

CGC

ABA Business Law Section Corporate Governance Committee

INSIGHT

Keeping you **in the know** about recent developments in corporate governance



Editorial In Sight:
The Value of Culture

**Clayton Emphasizes Capital
Raising Initiatives**

**New SEC Enforcement
Priorities**

CGC Leadership

Bruce Dravis, CGC Chair
Holly J. Gregory, Former CGC Chair

CGC In Sight Leadership

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RECENT DEVELOPMENTS

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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EDITORIAL IN SIGHT

The Value of Culture

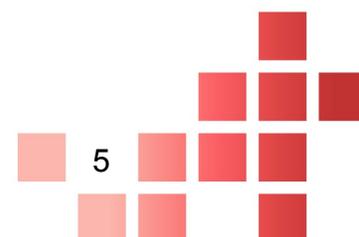
In the November 2016 edition of *CGC In Sight*, our editorial posed the following question: “*What can the governance community do in working with clients and providing thought leadership to help change corporate cultures and perhaps prevent future scandals?*” Cultural factors were widely considered to have contributed to high profile scandals at several public and private companies in 2016, including a significant financial institution, harkening back to the pre-financial crisis Enron and WorldCom era failures. In the past year, a new wave of corporate scandals has emerged, and the political environment in Washington, D.C. has cast a long cultural shadow. In addition to corporate operational and compliance failures, cultural factors cannot be ignored, particularly in light of the current wave of sexual harassment and assault allegations against senior talent at established companies.

In October 2017, a blue ribbon panel of the National Association of Corporate Directors (NACD) issued recommendations for strengthening corporate culture. The panel concluded that “corporate culture can no longer be considered as a soft issue by management and boards. Its strength or weakness has a lasting impact on organizational performance and reputation. The oversight of culture must be a key board responsibility, as it is inextricably linked with strategy, CEO selection, and risk oversight.” The report identifies key red flags - including focus on performance with little regard to how results were achieved, tolerance for high performers to operate outside established policies, and retaliation against bearers of bad news - which will sound familiar to anyone reading today’s news coverage.

This NACD report echoes existing thought leadership on corporate culture from around the globe. To take just one example, the UK Financial Reporting Counsel’s guidelines include the following on recognizing the value of corporate culture: “A healthy corporate culture is a valuable asset, a source of competitive advantage and vital to the creation and protection of long-term value. It is the board’s role to determine the purpose of the company and ensure that the company’s values, strategy and business model are aligned to it. Directors should not wait for a crisis before they focus on company culture.”

Heading into 2018, we expect environmental, social and governance topics to be an area of focus for the corporate and investor communities. Undoubtedly, the dialogue with respect to corporate governance, sustainability and long-term planning will now more explicitly incorporate corporate culture. There is work to be done, and the *CGC In Sight* Editorial Board looks forward to working with our talented ABA colleagues to further thought leadership, education and sound legal advice to companies, boards of directors, investors and other constituents as we seek to promote strong corporate cultures and successful, sustainable businesses.

Ellen C. Grady, Jayne E. Juvan and Anne C. Meyer
Co-Editors, *CGC In Sight*



NOTE FROM THE CHAIR

The CGC Is Expanding Online--So Be Part of It Live

The Corporate Governance Committee (CGC) will increase its online presence in the coming year. The goal is to expand the visibility of CGC members and their talents in the virtual world, and to make the knowledge generated in CGC programs more widely accessible for lawyers and businesses.

In 2018, more CGC material will be available online, through webinars, and (we expect/hope) through podcasts.

But the CGC's live meetings are the beating heart of the committee's work. If you actively engage with any ABA committee—organize or participate in a program, or write for a committee—you become a subject matter expert, to the benefit of your clients and your firm. Young attorneys learn. Experts pass on their expertise. The active engagement grows out of attendance at one or more of the handful of live ABA meetings each year.

The reason to attend a live ABA meeting is to come away with knowledge, insight, enthusiasm, energy and inspiration. In a program, or a meeting, or an interaction with peers, you will hear something new, a perspective that will reshape your understanding of a subject, or a point of law. When you take it back home, you will be a better lawyer, and your clients and your firm will benefit.

