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The ABA Business Law Section Corporate Governance Committee (CGC) has produced this quarterly newsletter, CGC In Sight, to advise members of recent developments in the corporate governance field. Articles link to source material for reference or additional research. For quick access to any section or article, click through the headline below.

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ABOUT CGC IN SIGHT

The goal of CGC In Sight is to give practitioners a quarterly “heads-up” summary of recent and pending developments affecting corporate governance.

Each summary is linked to underlying source material for the practitioner’s reference or additional research. Members of the CGC In Sight Editorial Board monitor developments in the substantive topic areas listed to the right. That list is not confined solely to legal topics, but looks to other institutions whose actions can influence corporate governance. Over time, we expect to add columns and commentary from practitioners in the field.

GET INVOLVED

Members of the ABA CGC are encouraged to participate as members of the CGC In Sight Editorial Board and in preparing summaries and other items for publication.

Article proposals and submissions are welcome, but will be printed only with the approval of the Editorial Board.

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EDITORIAL IN SIGHT

Prompt CEO Resignations After Impropriety Claims

Over the last quarter, CEOs resigned at two major publicly traded corporations as a result of alleged scandals.

On September 8th, at United Airlines (“United”), the chief executive officer and two senior executives resigned abruptly due to a federal investigation involving potential illegal arrangements with the Port Authority of New York and New Jersey (the “Port Authority”). According to The New York Times, the investigation is focusing on whether United executives exchanged favors with the former head of the Port Authority (who resigned from that position in 2014 during the scandal involving the lane closing at the George Washington Bridge). Executives of United allegedly reintroduced a flight that operated at a loss from Newark Liberty International Airport to Columbia, South Carolina, a location convenient to the former head of the Port Authority’s weekend home, in return for his approval of certain planned improvements by United at Newark Liberty International Airport.

Then, only a few days later, the U.S. Environmental Protection Agency (“EPA”) issued a notice alleging that Volkswagen cheated on emissions testing for certain of its manufactured automobiles. The EPA argued that Volkswagen intentionally installed software programs on certain vehicles designed to allow the vehicles to meet nitrogen oxide standards during laboratory emissions testing, but which produced significantly higher emissions outside of laboratories while driving. Volkswagen’s Chief Executive Officer Martin Winterkorn abruptly resigned, and Volkswagen has suspended senior executives and a large number of other employees at all levels of its organization pending the results of its internal investigation into the allegations.

Most of us likely are not privy to the deliberations in the boardroom surrounding these events. Based upon the departure of these executives, it would appear that the boards of these companies responded by taking a “no tolerance” approach when the alleged misconduct came to light, as high level executives at both companies quickly resigned. The departures may have been pure amoral pragmatism, with the boards recognizing that a CEO damaged by scandal loses at least some effectiveness (and poses the risk of placing the directors’ judgment into question, were further offenses to occur if the board retained the executive). But it is also possible the boards were acknowledging that good character is at the heart of good governance, and that the leadership of the organization is accountable for any alleged deceit.

Perhaps the most significant impact for executives who find themselves in the midst of scandals is the loss of reputation rather than the loss of position. As many of the corporate scandals of the past demonstrate, in business as in politics, it is prudent to heed the wise advice of one of the U.S. founding fathers, Thomas Paine, who once said, “Character is much easier kept than recovered.”

Bruce Dravis, Ellen C. Grady and Jayne E. Juvan
CGC In Sight Co-Editors

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SECURITIES AND EXCHANGE COMMISSION

