency. Again, revisiting your code of conduct, is it being complied with, has it been well communicated, how is your whistle blower system working, have you ever got a call in your whistle blower system? If you haven't, something's wrong.

Lee Cusenbary: Yes, that's true.

Steven Barth: You know …

Lee Cusenbary: Making it accessible, too, Steve. A lot of companies have policies in place for communications to occur, but it's not accessible. There's no 1-800 number, there's no drop box, there's no, there's no safe way for an employee to give feedback. And almost every case study you read regarding white collar crime in areas similar to what we're talked about already, the people you know in middle management knew what was going on the whole time, it was not a surprise.

There's no way to keep something as big as some of these recent headlines out of the managers hands, they know what's going on, but they're afraid of retaliation and they're afraid to say anything. So, accessibility for communications is also important.

Steven Barth: Great point. Communication skills in today's environment, straight shooting communication, I think is critical. It goes without saying there's a lot of skepticism out there. There's not a lot of trust in the investment community, and that investor confidence has been shaken to levels that I certainly have never seen and I'm not sure many people have seen the fragility of investor confidence that is out there right now. And so I think external and as well as internal communication skills and straight shooting, I think are critical attributes of any successful management team in the type of economic environment we're dealing with now.

Lee Cusenbary: And Steve while you get back on your other slide, I wanted to add to the slide you were last on about setting the tone at the top. During a difficult economic period, it's really important that the board really kind of identify who their leadership is within the corporation. Are they a shoot from the hip kind of (yippy ki oh) kind of person that really is a risk taker, and evaluate whether that's who they need leading at that point or not.

And those are very difficult things to talk about, but I don't know that you can, in today's environment I don't know that you can go forward with any kind of planning or confidence without looking at what is the temperament of the leadership. Do they inspire trust in the community and the in the corporation or not? And that trust factor's hard to, hard to regain once you have one of these headlines, as Steve mentioned. So, it's worth talking about at a board level.

Steven Barth: You bet, absolutely critical. Obviously, in today's financial markets, over-leverage has been a key reason for our credit crisis and our economic condition, and so I think it is absolutely necessary for every company to be going through a liquidity and a credit facilities assessment, to

assessing your relative leverage levels versus both your historical basis as a company and also versus your peers.

I think you need to really have a great handle on your access to credit and your liquidity sources, be evaluating and assessing how you're going to be using your liquidity and capital resources as you're doing your budgeting process for 2009. Another key element that has been the downfall of a number of companies in today's environment are the mismatching of assets and liabilities utilizing short term funding for long term assets.

And obviously as we've seen the disintegration of the short term funding market, there isn't the necessary financing for those long term assets, and that's been a key issue on many balance sheets and many capitalizations of a number of companies. And I think audit committees and boards need to be well aware of those things, and it obviously starts in the CFO's office. Number of companies, as you probably well know, in making these assets of their access to credit have looked at their revolvers and have drawn them down.

I don't think that's happening as much now as it did a month ago, but certainly a knee jerk reaction as we were seeing some unprecedented events at the banking level, was to make the assessment that we're going to draw down our revolver even though we don't need it and make sure we have the cash in the bank, so to speak, or in our drawers and not be worried about what's going to happen at our financial institution. Again, I'm just pointing that out as something that very aggressive companies were doing, as they were worried about whether or not their revolvers were actually going to be accessible.

I think it is critical that you do a credit facility analysis and a covenant default analysis. Stress testing your covenants as you're looking and you're doing your budgeting for 2009, determining you know at what level might we trigger a covenant. Because I'm telling you, and many of you probably have been to this, been to this nightmare already within the last month or two, if you are going to your bank on a covenant default, oh boy, are you going to pay the price.

Not only in fees, but in rate changes and a reevaluation of your entire facility. This is the opportunity for many banks to reset your entire debt facilities, just utilizing even a very nominal or inconsequential covenant default. So, please stress test those and make sure you are avoiding, if at all possible, a covenant default.

That goes for voluntary renegotiations as well. You know a number of companies are saying gee whiz you know maybe I can get a better deal, or geez, there's a great acquisition opportunity – and there are a lot of great acquisition opportunities out there right now – but it may need you to go to your bank or financing sources to negotiate higher availability or the like. I am telling you, voluntary renegotiations; again, you are going to pay a very stiff price for your entire facility.

