

# THE VERY REASONABLE FLAT FEE OFFER TO ASSIST AND IMPROVE YOUR AUDIT COMMITTEE SELF-EVALUATION PROCESS

David Tate, Esq.\*

San Francisco, CA

<http://davidtate.us>

[tateatty@yahoo.com](mailto:tateatty@yahoo.com)

(\*see summary bio at end of paper)

## 1. \$550 FLAT FEE AUDIT COMMITTEE SELF-EVALUATION FACILITATION

The following eight steps outline an offer that I make to help audit committee's with their self-evaluation process. This offer to assist through interactive facilitation is available for audit committees of public companies, private companies, nonprofit organizations, and governmental organizations. The goal of this offer is to help make the audit committee's self-evaluation process significantly more beneficial and helpful to the committee, at a price that every audit committee can afford. Please contact me if you would like to arrange this assistance.

The following are the eight primary steps in the self-evaluation assistance that is being offered:

1. Determine which people will be participating in the evaluation process, including the audit committee members and other people, if any, to interview for comment and input.
2. Determine how the participant interviews will be conducted, individually or in a group, in person or by telephone.
3. Arrange participant individual or group interview dates and times.
4. Provide the participants with pre-interview materials and potential issue or topic areas (broad and specific) to consider for discussion.
5. Receive from each participant additional important issue or topic areas that the individual participant would specifically like to discuss.
6. Conduct the interactive interviews with the participants individually or as a group.
7. Summarize the interview discussions in a report format.
8. Report back to the audit committee members, and possibly conduct a committee group review of the process.

Facilitation assistance at this price is available if the participants in the audit committee self-evaluation process include the audit committee members only. Travel time and costs, if any, are extra but are negotiable and will remain reasonable prices; however, the process can be handled by phone in which case there would be no travel time or costs. If the audit committee decides

that the evaluation process will include participants in addition to the audit committee members, the additional cost is negotiable, but again will remain reasonably priced.

## 2. ADDITIONAL DISCUSSION ABOUT COMMITTEE SELF-EVALUATION

The following discussion is summarized from a series of papers that cover audit committee functions, responsibilities, and interaction with other people. Although an increasing number of audit committee functions and responsibilities are specified by statute, regulation or rule, an audit committee member's standard of care remains significantly dependent on due diligence, prudent judgment and decision making, and reliance upon and interacting with other people. Additional materials can be found at <http://davidtate.us>.

*The following materials do not provide legal, accounting or other professional advice or services, and are not a solicitation for work. These materials do not apply to any particular person, entity, event, transaction or situation. These materials are only a summary. If you have questions or issues about a particular specific situation, you need to seek your own legal, accounting or other professional assistance, and you should not rely on the following materials.*

New York Stock Exchange Listed Company Manual §303A.07 requires that the audit committee of each company listed on the Exchange conduct an annual performance self-evaluation. However, every public company, private company, nonprofit organization and governmental organization audit committee should also consider performing an annual self-evaluation.

Prudent audit committee practices are important to reduce audit committee, board, management, and overall company or organization liability and reputation risk. Cases hold that audit committee members can be held liable for their failure to exercise diligence, and for the failure to spot, respond to and remedy red flags. See, e.g., *In re Hollinger International, Inc. Securities Litigation* (N.D. Ill. 2006) 2006 U.S. Dist. Lexis 47173; *In re WorldCom, Inc. Securities Litigation* (S.D. N.Y. 2005) 2005 U.S. Dist. Lexis 4194; and *In re Hayes Lemmerz International, Inc. Equity Securities Litigation* (E.D. Mich. 2003) 271 F. Supp. 2d 1007. On the other hand, active board, committee and corporate diligence evidence prudent business judgment processes and tend to negate allegations of wrongdoing, thus reducing the risk of liability and damages. See, e.g., *In re Digi International, Inc. Securities Litigation* (8th Cir. 2001) Fed. Appx. 714.

