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NYSE Commission Report Defines Core Principles of Corporate Governance

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Editor's Note: This post comes to us from David Berger, a partner in the litigation department at Wilson Sonsini Goodrich & Rosati, and is based on a WSGR Alert memorandum.

In the fall of 2009, the New York Stock Exchange formed a diverse and independent commission to examine core governance principles that could be widely supported by issuers, investors, directors, and other market participants. Chaired by Wilson Sonsini Goodrich & Rosati chairman Larry Sonsini, the NYSE Commission on Corporate Governance recently issued its final report, which was released by NYSE Euronext on September 23, 2010. The report identifies 10 core governance principles covering such topics as the fundamental objectives of the board, management's responsibility for governance, and the relationship between shareholders' trading activities, voting decisions, and governance.

The principles outlined by the commission are a significant contribution to understanding the core duties and responsibilities of boards, management, and shareholders in the governance process, and provide an important framework outlining the common interests of these groups.

Core Principles

The 10 core principles contained in the report are as follows:

- 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.
- Management has a critical role in establishing proper corporate governance, as it has primary responsibility for creating an environment in which a culture of performance with integrity can flourish.
- Shareholders have the right, the responsibility, and the long-term economic interest to vote their shares in a thoughtful manner, in recognition of the fact that voting decisions

influence director behavior and conduct, and that voting is one of the primary means of communicating with companies on issues of concern.

- Good corporate governance should be integrated with the company's business strategy and objectives, and should not be viewed simply as a compliance obligation separate from the company's long-term business prospects. Yet there is a risk that the number of new governance mandates and "best practice" recommendations over the past decade can lead even the best boards to adopt a "check the box" mentality when trying to comply with certain governance requirements.
- Legislation and agency rule-making are important to establish the basic tenets of corporate governance and ensure the efficiency of our markets. Beyond these fundamental principles, however, the commission has a preference for market-based governance solutions whenever possible.
- Good corporate governance includes transparency for corporations and investors, sound disclosure policies, and communication beyond disclosure through dialogue and engagement as necessary and appropriate. Investors also should be held to appropriate levels of transparency and be required to disclose holdings, including derivative or other security ownership, on a timely and equal basis, subject to the recognition that certain information relating to trading and investment strategies may be proprietary.
- While independence and objectivity are necessary attributes of board members, companies also must strike the right balance between the appointment of independent and non-independent directors to ensure that there is an appropriate range and mix of expertise, diversity, and knowledge on the board. While the commission fully supports the NYSE's listing requirements generally providing for a majority of independent directors, the commission also believes that, as provided for under the NYSE's listing standards, a properly functioning board can include more than one non-independent director.
- The commission recognizes the influence that proxy advisory firms have on the market, and believes that such firms should be held to appropriate standards of transparency and accountability. At a minimum, such firms should be required to disclose the policies and methodologies they use to formulate specific voting recommendations, as well as all material conflicts of interest, and to hold themselves to a high degree of care, accuracy, and fairness in dealing with both shareholders and companies by adhering to strict codes of conduct. The advisory services also should be required to disclose the company's response to its analysis and conclusions.
- The SEC should work with the NYSE and other exchanges to ease the burden of proxy voting and communication while encouraging greater participation by individual investors in the proxy voting process.

- The SEC and the NYSE should consider a wide range of views to determine the impact of major corporate governance reforms on corporate performance over the last decade. They also should periodically assess the impact of major corporate governance reforms on the promotion of sustainable, long-term corporate growth and profitability.

Summary of Recent Corporate Governance Developments

In addition to outlining the 10 principles listed above, the report puts the current environment into historical context by summarizing significant developments in corporate governance since 2000, including:

- Turbulence in the financial markets over the last 10 years (both in terms of stock indices and capital market transactions)
- Widespread changes in the composition and influence of shareholders of publicly traded companies (such as the increasing trend away from individual stock ownership towards institutional ownership and the increasing use of derivative securities and hedging transactions)
- Increased corporate governance and disclosure regulation (such as the changes brought about by the Sarbanes-Oxley Act and the changes that will result from the Dodd-Frank Act)
- The evolution of corporate governance principles espoused by various organizations, coalitions, and groups

Specific Principles for Board, Management, and Shareholders

The report concludes with specific principles of corporate governance for the following groups:

- Boards of directors, including their composition, role, duties, and obligations
- Management, including their responsibilities and relationship with the board and shareholders
- Shareholders, including their rights and responsibilities

While the issuance of the report formally concludes the work of the NYSE Commission on Corporate Governance, the NYSE announced that the group would, from time to time, continue to provide constructive input on corporate governance and the proxy reform process.