See you in Orlando in April!

Bruce Dravis
Chair, Corporate Governance Committee

SECURITIES AND EXCHANGE COMMISSION

SEC Chairman Jay Clayton Emphasizes Capital Raising Initiatives

September 2017

In several speeches since being sworn in as Chairman of the Securities and Exchange Commission (SEC) in May 2017, Chairman Clayton has emphasized his intent to support U.S. businesses' access to public markets. In his much discussed remarks at the Economic Club of New York, Chairman Clayton described the eight principles that will guide his tenure as Chairman, one of which is a focus on capital formation. In his remarks, Chairman Clayton noted that "a large number of companies, including many of our country's most innovative businesses, are opting to remain privately held." He stressed the need to "increase the attractiveness of our public capital markets without adversely affecting the availability of capital from our private markets."

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Chairman Clayton noted that the confidential review process under the JOBS Act that allows emerging growth companies to submit draft registration statements confidentially and phase in their reporting obligations gradually is now open to larger issuers that do not qualify as emerging growth companies. He also reminded the audience that companies may request modifications to their financial reporting requirements under Rule 3-13 of Regulation S-X when they are faced with burdensome disclosures that may not be material to the total mix of information available to investors.

In his opening remarks before the SEC Advisory Committee on Small and Emerging Companies, Chairman Clayton discussed the permanent successor of the Committee (which expired on September 24, 2017), the Small Business Capital Formation Advisory Committee, and the new Office of the Advocate for Small Business Capital Formation. He mentioned the Committee's discussion of potential updates to modernize Rule 701 under the Securities Act, which is an exemption from registration for certain securities issued by non-reporting companies to employees, noting that since the rule was last amended in 1999, many companies have chosen to stay private longer and at higher valuations.

SEC Provides Additional Guidance on CEO Pay Ratio Disclosure Rule

September 2017

On September 21, 2017, the SEC issued additional guidance on the CEO pay ratio disclosure rule, consisting of an SEC interpretive release, guidance from the Division of Corporation Finance, and revised C&DIs. The release of additional guidance confirms that the rule, originally adopted in 2015, will go into effect as scheduled for 2018 SEC filings.

The rule requires disclosure of a company's median annual total compensation of all employees excluding the CEO, the annual total compensation of the CEO, and a ratio of those two amounts. Registrants have expressed concerns about the merits as well as challenges associated with complying with this new disclosure, in particular concerns over the administrative burden of identifying a company's median employee. In the press release announcing the additional guidance, SEC Chairman Jay Clayton noted that the guidance "encourages companies to use the flexibility incorporated in our prior rulemaking to reduce costs of compliance."

The guidance from the Division of Corporation Finance provides several examples of how registrants may use reasonable estimates, statistical sampling and other methods to meet the pay ratio disclosure requirements. The Division notes that the examples are not meant to advocate one particular approach over the other, and that each registrant should make a determination based on its facts and circumstances about how to develop the most appropriate methodology. The SEC's interpretive release echoes this emphasis on flexibility, noting that "if a registrant uses reasonable estimates, assumptions or methodologies, the pay ratio and related disclosure that results from such use would not provide the basis for Commission enforcement action unless the disclosure was made or reaffirmed without a reasonable basis or was provided other than in good faith."

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SEC Approves PCAOB Changes to Auditors' Report

October 2017

On October 23, 2017, the SEC approved rules proposed by the Public Company Accounting Oversight Board (PCAOB) that will require auditors to provide new information about the audit in the auditor's report on financial statements for most reporting companies. The changes are intended to make the auditor's report more informative and relevant to investors and other financial statement users.

The most significant change is the requirement to describe "critical accounting matters" (CAMs) in the report. A CAM is a matter that was communicated or required to be communicated by the auditor to the audit committee that (a) relates to accounts or disclosures that are material to the financial statement being reported on and (b) included especially challenging, subjective or complex auditor judgment. Financial statements specifically includes the statements themselves and the notes and related schedules, but not supplementary information schedules. In addition, the PCAOB proposal requires (1) disclosure of the year in which the auditor began serving consecutively, (2) a statement that the auditor is registered with the PCAOB and is required to be independent under federal securities laws, SEC rules or PCAOB rules, (3) that the report be addressed to the issuer's board of directors and shareholders or equivalents, and (4) the inclusion of the phrase "whether due to error or fraud" when describing the auditor's responsibility to obtain reasonable assurances as to the absence of material misstatements in the financial statements. The new rules also make other minor changes to the standardized form of auditor's report as well as various additional amendments to PCAOB standards.