SEC Adopts CEO Pay Ratio Disclosure Rules

August 2015

On August 5, 2015, the Securities and Exchange Commission ("SEC") adopted the final rules requiring public companies to disclose the ratio of the annual total compensation of the chief executive officer ("CEO") to the median annual total compensation of all employees. The final rule amends Item 402 of Regulation S-K to require issuers to disclose (1) the median annual total compensation of all employees of the issuer (other than the CEO), (2) the annual total compensation of the CEO of the issuer, and (3) the ratio of those two amounts. In adopting the final pay ratio disclosure rules, the SEC sought to address commentator concerns by providing issuers with some flexibility in calculating the required CEO pay ratio disclosures. For example, the final rule permits issuers to select a reasonable methodology for identifying the “median employee,” which may include statistical sampling. In addition, the final rules provide that issuers should calculate “total annual compensation” for the median employee for the last completed fiscal year in accordance with the calculation of total compensation under Item 402(c)(2)(x) of Regulation S-K, but permits issuers to use reasonable estimates for components of total compensation. The final rule also permits public companies to include additional narrative disclosure or ratios, provided that the additional disclosure is clearly identified, not misleading and is not given greater prominence than the required CEO pay ratio disclosure. The rules adopted continue to define the term "employee" broadly to include any individual employed by the registrant as of the last day of the last completed fiscal year, including U.S., foreign, full-time, part-time, seasonal and temporary employees.

The CEO pay ratio rules became effective October 19, 2015. All public companies required to provide executive compensation disclosure are subject to the new pay ratio disclosure requirement, except smaller reporting companies, foreign private issuers, emerging growth companies and registered investment companies. Public companies will first be required to report CEO pay ratio disclosure for the first full fiscal year that begins on or after January 1, 2017, with certain transition periods for companies that have not previously been reporting companies.

Here is a link to the final text of the new rules.
SEC Declines to Recommend Enforcement Action in Target Security Breach

August 2015

According to Target Corporation (“Target”), the SEC concluded its investigation into the data breach that occurred during the fourth quarter of 2013 and has declined to take enforcement action against the retailer. The data breach involved stolen credit card and debit card data for approximately 40 million customers and other personal information for up to 70 million customers. However, in its most recent Form 10-Q for the quarterly period ended August 1, 2015, Target acknowledged that litigation is still pending, and the Federal Trade Commission and state attorneys general are continuing to investigate the matter.

2016 ISS Policy Survey

September 2015

On September 28, 2015, proxy advisory firm Institutional Shareholder Services (“ISS”) published the results of its annual global policy survey for the 2016 proxy voting season. ISS annually uses the results of the survey to prepare updates to its global proxy voting policies. A total of 421 investors, issuers, advisors and other governance professionals responded to this year’s survey, which requested feedback on a number of key issues including proxy access in the United States, director and CEO overboarding, the uses of equity compensation for non-executive directors, and the role of share buybacks in capital allocation. ISS will release its 2016 draft policy updates on October 26, 2015 and will solicit comments on those draft policy updates. ISS expects to release its final voting policies on February 1, 2016.

Here is a link to the 2015-2016 ISS Global Policy Survey Summary of Results.

SEC Renews Charter of Advisory Committee on Small and Emerging Companies

September 2015

SEC Chair Mary Jo White announced at an open meeting of the SEC that the Commission has renewed the charter of the Advisory Committee on Small and Emerging Companies for two years. The renewal extends the Committee until September 24, 2017. Chair White specifically noted that the Committee had provided valuable advice to the Commission on a variety of issues relating to small and emerging companies during the previous two years. Here is a link to the press release.

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SEC Concept Release on Audit Committee Disclosure Requirements

July 2015

On July 1, 2015, the SEC published a concept release seeking comments on the adequacy of the current audit committee disclosure requirements, with a focus on the audit committee’s reporting of its oversight of the independent auditors. The SEC is seeking comments on whether the SEC’s current rules governing disclosure of audit committee activities permit investors to understand and evaluate audit committee performance. The concept release notes that the disclosure requirements applicable to audit committees were principally enacted at the time Item 407 was added to Regulation S-K in 1999, and that the regulations have not changed substantively since that time. The concept release also seeks comments on whether issuers should be required under SEC rules to provide additional insight into the audit committee process for selecting and overseeing the independent auditor, including the process for appointing or retaining the auditor, the qualifications of the auditor, and whether certain individuals on the engagement team selected by the audit committee to provide audit services should be named. Some investor groups, including the Council of Institutional Investors, have called for additional audit committee disclosure. The Public Company Accounting Oversight Board (the “PCAOB”) also is considering similar initiatives to require additional disclosure relating to auditors. The comment period for the audit concept release closed on September 8, 2015.