Banks are licking their chops, looking forward to these opportunities to reset your entire rate structure. This is not a time to be renegotiating your credit facilities. Part of your assessment of your liquidity and your capital resource uses will be revisiting, as a board, your dividend policies. If you have a corporate stock repurchase program in place, and it certainly might seem like a great opportunity, as many, many companies, as you well know, are seeing unprecedentedly low stock price levels, and if you view those stock prices on a historical basis, I think the thought is boy, what better time for us to use our available cash or facilities to buy back our stock.

I would say that there are very strong feelings on the flip side of that issue, that that is not a prudent use of your cash in these difficult economic times. There are many experts who are not believers in corporate repurchase programs and the ultimate benefits they provide to shareholders of the companies, and I'm not here to debate the pros and cons of either side of that, I just point out to you as corporate counsel that there are certainly two sides of that issue and I think it needs to be fully vetted with your CEO, CFO and then at the board level.

Capital expenditures are on the chopping block for many companies, and that's clearly something that should be on your radar screen, too, as the board and your audit committees are evaluating and your CFO suite are evaluating your budget for 2009. Is it just going to be maintenance CapEx, are there certain projects you still continue to believe are valuable, and despite the down economy you are, you're going to commit to. But that's clearly on everyone's radar screen.

As I mentioned, there are a lot of great acquisition opportunities out there. I don't just say that as an M&A lawyer, but there really are a number of opportunistic acquisition opportunities. Pricing certainly seems to be coming down from the level where, valuation levels over the past several years. So, there certainly are opportunities out there for acquisitions. Again, take into account your liquidity and your access to capital, and how that plays into your leverage ratios. And I just point those out as things that should be being talked about in your C suite and at the board level.

And investment policies, I mean, boy, if those haven't been revisited already, they better be coming up very quickly. Safety, safety, safety, number one priority. Don't have to tell you that it is shocking to come back to the board if you are a – if you're not in the financial services industry, but you have an investment portfolio and for the CFO to come back to the board and to shockingly tell the board that you know you were invested in high risk securities that now have lost significant value.

That's a big problem for the board, too. So, clearly you need to be reevaluating your investment policies, revisiting what those say, what are your authorized types of securities and investments that you're authorized to invest short term cash resources in, and to be reevaluating those.

Oh, here's our next code. ACC webcast 1216.

All right, so, along with your budgeting for 2009, and I am probably telling things you have already done, and if I am, that is good news. These should already be in place. If you are just starting to think about cost containment strategies, as one commercial banker told me, you are far too late. But nonetheless, I will point these out.

A number of companies, I think, have rings of fire defenses you know plan A, B, and C, based on various levels of economic activity, in place, ready to go, pre-vetted at the board level, so that you understand, OK, if GDP goes down 2% you know here's plan A. If it's 4%, plan B and you know plan C is the so-called nuclear option, what have you. But those types of thoughts should have already been vetted at the board level. And again, this gets into at various different plan A, B and Cs you know your analysis of where you're at on your SGNA, cost to goods sold, personnel analysis, facilities analysis, all of those, I think, are part of your cost containment strategies that should be evaluated based on your particular company.

Executive compensation is on the front page, it seems, of almost every Wall Street Journal that we pick up today. In today's environment, this is a key populist area for review. These headlines, business editors love to write about executive compensation. I mean, there is no question that the one thing that business editors know will sell papers and get the buzz going is talking about CEOs or even boards or management teams who've been, quote unqote "Been paid outrageous sums" yet their company is struggling, or they've had layoffs, or you know they're going through tough economic times.

So, I think, clearly at the board level and at your compensation committee level, your executive compensation programs need to be evaluated. And as part of the TARP legislation that was passed in October to provide for the sale of troubled assets to the Treasury by financial institutions, but now also as part of a capital purchase program the Treasury has enacted to infuse direct equity capital in the financial institutions.

The TARP legislation has created a blueprint and a precedent for compensation committees to be evaluating, in those cases, those financial institutions who are participating in the capital

purchase program. These are requirements for compensation committees to be reviewing the compensation practices and programs at those institutions.

I will tell you, this is a blueprint for what is going to be applicable to virtually, to all public companies, sooner rather than later, and my bet is these will trickle down to private companies and non-profits as well. So, if you aren't aware of these, I'm going to take some time just to go through them because, again, I think this will be part of. I think this will be mandated for public companies very shortly. So I think your comp committee needs to be aware of these things now and to be taking them into account as your going through year-end assessments of your bonus plans and your equity plans and your entire compensation philosophy.