The proposed rules, other than the requirement to describe CAMs, are effective for all audits of fiscal years ending on or after December 15, 2017. The requirement to describe CAMs will be effective for audits of large accelerated filers for fiscal years ending on or after June 30, 2019, and for audits of other companies to which the requirements apply for fiscal years ending on or after December 15, 2020. The requirement to disclose CAMs would not apply to audits of emerging growth companies (EGCs), registered broker-dealers, most investment companies and ESOPs, and similar benefit plans, but the other new audit report requirements are applicable to EGCs and other excepted issuers. Auditors auditing issuers not subject to the requirement to communicate CAMs also may choose to include descriptions of CAMs in their reports.

The changes requiring CAMs to be described in the auditor's report are an important departure from the existing "pass/fail" model of the auditor's report. These changes were adopted in response to a perceived need to address asymmetries in the information available to auditors and investors. The requirements are intended to add to the total mix of information available to investors by providing information that is uniquely within the perspective of the auditor.



ABA BUSINESS LAW SECTION

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Simplification of Regulation S-K

October 2017

On October 11, 2017, the SEC proposed amendments to modernize and simplify certain disclosure requirements in Regulation S-K. As SEC Chairman Jay Clayton noted in his [remarks](#) at the SEC's open meeting, the proposed changes "should result in significant savings of time and money for registrants without any reduction in material information and with increased accessibility."

The [proposal](#) includes efforts to reduce repetitive reporting and to ease the process of redacting nonmaterial confidential information in exhibits, such as:

- Limiting the required disclosure of properties only to the extent that the property and its encumbrances are material.
- Limiting the year-to-year comparison in the MD&A to the two most recent fiscal years, as opposed to the three most recent fiscal years, provided that the earlier year-to-year comparison is not material and was included in a previous Form 10-K.
- Allowing registrants to redact confidential information from material contract exhibits if the information is not material and would cause competitive harm if publicly disclosed, without having to submit an unredacted copy and a prior confidential treatment request to the SEC staff.
- Allowing registrants to omit entire schedules and similar attachments to exhibits unless the information is material and not otherwise disclosed.
- Allowing registrants to redact all personally identifying information without a prior confidential treatment request.

The proposal also requires certain registrants engaged in financial transactions to disclose legal entity identifiers, or LEIs, for themselves and significant subsidiaries. LEIs allow investors to more easily identify market participants and understand their risk profiles. The proposal notes that LEIs "would allow investors to link third-party data with structured data from the Commission to produce more meaningful analysis." The SEC is seeking comments on its proposal until January 2, 2018.

New SEC Enforcement Priorities

November 2017

On November 15, 2017, the SEC's Division of Enforcement issued its [Annual Report](#) for fiscal year 2017. The report sets forth five core principles to guide the Division's priorities in its enforcement of the federal securities laws. The principles echoed the sentiments previously expressed by SEC Chairman Jay Clayton in his [remarks at the Economic Club of New York](#).

Principle 1: Focus on the Main Street Investor. The report notes that retail investors are the most vulnerable market participants. The SEC's recently formed Retail Strategy Task Force will focus on types of misconduct that often target retail investors such as Ponzi schemes, offering frauds, and abusive practices by investment professionals.

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Principle 2: Focus on Individual Accountability. The report mentions that during the six months since Chairman Clayton took office, one or more individuals have been charged in more than 80% of the SEC's standalone enforcement actions. The SEC will continue this trend, noting that pursuing individuals as opposed to institutions more effectively deters wrongdoing.

Principle 3: Keep Pace With Technological Change. The SEC's new Cyber Unit will coordinate with the Department of Justice and other criminal authorities to focus on technologically-driven violations. The Cyber Unit includes experts in cyber intrusions, distributed ledger technology, and the dark web.