Within the context of an organization's extended accounting and financial reporting functions and activities, situations that can lead to potential problems or allegations of lack of diligence or wrongdoing most typically arise in the context of alleged (1) improper accounting practices, (2) written or oral public misrepresentations (such as relating to financial matters), or (3) the failure or lack of appropriate internal controls, risk management, or compliance and ethics oversight.

Audit committee work is a year-round process. At various levels the audit committee members interact not only as members within the committee, but also with the board, CEO, CFO, and outside auditor, internal audit, compliance and ethics, risk management, legal counsel, and tax and other professionals. Other people also rely on the effectiveness of the audit committee's oversight activities. Thus, it only makes sense that the committee should at least once each year take time to step back to (1) review, evaluate and make improvements to its manner of operation,

and (2) consider helpful actions or changes that can be made by other people with whom the committee interacts to improve audit committee effectiveness and ease of operation.

No specific committee self-evaluation process or format is required; however, there can be advantages to having a facilitator conduct an interactive evaluation approach to stimulate or prompt better topical ideas, discussions, follow-up and compilation.

Also consider whether the evaluation will be conducted under the umbrella of legal counsel. Although I mention this as a potential issue, I do not consider it to be of prime importance. The fact is that board and committee members should always consider that their activities may be discoverable, and that they may want to voluntarily make their activities known so as to demonstrate diligent business judgment, or to negate allegations improper intent, recklessness, or intentional wrongdoing, also known as "scienter" in the context of securities litigation.

The following is a list of some of the potential issues or topics that might be considered for discussion during the audit committee self-evaluation process. The listed items are provided so as to help trigger your thought processes but are not intended to be an exhaustive list of potential issues or topics. Issue and topic areas will naturally vary somewhat from entity to entity and from audit committee to audit committee.

- The committee meeting agenda preparation and dissemination process.

- Committee member knowledge about and access to information and continuing education pertinent to the member's functions and responsibilities on the audit committee. Are the needs of the committee members being met with respect to knowledge or information about the organization and its industry; relevant significant accounting and auditing issues; relevant legal matters; internal controls, risk management, compliance, ethics, and governance; taxation; and new developments in those and other areas?

- Committee and committee member interaction, including interaction between the committee members, and interaction between the committee and committee members and other people.

- The committee's processes for issue identifying and spotting, evaluation and decision making.

- The contents of the audit committee charter. Each public company audit committee is required to have a committee charter. Each private company, nonprofit organization, and governmental organization audit committee should also have a charter. The charter is an important and prudent document to identify and clarify the audit committee's responsibilities and limitations, for the benefit of the audit committee members and other people who rely upon the audit committee.

- Selection of the outside auditor; audit planning; review of the performance of the outside auditor; and review of the quarterly review and annual audit reports and process (or compilation report, if appropriate).

- Recent developments in standards of care, governance, and acceptable reliance on other people.

- Review of processes relating to internal controls, risk management, ethics, and compliance with laws, regulations, and rules that are within the scope of the audit committee's functions and responsibilities.
- Current accounting principles, policies other related issues that are significant to the organization and its industry.
- Review of the organization's financial/accounting positions and functions, and how the committee works and interacts with those functions and their senior officers and management.
- Review of the organization's internal audit positions and functions, and how the committee works and interacts with internal audit and the chief audit executive.
- Documenting and reporting the audit committee's activities and minutes.
- The audit committee's use of attorneys and consultants.
- The company's investor communication processes.
- Whistleblower, ethics and complaint handling processes; and corporate investigations.
- Review of relevant document retention policies.
- Review of the organization's compliance and ethics and related processes that are within the scope of the audit committee's functions and responsibilities, and how the committee works and interacts with compliance and ethics.
- Governance, including tone at the top, financial leadership, transparency and appearance.
- Review of employer, employee and workplace processes that are within the scope of the audit committee's function and responsibilities.
- Review of tax compliance and reporting issues that are within the scope of the audit committee's function and responsibilities.
- Relevant insurance related topics or issues.
- If appropriate, issues pertaining to audit committee member independence, and/or accounting, auditing, and financial literacy.
- Review of pension and health plan related issues that are within the scope of the audit committee's function and responsibilities.
- And, additional significant topics or issues as they are relevant to the audit committee.