Under the TARP capital purchase program, compensation committees are required to evaluate whether the compensation philosophies and plans at those financial institutions participating in the capital purchase program, quote unquote "Encourage unnecessary or excessive risk that could threaten the value of the company," in quotes. All right, what in the heck does that mean?

Lee Cusenbary: That's pretty vague.

Steven Barth: It is, and unfortunately, the Treasury was sly and put the target on the back of the compensation committees to figure it out, and these decisions will be judged in hindsight. So, I think there are some best practices here that we think are the best practices for your compensation committee to be following to make this assessment and to pass duty of care, and to minimize potential liability if you're ever questioned on whether or not you as a comp committee actually performed this type of analysis.

But I think you, first and foremost, have to be evaluating your bonus plans and your equity incentive plans. Maybe not so much your salary levels, but certainly bonus plans and equity incentive plans, and how they are tied into your financial performance goals. Are those financial performance goals based on long term or short term financial performance, and how easy or how hard are the targets?

And here what risks are encouraged by using those financial performance targets, how do those tie in to your enterprise risk management assessment, how do those tie in to your SWOT analysis and your threats that were identified in your SWOT analysis? That type of analysis needs to be undertaken by your comp committee.

Lee Cusenbary: And Steve, are you saying that going through that, through that analysis and documenting all that will not only help you come to the right conclusion, but will help you with regard to investigations related to compensation?

Steven Barth: Absolutely. Absolutely.

Lee Cusenbary: Or help mitigate some of that potential …

Steven Barth: Absolutely. I think it's going to answer a lot of questions for you. For example you know are your bonuses solely based on, based on annual earnings. Annual EPS or net earnings, EBITDA, or are they also tied in to longer term financial performance measures? How are those weighted? Is there, is there all the weight on the short term? Is it balanced between long term value creation and short term value creation?

I think there's going to be a lot of, your comp committees need to be making those assessments. At what level is your, are your performance goals, if at all, tied in to risk mitigation or corporate integrity? I have to tell you, I don't know if I know of, off the top of my head, any bonus plans that are tied into those metrics. I don't know if you do, Lee?

Lee Cusenbary: No, I've not heard of that. It's interesting though, I'm sitting here thinking about that, and I don't.

Steven Barth: Should they be, I guess, is the question.

Lee Cusenbary: Well, yes.

Steven Barth: And I don't know if you have a view on that.

Lee Cusenbary: I do. I think that what you see when you look at, for example, there's a lot of study that have been done with (Ethics Fair) magazine and a division of Forbes, where they looked at companies that had very, very strong corporate integrity and risk mitigation programs, along with executives ethics training and board of director training in that area, and they showed that during economic recession periods, that those companies tended to be more stable.

And they didn't know whether it was due to consumer or you know reputation of the company or its consistent quality, they weren't sure exactly why, but they tried to do some, get some data out of that. And I think what we're finding is that if you tie corporate integrity and risk mitigation to all areas of the company, including financial goals, that it really can't hurt. I mean, it may not be the cure-all, but that's interesting. I hadn't looked at that particular piece of it, but that makes sense.

Steven Barth: I will tell you, if I'm on a comp committee and I'm reading, and if I'm trying to think about ways in order to write my CDNA and my proxy statement, and part of you know there's, many times there's a subjective aspect to you know annual bonuses or mid-term bonuses …

Lee Cusenbary: Right.

Steven Barth: … if part of that is tied into an evaluation, whether it's at the governance committee level or at the risk management committee level, of an assessment of how the executive has mitigated risks or has enhanced corporate integrity, oh, I think that'd be a great fact that I would like as a comp committee member.

Lee Cusenbary: It's got real value, too. I mean, you can, you can really make sure that that's known all year long, it's got to help make decisions a little bit easier for some people to make in a management position.

Steven Barth: Yes, yes. I think you as a comp committee need to be looking at how much discretion is inherent in the bonus plan, or is it strictly formula driven. And if it's strictly formula driven, does that lead to potential manipulation of the formula? And I think that's something that needs to be carefully looked at as part of your overall assessment of your comp plan.