Principle 4: Impose Sanctions that Most Effectively Further Enforcement Goals. The report mentions that the SEC does not use a formulaic or statistics-oriented approach to impose sanctions, preferring instead to determine sanctions on a case-by-case basis.

Principle 5: Constantly Assess the Allocation of Our Resources. The report provides qualitative and quantitative assessments of the SEC's resource allocation, including comparisons of the type and number of enforcement actions brought in fiscal year 2017 as compared to fiscal year 2016.

ISS Releases 2018 Policy Updates

November 2017

On November 16, 2017, Institutional Shareholder Services (ISS) released its 2018 policy updates, which will be applicable to all meetings held on or after February 1, 2018. The policy updates applicable to U.S. companies are relatively limited in scope and were generally addressed in the surveys and/or the draft policy updates previously released by ISS. The policy updates relate to some perennial issues, including say-on-pay votes, pay for performance, and poison pills. Companies should note, however, that certain topical governance and social issues are addressed as well. These include gender pay disparity proposals, non-employee director pay and lack of board gender diversity.

A summary of the key 2018 policy updates follows.

Shareholder Engagement Following Low Say-on-Pay Votes. Companies should be prepared to provide detailed disclosure regarding investor engagement efforts if their prior year's say-on-pay vote received less than 70% support.

Pay for Performance. ISS has moved from the qualitative section to the quantitative section of its compensation evaluation framework, a test that ranks CEO total pay and company financial performance, within a peer group, over a three-year period.

Non-Employee Director Pay. ISS will make adverse vote recommendations, beginning in 2019, for board/committee members who approve or set non-employee director compensation when there is a recurring pattern of excessive pay to these directors without a compelling rationale or other mitigating factors.

Gender Pay Gap Proposals. ISS has added a new policy to provide more clarity to its current approach to gender pay gap shareholder proposals. ISS will make case-by-case recommendations on requests for reports on a company's pay data by gender, or a report on a company's policies and goals to reduce any gender pay gap, taking into consideration identified circumstances.

Climate Change Risk Proposals. ISS has broadened the circumstances under which it will recommend in favor of shareholder proposals requesting a company disclose information on operational and investment risk related to climate change.

Poison Pills. ISS will now recommend against all board nominees, every year, at a company that maintains a "long-term" (defined as greater than one year) poison pill that has not been approved by shareholders.

SEC Issues New Staff Legal Bulletin (SLB 141) on Rule 14a-8 Shareholder Proposals

November 2017

On November 1, 2017, the SEC issued a new Staff Legal Bulletin (SLB 141) on shareholder proposals under Rule 14a-8. SLB 141 addresses several issues that have been in the spotlight in recent years, including the scope of the "ordinary business" exception, the ability for proponents to act by proxy and the use of graphics and images in shareholder supporting statements. SLB 141 is effective immediately.

Rule 14a-8(i)(7) – Ordinary Business Exception. Under Rule 14a-8(i)(7), a company may seek to exclude a shareholder proposal if it relates to the company's ordinary business operations. In the SEC Staff's interpretation, proposals that raise matters that are fundamental to management's ability to run a company on a day-to-day basis may be excluded, unless such a proposal focuses on policy issues that are sufficiently significant because they transcend ordinary business and would be appropriate for a shareholder vote. No-action letters issued by the Staff over the years provide some guidance on which proposal topics constitute ordinary business. Some relatively common topics for shareholder proposals, such as environmental matters, are generally considered to constitute significant policy matters and fall outside of the ordinary business exception. However, novel issues arise each year and the SEC, companies and proponents must grapple with how they fit within the context of the rules as well as existing precedent.

Under SLB 141, the SEC places the onus on a company's board of directors, in the first instance, to analyze and determine whether a shareholder proposal relates to the company's ordinary business operations or raises a potentially significant policy issue, noting that a company's board of directors is better positioned to make these tough decisions. Companies will now be expected to include in their no-

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action request a discussion that reflects the board's analysis of the particular policy issue raised by the shareholder proposal and its significance. SLB 141 notes that it would be most helpful if this discussion details "the specific processes employed by the board to ensure that its conclusions are well-informed and well-reasoned."