SEC Provides Guidance on Whistleblower Rules

August 2015

The SEC issued an interpretive release clarifying its position on the whistleblower rules originally promulgated under Section 21F of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), in 2011. The SEC issued the interpretive release to clarify that, for purposes of the employment retaliation protection afforded to individuals under Section 21F of the Exchange Act, which was added to the Exchange Act by The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), an individual is not required to first report the violation to the SEC before qualifying as a whistleblower eligible for the protections afforded by Section 21F. Rather, the SEC release clarifies that an individual who first reports a violation internally to a supervisor or compliance official at the issuer with authority to investigate, discover or terminate misconduct is protected under Section 21F to the same extent as an employee who first reports the violation to the SEC. Here is a link to the SEC’s Interpretive Release.

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In an August 27, 2015 opinion in *Dole Food Co., Inc. Stockholder Litigation*, the Delaware Court of Chancery ordered Dole Food Company, Inc.’s Chairman and CEO, David Murdock, and Dole’s former President, COO and General Counsel, C. Michael Carter, to pay $148 million to class members for breaching their fiduciary duties in connection with a leveraged buyout. In one of the largest ever M&A-related recoveries for shareholders, the Court applied Delaware’s entire fairness standard of review to hold Murdock and Carter personally liable despite the fact that the transaction was conditioned on the approval of an independent committee of Dole’s board of directors and the affirmative vote of a majority of Dole’s minority shareholders. The Court found that the defendants – and specifically Carter, acting on Murdock’s behalf – had acted deliberately to undermine the independent committee’s evaluation of the merger.

This decision demonstrates that even when a transaction is approved by an independent committee that carries out its duties with fidelity, corporate insiders still face a threat of substantial personal liability to the extent they engage in conduct that undermines the independent committee’s authority and decision-making process. The decision also highlights management’s role in ensuring that an independent committee has accurate information to properly assess the offer on the table. If a corporate insider conceals material information, even an otherwise perfect independent process may be insufficient to prevent substantial personal liability.
Contractual Good Faith Standard in Conflict Transactions:  

**El Paso** and **Kinder Morgan**

April 2015 and August 2015

In two recent decisions, *In re El Paso Pipeline Partners, L.P. Derivative Litigation* and *In re Kinder Morgan, Inc. Corporate Reorganization Litigation*, the Court of Chancery considered whether approval of certain transactions was properly granted in cases in which the applicable limited partnership agreement replaced traditional fiduciary duties with a contractual standard of good faith and a conclusive presumption of good faith if those approving the transaction subjectively believed the transaction to be in the best interests of the limited partnership (not the limited partners).

- **El Paso**: The court’s post-trial opinion in *El Paso* held that the conflict committee acted in bad faith by focusing on whether the transaction would allow the partnership to increase distributions, finding that the committee’s primary focus on accretion was not a proper measure of the value to the partnership as an entity. The court concluded that the committee’s sole focus on accretion, combined with prior statements from members of the committee reflecting that the members of the committee did not support further transactions of that kind with the controller, demonstrated an absence of good faith.

- **Kinder Morgan**: By contrast, in *Kinder Morgan*, the court granted a motion to dismiss, finding that the complaint failed to allege bad faith properly where it alleged that the corporate reorganization was unfair to the limited partners but failed to allege that the terms of the reorganization were unfair to the partnership itself. The court noted, however, that the complaint likely would have survived a motion to dismiss had the contractual good faith standard referenced the best interests of the limited partners rather than the partnership.

These decisions serve as a reminder that while contractual waivers of fiduciary duties are enforceable, careful attention must be paid to ensure compliance with the specific contractual standard set forth in the partnership agreement. An appeal is pending in *Kinder Morgan*; a final order has not issued in *El Paso*.