Lee Cusenbary: Well, don't you feel like you're always safer when you have a strict formula? I mean, the amount of subjectivity in anything, whether it's a bonus you're deciding on or you know it seems to me that from a regulatory perspective, the more formula driven it is, the more predictable and the more evenly applied.

Steven Barth: That would be your initial reaction. I'm not sure that's the case …

Lee Cusenbary: ((Inaudible))

Steven Barth: I think you know a lot of the argument have been, geez, all we have to do as a management team is drive the metric earnings. All we have to do is make sure that earnings are up x percent over the target, and we're going to get paid out our bonus. Well, what is being done then to drive that metric? And because it is simply formula driven, there's no inherent subjectivity or assessment at the comp committee level about the integrity of that metric.

And I think that should be part of the assessment in today's economic environment, and what we're facing now is, again, all the assessment is on, where was the board, where was the comp committee, where was the audit committee in assessing risk and risk mitigation. Again …

Lee Cusenbary: Excellent point, yes.

Steven Barth: … we are not in normal times, and while I would have absolutely agreed with you, hey, you're driving the formula, you don't want subjectivity because the assumption before was, well you know if there were some extraordinary losses or expenses, we're going to convince the comp committee to ignore those so that we make our bonus. I think the flip side is now being presented, that is we want the comp committee to make sure that it is assessing the quality of those financial metrics.

Lee Cusenbary: That goes back to what we started with today, which was where are your motivations placed? And you're absolutely right, when you think of it in today's environment, it's kind of the opposite. You need that subjectivity so you can use it to drive people with the right motivation.

Steven Barth: Yes, is the world round or flat, once again, we are in abnormal times.

Lee Cusenbary: Here we are. The theme keeps popping back up.

Steven Barth: Yes. A very critical part of your comp committee's assessment of your compensation plan is an assessment of your equity compensation component, assuming you have one. Is that equity incentive compensation tied to long term value creation? Lots and lots has been said and talked about here, and there's lot of, I think, great thinking.

The emphasis is clearly on building long term shareholder value, so what percentage of your total comp is tied into equity incentive compensation. Less is now better. Only a few years – again, is the world flat or round you know only a few years ago it was more was better, we want to tie our management team's compensation to the economic benefits of our shareholders, what better way to do that than to tie their compensation to the equity of our company?

Now we have come full circle into equity is now suspicious. Again, the way to overcome that is to have your equity compensation tied to long term shareholder value. Performance based, over time based is now the favored way of having vesting tied into your equity incentives. Options are and SARs are now frowned upon, restricted stock is the more favored nation. Again, particularly if it's performance based. Hold 'til retirement or now even hold through retirement is catching like wildfire in many companies, encouraging, once again, holding and encouraging long term shareholder value creation.

Many, many companies dealing with your stock prices now at historically unprecedented low levels. Options, SARs, even restricted stock you know underwater or not having near the value that was intended. Many companies and comp committees are going through an assessment about what that means from a retention standpoint and a motivation standpoint, and I understand those arguments very, very well. But just beware that this is a headline grabber.

If you are re-pricing your options, even though you're doing it with shareholder approval or doing it through a tender offer or what have you, that this is, it couldn't be a redder bullseye on your back, to be doing something like that in today's environment. You also have to be watching very closely your equity burn rate.

There's lots of formulas out there based on what industry you're in or what type of company you are, but you should be well aware of where your equity burn rate is, and being careful that in these down times, and you're trying to make up for prior underwater equity grants, that you are not blowing through your burn rate limitations. And good luck, if you're going to try to get a new equity incentive plan approved by your shareholders at your annual meeting in 2009. Look at

your stock ownership requirements as a public company, what counts toward your ownership guidelines. This hasn't gotten a lot of press lately.

I know that a number of institutional investors do look at this, I'm not even sure ISS is really focused on this, but I will tell you as a comp committee, or you as corporate counsel, you should be evaluating what goes into that ownership requirement. Is it vested options, vested SARs, unvested options, unvested SARs. The bottom line you should be asking and the comp committee should be asking is is that stock that goes into that ownership requirement at risk? Is it really like going out and buying the stock through the broker or through your, through your stock purchase program that you run through the company, is it really money at risk, or is it really compensation that's at risk?