Submission of Proposals by Proxy. SLB 141 confirms the SEC's current position that it is acceptable under Rule 14a-8 for a shareholder's proposal to be submitted by proxy. Active individual proponents often use this approach, which allows a proponent to meet the Rule 14a-8 ownership requirements to submit proposals at numerous companies at which they may not have personal shareholdings.

Under SLB 141, a proposal submitted by a representative of a shareholder must now include documentation setting forth basic information – including the name of the shareholder-proponent and person acting by proxy, the targeted company, the topic of the proposal, and the meeting at which the proposal will be submitted – and this documentation must be signed and dated by the shareholder.

Rule 14a-8(d) – Use of Images and 500 Word Limit. In recent no-action requests, companies have argued that shareholder proponents should not be able to use images and graphics in their supporting statements, citing Rule 14a-8(d), which provides that a "proposal, including any accompanying supporting statement, may not exceed 500 words." SLB 141 reaffirms the SEC Staff's position that any words used in conjunction with graphs or images will count toward the word limit, but that the use of images is not per se prohibited by the rules.

Rule 14a-8(i)(5) – Economic Relevance Exclusion. The "economic relevance" exclusion under Rule 14a-8(i)(5) has not commonly been used by companies, in large part because the SEC Staff has historically granted only limited no-action relief. Under SLB 141, the Staff's analysis for no-action relief will focus on a proposal's "significance to the company's business when it otherwise relates to operations that account for less than 5% of total assets, net earnings and gross sales." Similar to the SLB 141 mandates for the ordinary business exception, if a company submits a no-action request on the grounds that the issue raised in the proposal is economically irrelevant, the company must now include disclosure reflecting, among other things, the board's analysis of the proposal's significance to the business of the company.

DELAWARE

Delaware Supreme Court Declines to Adopt Presumption in Favor of Deal Price in Appraisal Action

July 2017

In [DFC Global Corporation v. Muirfield Value Partners](#), the Delaware Supreme Court rejected a proposed bright-line rule that the deal price is the best evidence of fair value in arm's-length merger transactions, but nonetheless reversed and remanded the Court of Chancery's determination that the fair value exceeded the merger price. Following a private equity firm's acquisition of DFC Global Corporation (DFC), a publicly traded payday lender, for \$9.50 per share, several stockholders commenced statutory appraisal actions. In

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its post-trial opinion, despite concluding that the sale process was “arm’s-length” and “robust,” the Court of Chancery held that DFC’s fair value was \$10.30 per share by giving equal weight to “three imperfect techniques”: a discounted cash flow analysis, a comparable company analysis and the deal price.

On appeal, the Delaware Supreme Court declined to adopt a presumption in favor of the deal price, emphasizing that the appraisal statute requires that a determination of fair value be made in light of “all relevant factors.” The Supreme Court nonetheless concluded that the Court of Chancery had abused its discretion in according the deal price only one-third weight, finding that this determination was not supported by the record or accepted financial principles.

Delaware Court of Chancery Finds Fair Value Was Less than Half of the Merger Price

August 2017

In a post-trial opinion in ACP Master, LTD. v. Sprint Corporation, ACP Master, Ltd v. Clearwire Corporation, the Court of Chancery held that the \$5.00 merger price paid by Sprint to acquire the remaining stock of Clearwire exceeded the company’s fair value by more than 100%. Prior to the merger, Sprint owned over 50% of Clearwire’s outstanding common stock. Stockholders asserted that Sprint breached its fiduciary duties as a controlling stockholder and sought appraisal, contending that an unfair process resulted in less than fair value to the Clearwire stockholders. Despite finding some evidence of unfair dealing early in the process, the Court concluded that the transaction was entirely fair to the minority stockholders because a bidding war following the special committee’s approval of a \$2.97 merger price resulted in a substantial increase in the merger price to \$5.00, which the Court concluded exceeded fair value. As to the appraisal claim, the Court considered competing discounted cash flow analyses presented by the parties, which valued Clearwire at \$16.08 per share and \$2.13 per share, respectively. The Court adopted the determination of Sprint’s expert that the fair value of Clearwire was \$2.13 per share, emphasizing, *inter alia*, that (i) the Delaware appraisal statute requires the Court to back out synergies embedded in the merger price and (ii) Clearwire’s expert used more reliable projections created by Clearwire’s management in the ordinary course of business.