**Court of Chancery Provides Important Warning Regarding Disclosure-Only Settlements**

September 2015

The explosion of M&A litigation and the “disclosure-only” settlements that resolve the vast majority of such lawsuits have been the subject of ongoing controversy, and the focus of the debate has turned to the scope of the releases to be granted in such settlements. In *In re Riverbed Technology, Inc. Stockholders Litigation*, C.A. No. 10484-VCG, (Del. Ch. Sep. 17, 2015), the Court of Chancery warned that parties will face continued judicial scrutiny when exchanging broad releases of liability for arguably trivial supplemental disclosures. After weighing the marginal benefits of the additional disclosure against the (equally light) potential merits of the claims being released, the court approved the settlement, but did so largely because of the “reasonable reliance of the parties on [the] formerly settled practice in this Court” of examining and
Disclosure-Only Settlements (continued)

approving settlements of this type. The court warned, however, that the ability of the parties to rely on past practice “will be diminished or eliminated going forward in light of [its opinion] and other decisions of this Court,” and stated that in future cases, “the interests of the Class might merit rejection of a settlement encompassing a release that goes far beyond the claims asserted and the results achieved.”

A copy of the opinion is available here.

Continuous Insolvency Not a Standing Requirement for Derivative Claims: Quadrant Structured Products Company, LTD v. Vertin

May 2015

In its May 4, 2015 opinion in Quadrant Structured Products Company, LTD v. Vertin, C.A. No. 6990-VCL (Del. Ch. May 4, 2015), the Delaware Court of Chancery denied a motion for summary judgment made by the directors and the 100% stockholder of Athilon Capital Corp. The motion sought dismissal of derivative claims brought by the holder of Athilon’s senior debt securities, Quadrant Structured Products Company, Ltd. The defendants argued that Quadrant lacked standing to bring derivative claims on behalf of Athilon, contending that for a creditor to have derivative standing the company on whose behalf the creditor sues must be insolvent at the time of suit and continuously thereafter.

The Court held that there is no continuous insolvency requirement for creditors to have standing to bring derivative claims. If a creditor can show that the company was insolvent at the date the suit was brought, a creditor has standing even if the company regains solvency during the pendency of the lawsuit. In addition, the Court affirmed the use of the balance sheet test for determining whether a company is insolvent for the purpose of determining creditor standing. In doing so, it rejected the argument that the “irretrievable insolvency” test (which is required for the appointment of a receiver) should be used to determine creditor standing to bring a derivative claim.
ACCOUNTING AND AUDITING


September 2015

The Financial Accounting Standards Board issued an Exposure Draft that would provide guidance in assessing whether financial statement disclosures are material by amending Accounting Series Update 235 to FASB’s Accounting Standards Codification. See Proposed Accounting Standards Update, Notes to Financial Statements (Topic 235): Assessing Whether Disclosures Are Material. The proposed amendment: (1) clarifies that materiality is applied to qualitative and quantitative disclosures individually and in the aggregate in the context of the financial statements taken as a whole; (2) states that “materiality” is a “legal concept” that FASB observes and does not define; and (3) provides that omission of immaterial information is not an accounting error. The Exposure Draft notes that the FASB originally considered adopting the Supreme Court’s definition of “materiality” (e.g., TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976) and Basic, Inc. v. Levinson, 485 U.S. 224 (1988)), but decided to merely state that materiality is a legal concept, which may be changed through legislative, executive or judicial action. Comments are due December 8, 2015.

TRADE ORGANIZATIONS

CII Releases Position Paper on Proxy Access Best Practices

August 2015

The Council of Institutional Investors (“CII”) has released its position paper, “Proxy Access: Best Practices.” The paper is a multi-page listing of proxy access factors CII regards favorably, such as a 3% ownership threshold for proxy access eligibility, a right to nominate at least two directors per election, and the elimination of caps on the number of shareholders whose shares may be aggregated to reach the ownership threshold. In addition to setting out the practices CII views most favorably, the paper identifies the multiple issues involved in implementing proxy access, including the use of loaned shares in voting and requirements for continued ownership following an election.

Business Roundtable Comments on Pay Ratio and Pay vs. Performance

July 2015

In providing comments to the SEC respecting the then-pending CEO pay ratio rules (which were adopted in August), the Business Roundtable stated its view that the June 2015 technical analysis prepared by the SEC’s Division of Economic and Risk Analysis “illuminates the heart of the problem” with pay ratio reporting. The Business Roundtable also stated its view that the then-proposed pay ratio rules would impose substantial costs and burdens on companies and investors. The Business Roundtable also expressed its

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Pay Ratio and Pay vs. Performance (continued)

opinion that the pay ratio reporting requirements of Dodd-Frank Section 953 “impose conflicting and irreconcilable mandates on the SEC by directly undermining the Commission’s central statutory objective, as set forth by the Exchange Act, to protect investors, maintain fair and orderly markets and promote capital formation.”