That's the key question that you should be asking, someone should be asking at the comp committee level. Evaluate your policy about using your company stock as collateral. In today's down market, and as stock prices have plummeted, what you don't want, and you as corporate counsel need to be making sure that even if you don't have a policy against it, that you are really watching out for your management team. And your directors so they're not caught in a margin call, and having your stocks sold, having their stocks sold out from under them in a margin call by a bank who's taken the stock as collateral for a personal loan, and they may not care about the relationship at this point that they have any longer.

I've seen this happen, they have very strict rules now about when they're going to sell that stock on a margin call, and the personal relationship that that private wealth management team at that bank had with your CEO or CFO is not going to count for much any longer. And obviously, lots of issues can come up as part of the stock being sold, whether it's from insider trading issues or 144 issues or you know (form four) reporting issues, or what have you. Also, I would hope that you would have a policy against your management team or directors hedging against the downside risk of you stock as well.

Compensation consultant engagement terms and oversight is a key area of focus now. There has been lots of talk about compensation consultants feeding in to the race for the bottom. No one wants to be average any longer, and so therefore when the compensation consultants run their assessment of your peer group and the average level of compensation at your peer group, again, no one wants to simply be at the median, so there's a race to the bottom or a race to the top as far as coming up with comparable compensation analyses.

And I think your comp committee has to be looking at that very closely. Pass the smell test. Again, this is another area that business editors love to write about you know how much was your CEO's compensation compared to your average worker compensation.

I am worried that there may actually be legislating coming down the pike as we have a new Congress and a new President, who may well be looking at some type of limitation here. I hope that it doesn't come to that, but I will tell you, the more headlines we get over you know geez the CEO's comp was 500 times the average worker and you know there may be lots of great reasons for that, but tell it to the guy who's writing the article and the headline, it's not going to come through.

And you do not want that headline. So, make sure you're running that smell test just so you know where you're at. Also, be aware as a comp committee about what type of disparity there is between your CEO and your other named executive officers in your proxy statement. This is a key area of inquiry by the SEC, by the way, they want to know how you came up with that disparity as a comp committee.

So you should be thinking about this and have an answer for that, and either answer it upfront in your proxy statement or be ready to address the SEC comment you get. Pension plans, big issue

as well. You should understand what is going into those (SRPs), are there any sweeteners involved. An executive employment contract review, again, I think should be reevaluated.

There is a whole new focus on the definition of cause, what constitutes cause you know how egregious of conduct does it need to be before it is cause. Automatic renewals and evergreen contracts, I think are coming under scrutiny as well. And then I think claw backs, and obviously they are required at some level by (socks 304), but certainly the capital purchase program requires broader claw backs to be implemented by financial institutions participating in the capital purchase program.

I think this is probably a best practice that all public companies should be considered by private companies as well, and that is a recoupement of incentive compensation paid on financial metrics that are later proven to be false or materially inaccurate. I'm trying to hustle here, because I think we're running out of some time, so. What are the – I'm sorry?

Bob Roach: We have about five minutes left.

Lee Cusenbary: And we do have one question on the chat, just so you know.

Steven Barth: OK. The hot button comp issues for your compensation, you as corporate counsel should be well aware of these. You should be providing some information, at least to your compensation committee so they know, if they haven't been reading the papers – and I hope they have – what are the real compensation, comp hot buttons, either at the ISS level, at the institutional shareholder level, or at the populous level. Say-on-pay is coming, it is a certainty, it will be enacted; count on it, bank on it.

Golden parachutes need to be reevaluated, especially cache (gross ups). Do you parachutes have single triggers, do they have straight up double triggers. There's a new focus on the definition of change of control you know in fact, are your parachutes triggered before there is a true change of control? There's lot to be said about that, and I don't have the time to say it, but you should know those are key issues.

(Golden coffins) are hot button issues, paying for failure, severance arrangements need to be evaluated. Again, just think about what happened with Bob Nardelli, and I don't think he was a failure, but he's tainted that way in the press. And especially when he got paid $142 million. So, perks, perks, perks are always on the list.

Rule 10D 51 selling plans, this is a key area of analysis by the SEC, as well as institutional shareholders. I think you should be evaluating company adopted best practices here. Again, lots to be said about 10D 51 plans that do pass muster; there are many that don't.

And then compensation in a down market, like we've been talking about here for the last 20 minutes, 30 minutes. The scrutiny is going to be more intense than ever. If your company has had layoffs, if your CEO comp doesn't pass the smell test, be wary of those things. Be thinking about them in advance before they become issues in the headlines for you.