Delaware Court of Chancery Applies MFW Standard to Conflicted One-Sided Controller Transaction

August 2017

In In Re Martha Stewart Living Omnimedia, Inc. Stockholder Litigation, the Court of Chancery dismissed breach of fiduciary duty claims brought by former stockholders of Martha Stewart Living Omnimedia (MSLO) against Martha Stewart, MSLO’s former controlling stockholder, holding that the “road map” established in the Delaware Supreme Court’s seminal Kahn v. M&F Worldwide Corp. (MFW) decision applies when the controller is a seller only, *i.e.*, in “conflicted one-sided controller transactions.” The claims arose from third-party Sequential Brands Group, Inc.’s (Sequential) acquisition of MSLO by merger. The plaintiffs alleged that Martha Stewart leveraged her position as controlling stockholder to secure greater (or disparate)

consideration than was paid to the other stockholders. In granting the defendants' motion to dismiss, the Court found that the applicable standard of review was the business judgment rule for two principal reasons. First, the Court held that there was no basis to invoke the entire fairness standard *ab initio* because (i) Stewart received the same merger consideration as all MSLO stockholders and (ii) the plaintiffs failed to plead sufficient, non-conclusory facts to render it reasonably conceivable that Stewart's alleged "side deals" diverted consideration from the minority stockholders. Second, the Court held that the correct time to measure compliance with the MFW framework in a "conflicted one-sided controller transaction" is prior to the point "where the controlling stockholder actually sits down with an acquirer to negotiate for additional consideration"; here, by the time Stewart began discussions with Sequential, the dual procedural protections endorsed by MFW – namely, the creation of an independent special committee and the adoption of a majority of the minority approval condition — were in place. Thus, applying the business judgment rule standard, the Court stated that the transaction only could be challenged on the basis of waste, and the Court was unable to conceive of "a scenario where [the plaintiffs] could meet that high standard" Accordingly, the Court granted the defendants' motion to dismiss.

Board's Knowing Violation of Federal Regulations Excuses Pre-Suit Demand in Derivative Case

September 2017

In Kandel v. Niv et al., No. 11812-VCG (Del. Ch. Sept. 29, 2017), the Court of Chancery denied a motion to dismiss derivative claims brought on behalf of FXCM, Inc. (FXCM). Specifically, among other things, the plaintiff alleged that the directors caused or permitted a policy at FXCM that violated a federal regulation of the Commodity Futures Trading Commission (CFTC). The plaintiff did not make a litigation demand on the FXCM board. The Court was, therefore, required to dismiss the complaint unless it alleged particularized facts showing that demand would have been futile. The relevant analysis, as to the allegations that the directors caused or permitted FXCM to violate federal regulations, was whether the directors faced a substantial likelihood of liability. The Court noted the directors would only face liability if they *knowingly* caused or permitted FXCM to violate the law. In that regard, the Court found that demand was excused because the CFTC regulation "clearly prohibits" the FXCM policy and that there was a strong inference that the directors knew that the policy violated the CFTC regulation. The Court, therefore, concluded that demand was excused under the "highly unusual" facts alleged in the complaint because the directors faced a substantial threat of liability that rendered them incapable of disinterestedly evaluating the demand.

Books and Records Demand Denied in Lawyer-Driven Litigation

November 2017

In Wilkinson v. A. Schulman, Inc., No. 2017-0138-JTL (Del. Ch. Nov. 13, 2017), the Court of Chancery denied a Section 220 books and records demand on the basis that the stockholder had failed to demonstrate a proper purpose for inspection. The Court found that the stockholder's stated purposes were not his actual purposes, but rather his counsel's purposes. The stockholder plaintiff had "simply lent his name to a lawyer-driven effort by entrepreneurial plaintiffs' counsel." The Court contrasted situations in which

stockholders use counsel to seek books and records to carry out a stockholder's wishes with far different situations in which lawyers initiate the process, draft a demand to investigate issues that are different than what motivated the stockholder to a law firm's solicitation, and then pursue inspection with only minor involvement by the stockholder. The Court found the latter situation to be improper. Accordingly, the Court concluded that stockholder's stated purposes were not his actual purposes, they were his counsel's purposes, and held that stockholder lacked a proper purpose and was not entitled to inspect any documents.