With regard to the SEC’s pay vs. performance rules, the Business Roundtable provided the SEC with comments stating that a “principles-based approach would best serve investors” and outlined recommendations for such an approach.

CalPERS Announces Creation of Sustainability Benchmark for Infrastructure Investments

September 2015

The California Public Employees' Retirement System ("CalPERS") announced the launch of the Global Real Estate Sustainability Benchmark for Infrastructure to measure the sustainability of infrastructure investments. CalPERS joined with seven other global institutional investors representing an aggregate $1.5 trillion of investment capital. Once the benchmark is completed in early 2016, it is expected to provide “a framework for investors to collect and assess key environmental, social and governance factors, and related performance metrics, across their infrastructure assets.”

U.S. Chamber and Other Organizations Comment on SEC Clawback Proposal

September 2015

The Corporate Governance Coalition for Investor Value, comprised of the U.S. Chamber of Commerce and other business-oriented trade associations, provided comments to the SEC on its proposed rules requiring the listing exchanges and associations to propose and adopt listing standards that would require listing companies to “clawback” certain performance-based incentive executive compensation in the event a company restates its financial statements. The comment letter sets out the organizations’ concerns that the definition of “executive officers” under the proposed rule is overly broad, urges that the process for recovering erroneously awarded compensation be streamlined, and asks that the SEC clarify the kind of restatement that will trigger a clawback (noting, for example, that restatement might be required in order to correct an aggregation of immaterial errors). Organizations joining the U.S. Chamber in the comment letter include American Bankers Association, American Insurance Association, Institute of International Bankers, National Association of Manufacturers, National Association of Real Estate Investment Trusts, National Black Chamber of Commerce, Property Casualty Insurers Association of America, and the Securities Industry and Financial Markets Association.
Conference Board Publishes Report on the Business Case for Investment in ESG

The Conference Board published a report (payment required) reviewing existing literature on “the link between corporate investment in environmental, social, and governance (ESG) practices and firm performance.” The report concludes that while empirical studies have mixed results, “several studies have shown that a company can be rewarded for adopting these practices in the form of higher profits and stock return, a lower cost of capital, and better corporate reputation scores. This report reviews empirical analyses of the return on investment in ESG initiatives, outlines five pillars of the business case for corporate sustainability, and discusses why the positive correlations found by some academics remain disputed by others.”

A review of empirical research regarding the return on investment in ESG initiatives identifies five main elements in the business case for corporate investment in ESG practices: (1) to enhance market and accounting performance; (2) to lower the cost of capital; (3) to use such investment as means of engagement with key shareholders; (4) to improve business reputation; and (5) to use ESG related product innovation to foster new revenue growth.

A discussion of the report’s contents can be found on the Harvard Law School Forum on Corporate Governance and Financial Regulation.

PROFESSIONAL ORGANIZATIONS

Society of Corporate Secretaries and Governance Professionals Comments on Audit Committees

September 2015

On September 8th, the Society submitted a comment letter in response to the SEC’s concept release seeking comment on the adequacy of audit committee disclosures. The Society’s letter sets forth three general principles that reflect its approach to any new mandated disclosure the SEC might propose: (1) that mandatory disclosure should be principles-based; (2) that materiality should be the essential predicate of mandatory disclosure; and (3) the benefits of mandatory disclosure should outweigh the costs. The letter proceeds to elaborate further on these general principles, suggesting that the topics for which comments are requested may be problematic, and includes 13 enumerated points relating to the topics on which the SEC requested comment relating to enhanced audit committee disclosures. The Society’s letter reflects the input of its members and constituents, including in-house counsel and their outside legal advisors, and is available on the Society’s website.