\* \* \* \* \*

# **David W. Tate**

## **Attorney at Law**

San Francisco, California

E-mail: [tateatty@yahoo.com](mailto:tateatty@yahoo.com)

Website: <http://davidtate.us>

Blog: <http://david-tate.blogspot.com>

### **Attorney at Law**

- Litigation, trials and arbitrations—commercial/business; insurance; trust, estate and conservatorship; employment; ADA, FEHA and disability; professional liability; real property; property and casualty; personal injury; and elder abuse.

- Governance, risk management and compliance particularly with respect to audit committee, employer, workplace, and trustee responsibilities and activities.

- Mediator and arbitrator.

### **California State Bar Admission**

California, 1987; U.S. District Court, Northern District of California, 1987; U.S. Tax Court, 1988.

### **Certified Public Accountant (inactive)**

California, 1984-.

### **Education**

University of San Francisco School of Law, Juris Doctor, 1987.

United States District Court, N.D. Cal., Externship, Hon. Marilyn Hall Patel, Spring 1987.

Golden Gate University, San Francisco, California, Master of Science in Taxation, 1982.

San Francisco State University, Bachelor of Science, Business Admin. (Finance), 1981.

### **Select Activities**

San Mateo County Superior Court: Probate Mediator Panel; Small Claims Court Mediator.

Santa Clara County Superior Court: Settlement Judge Pro Tem; Probate Mediator Panel.

Audit Committee Chair, YMCA of Silicon Valley (2005-2007).

California Society of CPAs (positions held): Financial Leadership Forum, Advisory Panel; Statewide Business & Industry Committee, Vice Chair; Peninsula Silicon Valley Chapter Board

member; Peninsula Silicon Valley Chapter Secretary; CFO-Controller Group; Silicon Valley Forum; Statewide Government Relations Committee; Statewide Amicus Committee; Statewide Ethics Committee.

### **Select Materials Authored**

D&O, trust/estate, employment, and mediation materials at <http://davidtate.us>; *How Internal Audit Can Help The Audit Committee: An Audit Committee Member's Perspective*, Association of Healthcare Internal Auditors (March 2010); *Annual Audit Committee Evaluation*, Professional Liability Underwriting Society Journal (October 2008); *Audit Committee Statutory, Regulatory, and Stock Exchange Duties*, DRI (the Defense Research Institute) The Business Suit (July/August 2008); *Clarifying Responsibility of Audit Committee Members (Nonprofits)*, California CPA, California Society of CPAs (May/June 2008); *D&O Insurance: A Shield Against Litigious Activity*, California CPA, California Society of CPAs (March/April 2008); *Audit Committee Functions and Responsibilities*, Chapter 5A for the California Continuing Education of the Bar publication, *Advising and Defending Corporate Directors and Officers* (publication date October 2007), *Risk Management In The Audit Committee*, The Corporate Board (March/April 2001); *How to Talk to an Investor*, California Society of CPAs Outlook (Spring 2000); *Nursing Home Resident Care*, State Bar of California Estate Planning, Trust and Probate Law Section, California Trusts and Estates Quarterly (Winter 1996); *Opinions That Don't Add Up: The Sum of Courts Misunderstand Accounting Principles, Subtracting from the Merit of Financial Review*, The Recorder, August 19, 1994 (discussing the Ninth Circuit holding in *Monroe v. Hughes, Hudson and Deloitte & Touche*, 94 C.D.O.S. 5550); *Accounting and Its Legal Implications, A Guide for Managers, Business Owners, and Entrepreneurs* (Irwin Professional Publishing, Business One 1994); *Responding to a Board of Accountancy Disciplinary Inquiry*, California Society of CPAs, Outlook (Spring 1993); *IRS' Prelitigation File May Be Subject to Taxpayer Discovery*, Journal of Taxation (February 1992); articles and blog postings for various corporate, governance and professional websites.