INTERNATIONAL

Investors Increase Pressure for Board Gender Diversity in Canada

November 2017

Canadian securities regulators published the results of their third annual review of disclosure regarding the representation of women on corporate boards. Since 2015, companies listed on the Toronto Stock Exchange (TSX) must disclose details about the representation of women on their boards, including whether they have adopted gender diversity policies or targets for the number of women directors, or explain why they have not adopted these strategies. The results show that Canada continues to lag behind other developed nations in terms of gender balance on corporate boards. Women hold approximately 14% of all board seats of the 700 companies listed on the TSX and 39% of these companies have no women directors. The review also reported on board vacancies filled during the past year and found that only 26% of board vacancies were filled by women candidates. Troubled by these numbers the Chair of the Ontario Securities Commission (OSC) stated that, assuming that board vacancies filled by women increases to 50%, it will take over three decades to reach gender parity on boards.

As a result, investor groups have stepped up their efforts to promote gender diversity and effective board renewal ahead of the 2018 proxy season. Boards should take notice of the following developments. State Street Global Advisors recently announced that it will extend its board diversity engagement and voting policy to all TSX-listed companies, and confirmed that it may vote against the nominating committee chairs of companies that are laggards. This follows a similar statement from sixteen of Canada's largest institutional investors. Beginning in 2018, ISS will recommend to withhold votes for the chair of the nominating committee of boards of S&P/TSX Composite Index companies (approximately the 250 largest companies) that have no women directors, or have not adopted a formal written diversity policy. As of September 1, 2017, 29 companies, or 12% of the S&P/TSX Composite Index, have no women on their boards. This guideline will include all TSX-listed companies in 2019, and Glass Lewis intends to adopt a similar guideline for the 2019 proxy season. Moreover, securities regulators are reviewing the current disclosure requirement to determine if additional regulatory action is necessary. The OSC recently hosted a roundtable discussion on this issue, where a number of participants suggested that the securities regulators should require companies to set targets for women representation and disclose the boards' progress against that target.

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SELECTED LAW FIRM MEMORANDA AND OTHER ARTICLES OF INTEREST

Skadden Arps: [ISS Announces 2018 Updates to US Proxy Voting Guidelines](#)

Sidley Austin: [Governing Through Disruption: A Boardroom Guide for 2018](#)

Wachtell Lipton: [Activism: The State of Play \(Martin Lipton Memo\); Corporate Governance—the New Paradigm \(Martin Lipton Blog Post\)](#)

Securities and Exchange Commission: [Statement at Open Meeting: Proposal to Modernize and Simplify Disclosure Requirements \(Remarks of Chairman Jay Clayton\)](#)

Mayer Brown: [SEC Staff Issues Legal Bulletin on Shareholder Proposals](#)

Securities and Exchange Commission: [Governance and Transparency at the Commission and in Our Markets \(Remarks of Chairman Jay Clayton\)](#)

White & Case: [SEC Releases Timely Guidance on Shareholder Proposals](#)

Davis Polk: [NYSE Delays Implementation of New Rule Changing the Timing of Advance Notice of Dividend and Distribution Announcements](#)

Harvard Law School Forum on Corporate Governance and Financial Regulation: [Novel Defensive Tactics Against Activist Shareholders](#)

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GOVERNANCE CALENDAR

2018

April 12-14

Business Law Section Spring Meeting

Rosen Shingle Creek
Orlando, FL

September 13-15

Business Law Section Annual Meeting

Fairmont Austin and Austin Convention Center
Austin, TX

November 16-17

Business Law Section Fall Meeting

Ritz-Carlton Washington DC
Washington, D.C.