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NACD Reports on Board Turnover and Diversity

August 2015

In August, the NACD released updated findings and guidance with respect to board turnover and board diversity in advance of its 2015 Global Board Leader’s Summit held in September. The NACD released results from its forthcoming 2015-2016 Public Company Governance Survey indicating that board turnover is increasing: 72% of respondents reported that their board added or replaced at least one director in the past year, compared to 64% in the prior year’s survey. The NACD survey also asked directors to identify the types of board diversity they actively discussed in the past year. The results indicated that 89% discussed professional and industry experience; 74% discussed gender diversity; 61% discussed racial/ethnic diversity; and 50% discussed age as part of these conversations.

The NACD anticipates that “a likely outcome of increased board turnover will be an increase in diversity in the boardroom.” To facilitate more effective board-level discussions about diversity and recruiting diverse director candidates, the NACD published a Diversity Discussion Guide for Directors. The guide provides advice on preparing directors for diversity discussions and includes questions designed to help boards navigate these discussions in the context of their company’s specific circumstances, including how to define diversity, discuss desired objectives, determine and assess process for implementing objectives and discuss disclosures. The guide is available on the NACD’s website.

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INTERNATIONAL LAW

Toronto Stock Exchange ("TSX") Issues Guidance to Emerging Market Issuers

July 2015

TSX staff published a notice (the "Staff Notice"), which provides guidance to issuers that have a higher risk profile as a result of significant connections to emerging market jurisdictions (defined as "Emerging Market Issuers"). The Staff Notice is based upon existing rules and is intended to promote greater understanding of the TSX listing requirements in relation to Emerging Market Issuers. In determining whether a listing applicant is an Emerging Market Issuer, the TSX will consider the residency of its mind and management, the jurisdiction of the principal business operations and location of assets, the nature of the issuer's business, the jurisdiction of incorporation, and its corporate structure. In particular, the Staff Notice focuses on jurisdictions outside Canada, the US, the UK, Western Europe, Australia and New Zealand.

The Staff Notice identifies the risks associated with Emerging Market Issuers in respect of corporate governance, financial reporting, internal controls, complex corporate structures and legal risks relating to title and the ability to conduct operations. More importantly, the Staff Notice explains the underlying concerns of TSX staff in respect of each risk and provides useful guidance to Emerging Market Issuers to address these concerns and mitigate the risks identified. For example, Emerging Market Issuers must demonstrate that the board of directors is independent and comprised of individuals with public company experience and expertise relevant to the issuer's business and industry, including local language and business knowledge. As a matter of best practice, Emerging Market Issuers should also provide to the TSX for prior review its written policies in respect of related party transactions whistleblowing, and ethical business conduct, local disbursements, corporate governance and timely disclosure. Emerging Market Issuers that are listed on the TSX should be aware that the TSX may impose additional ongoing obligations, including pre-clearing new directors and officers, change of auditor, or requesting information about the issuer's financial reporting and internal controls.

Ontario Government Launches Public Consultation to Reform Corporate and Commercial Laws

July 2015

A 13-member panel known as the Business Law Agenda Stakeholder Panel (the "Panel") released a report entitled "Business Law Agenda: Priority Findings & Recommendations Report" outlining their recommendations to modernize Ontario's corporate and commercial legislation. The Panel was created by the Minister of Government and Consumer Services following a commitment in the 2015-16 Provincial Budget to review the corporate and commercial statutes in Ontario to ensure the laws are responsive to changing business priorities. The Panel's recommendations encompassed five key themes including establishing a process to keep corporate and commercial law current and making Ontario a jurisdiction of choice for business within the global economy by supporting greater certainty and confidence in market transactions. The report provided a number of specific recommendations, including updating the Business Corporations Act to reflect technological advancements and developments in other jurisdictions, in particular by:

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Ontario Government (continued)

- Contemplating electronic meetings and communications;
- Providing greater certainty about the standards to which directors and officers will be held, the liabilities to which they are exposed and the defenses and protections available to them;
- Allowing shareholders to effectively determine the composition of their boards of directors by allowing majority voting and eliminating Canadian residency requirements; and
- Making the same rights and remedies available to registered shareholders to the beneficial shareholders that hold their shares indirectly through the book-based system.

The Panel also recommend establishing a formal ongoing process to review and update corporate and commercial statutes.


