NACD Texas TriCities Chapter Program
Chapter 11 – Board Oversight in a Restructuring Environment
Septmber 9, 2016 | Houston, TX
SPEAKER KEY TAKEAWAY CONSIDERATIONS

NATIONAL ASSOCIATION OF CORPORATE DIRECTORS
TEXAS TRICITIES

Moderator | Brandon Aebersold, Partner, Lazard Freres & Co. LLC

- Be cognizant of the fact that your fiduciary duties may change. To whom you owe fiduciary duties and when it could shift is fact specific and very much a legal question, but it is important to fully understand the issues, the implications on decision making, common pitfalls and potential liability well in advance of any distress. Focus should always be on maximizing the value of the enterprise, but be careful when the board has to make decisions that potentially could favor one constituent (e.g., equity) versus another (e.g., creditors).
- Seek to be proactive. Leverage is lost whenever the company finds itself in a situation where it is "forced" to do something (e.g., it runs out of liquidity, breaches a covenant, etc.). The company should be in position to understand and have fully explored all of its options well in advance of any "triggering event". A common refrain heard in situations of distress is that "hope is not a strategy."
- Be directly engaged with your advisors to fully understand the issues and positions. Restructurings involve a number of complicated and nuanced issues with which most board members have limited experience (fortunately for them). It is critical that board members work to understand these issues, and one way to do so is to have an open dialogue with your advisors. Remember that your advisors constantly deal with similar issues, but they may not appreciate the slope of the learning curve for the board; don't be afraid to probe and ask questions.

Panelist | Mark Kelly, Managing Partner, Vinson & Elkins LLP

- **"Never quit the cattle on a stormy night."**
  When faced with a financially distressed situation, board members often raise whether they should resign to avoid dealing with an unpleasant situation. Better to remain on the board, continue to be a good steward and help guide the company through the restructuring process with the goal of reaching a consensual agreement with major creditor constituencies that includes a release and exculpation of all of the Company's officers and directors. If a board member resigns, he/she has no basis to request a release or exculpation.
- **Be Prepared for the Costs of Restructuring**
  One of the most eye-opening items for board members is learning the substantial professional fees (lawyers, investment bankers, financial advisors, consultants) that the company can incur as part of the restructuring process. In particular, companies must be prepared to foot the bill for the services incurred by the major creditor constituencies. This can be very frustrating to the Company when inter-creditor fights break out and the Company realizes it has no ability to control the creditor disputes and is forced to foot the bill.
- **Address Potential Conflicts with Subsidiaries and Affiliates**
  Corporations also need to be sensitive to potential conflicts that may exist among the various corporate affiliates, and consider whether it's appropriate to appoint an independent director at each conflicted affiliate. Failure to do this in a timely fashion can potentially lead to a creditor group being granted authority by the Bankruptcy Court to deal with these conflicting issues which could result in the Company losing control of the restructuring process.

- **Start Early**
  To successfully implement a complex corporate restructuring, it requires extensive planning, communications and negotiations with a diverse group of credit constituencies, shareholder groups, government agencies and regulatory authorities. Once it's obvious a comprehensive restructuring is likely, the Company should take immediate steps to retain experienced professionals to assist in running the restructuring process. Failure to get a head start can result in a disorderly process that may result in the company losing control of the restructuring.

Panelist | William "Bill" Transier
Founder and Chief Executive Officer, Transier Advisors, LLC
Director, Helix Energy Solutions Group, Inc., Paragon Offshore PLC, CHC Group Ltd.

- Be prepared—there is a huge knowledge gap between those that have been through a restructuring and those who have not. Be prepared by understanding business valuations, cash flows, and hiring good advisors. If you don't have someone on the board with restructuring experience—hire one!
- Restructuring takes much longer and costs much more than you would expect! Don't become an observer to the process. Do not casually pass on your board responsibilities to the advisors. Be engaged, stay informed, and do what you think is the best course of action to preserve and or maintain value for the business.
- Compensations programs do not work during a restructuring in Chapter 11. Look into ways to appropriately compensate key company personnel and the board long before the formal restructuring process.

Additional program resources on these topics can be found at:
https://texastricities.nacdonline.org/Resources/meeting.cfm