I'm just going to touch on strategic planning very quickly, because it doubles back on some of the things we've already been talking about. But again, at the strategic planning level, it ties into risk management. Long term fundamentals versus quarterly expectations, are you focused on smart growth, balance sheet integrity, conservative capitalization, all of those things, I think, should be topics as you're looking at your shareholder – strategic – planning, I'm sorry.

Code three, ACC webcast 1608. And if you've made it this far, thank you.

Shareholder communication. Proactive, now communication, as we mentioned before, is more important than ever. Avoid surprises. If you are having an open dialog with your shareholders,

one that encourages interactivity, are you using your Web site and are you having interactive road shows where you're posting your investor conferences to your webcast, are you opening up your investor conferences to other shareholders or interested investors, the press who want to listen in. I don't subscribe to these, I put them on the list of where some companies are going.

Some companies have shareholder councils, shareholder blogs in which management actually participate. Again, as an SEC lawyer, I don't like those one bit, but they're out there. And companies are moving in those directions in order to encourage more proactive communication with their shareholder bases. You know the days of having the five minute shareholder meeting in a place where nobody can get to, look, I love those types of shareholder meetings, but are they right in today's environment? And you have to be asking that question of your CEO and your board as well.

Transparency, more than ever, is important. Earnings guidance is really being revisited by many, many companies right now. There is a move away from earnings guidance, at least a move toward longer term, rather than quarter over quarter earnings guidance. Every company, every industry has their own viewpoint on this, and it's a complicated issue, but I would tell you it needs to be at least thought about and revisited.

And again, I think there's going to be a new era of MDNA in upcoming 10-Ks and annual reports, as companies deal with talking about the risks underlying your financial performance, where your capital resources and liquidity section is going. This is not your mother's MDNA, this is not the world is normal where you mark up last year's. I think a lot of new attention needs to be paid to this year's MDNA.

And then hot button governance issues that U.S. corporate counsel should be aware of. Hopefully no surprises here, majority voting, most S&P 500 companies, many have adopted majority voting. Yet I'm not a real proponent of it, but I will tell you many companies have moved to it.

Separating the chairman role from the CEO role. Again, I'm not a fan, but a lot of companies are. The stagger board has become disfavored along, that goes hand in hand with majority voting. Social responsibility is very active.

Poison pills, I will tell you that while this was at the top of the list for many institutional shareholders over the last couple of years, many companies, given where their current stock price is now, are revisiting whether they're let pills lapse or whether they've never had a pill, a certainly revisiting the advisability of having a pill. Whether you make it ISS compliant or not, I think it is something to at least be thinking about, as I think many companies are re-upping on previously lapsed pills. Again, I told you say-on-pay is coming, and I think proxy access is not far behind. All right, I almost did it.

Bob Roach: Yes, let me jump in here. This is Bob Roach, and I have a couple business things, we're just about up on time, but let me just say send in your questions now. We may not have the time to get to them on the webcast, but we do have a mechanism for answering your questions.

We have had one question. Let's see if we have time to at least answer that, that's been here for a while. And that is for the compensation committee, if a non-profit has an executive committee that includes volunteer officers, can that executive committee serve as the compensation committee.

Steven Barth: I think the answer to that is it really should be independent directors, and I don't know if having volunteer officers on the executive committee would fit the bill. I think you have to just be, just be very careful about the conflicts of interest, actual or perceived. It should be an independent review, someone who doesn't have skin in the game, who's making an assessment of your entity's compensation.

Lee Cusenbary: I agree, absolutely.

Bob Roach: OK. I guess we're, I think we're out of time. Let me just remind people to look in the links box for the webcast evaluation. Please click on that and fill out your evaluation. And let me, Amy, is there anything else we should cover before we disconnect.

Operator: No, just a reminder about the webcast evaluation.

Bob Roach: OK. Again, the webcast evaluation is in your links box. If you have any questions then send them in, we'll get those answers on the www.eventsACC.com. And I would say now we can all disconnect. Thank you so much for attending our webcast. I certainly enjoyed listening to our speakers; I hope you did as well.

Thank you for joining us, and we look forward to seeing you at the next ACC webcast. So you can now all disconnect. Thank you.

END