June 2015

The OSC published its Strategic Outlook and Statement of Priorities for the next two years. The Strategic Outlook sets out five organizational goals and how the OSC intends to achieve these goals, including its continued efforts to provide strong investor protection, deliver effective regulation, supervision and enforcement and promote financial stability through effective oversight. The Statement of Priorities sets out the areas that the OSC intends to focus its resources and actions for the current financial year. Notable priorities in respect of reporting issuers this year include the OSC’s continued focus on the women on boards initiative. In particular, OSC staff intend to complete a review of disclosures of over 700 TSX-listed issuers on the representation of women on boards and in senior management positions and publish the results of this review. On September 29, 2015, the OSC held a roundtable to discuss the results of staff’s review and consider how additional progress can be made. OSC staff are also monitoring developments in respect of say-on-pay in Canada and other jurisdictions to determine whether it would be necessary and appropriate to legislate mandatory say-on-pay votes in Canada. In respect of enforcement initiatives, the OSC intends to complete its consultation on the proposed whistleblower program and launch the program, if appropriate, later in 2016.
European Regulator Consults on the Impact of Best Practice Principles for Proxy Advisory Firms

June 2015

The European Securities and Markets Authority ("ESMA") published a consultation paper inviting public comment on the impact of the best practice principles for providers of shareholder voting research and analysis in the European Union (the "Principles"). The Principles were adopted in March 2014 following a review by a group of corporate governance research providers including ISS and Glass Lewis. The purpose of the consultation is to gather information on stakeholders' views since the adoption of the Principles and evaluate the extent to which new trends or changes in the proxy advisory industry have developed during the most recent proxy season.

The consultation includes a number of questions, some of which are directed specifically at proxy advisory firms, investors and issuers. Questions for issuers include, among others, whether their engagement with proxy advisors has changed since the adoption of the principles, whether, in their view the Principles have improved proxy advisors' procedures for managing and disclosing conflicts of interest and whether they have provided greater transparency in the way proxy advisors' arrive at vote recommendations. Questions for investors include, among others, to explain how they use the services of proxy advisors and how often they deviate from their research or recommendations when making voting decisions. Moreover, the consultation will consider whether the current industry-led governance structure for the maintenance and monitoring of the Principles continues to be appropriate. ESMA is also conducting its own review and noted that a number of issuers remain dissatisfied with how certain proxy advisors engage with issuers about negative vote recommendations and are concerned about the provision of automatic vote services in circumstances where the investor may wish to override the vote cast. ESMA intends to publish the final results of this review at the end of this year.
SELECTED LAW FIRM MEMORANDA

Mayer Brown: Preparing for the 2016 US Proxy and Annual Reporting Season

Gibson Dunn: SEC Proposed Amendments to Rules for Administrative Proceedings

Davis Polk: ISS Survey Results Released for 2016 Proxy Season

Sidley Austin: Hot Topics for the 2016 Proxy Season


Wachtell Lipton: SEC Narrows Shareholder Proposal Exclusion for Rule 14a-8 Proposals that “Directly Conflict” with Company Proposals

Sidley Austin: Is Proxy Access Inevitable?

John Coffee, Darius Palia: The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance

Wachtell Lipton: Will a New Paradigm for Corporate Governance Bring Peace?

Robert Pozen: Institutional Investors and Corporate Short-Termism

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GOVERNANCE CALENDAR

2015

November 18-19
Society of Corporate Secretaries & Governance Professionals
Delaware Law Issues Update
Wilmington, DE

November 20-21
ABA/Business Law Section Fall Meeting
The Ritz-Carlton
Washington, DC

2016

April 7-9
ABA/Business Law Section Spring Meeting
Fairmont Queen Elizabeth and Hilton Bonaventure
Montreal, QC, Canada

June 22-25
Society of Corporate Secretaries & Governance Professionals
2016 National Conference
The Broadmoor
Colorado Springs, CO

September 8-10
ABA/Business Law Section Annual Meeting
Boston Marriott Copley Place and the Westin Copley Place
Boston, MA

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GOVERNANCE CALENDAR

2017

April 6-8
ABA/Business Law Section Spring Meeting
Hyatt Regency New Orleans
New Orleans, LA

June 28 - July 1
Society of Corporate Secretaries & Governance Professionals
2017 National Conference
Marriott Marquis San Francisco
San Francisco, CA

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