

CGC

ABA Business Law Section Corporate Governance Committee

INSIGHT

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

Editorial In Sight:
Deregulation: The Market
Will Fill the Void

Jay Clayton Sworn in as SEC
Chairman

2017 Proposed Amendments
to Delaware General
Corporation Law

CGC Leadership

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CGC In Sight Leadership

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CONTENTS

CGC Leadership

About CGC In Sight

Recent Developments

Selected Law Firm Memoranda

Governance Calendar

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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.

Editorial In Sight

Deregulation: The Market Will Fill the Void

Securities and Exchange Commission

SEC Adopts Requirement for Hyperlinked Exhibits in EDGAR

SEC Conforms Rules to JOBS Act Provisions

Updated Statements on Conflict Minerals Rule

NYSE Submits Proposal to SEC to Require Advance Notice of Dividend Announcements

SEC Charges Executives in Connection with Accounting Failures

SEC Charges CEO with Failing to Disclose Perks to Shareholders

After Confirmation by U.S. Senate, Jay Clayton Sworn in as SEC Chairman

SEC Appoints Director of Division of Corporation Finance and Fills Additional Senior Roles

Delaware

Two Recent Opinions Provide Guidance on Application of *Corwin v. KKR Financial Holdings LLC*

Delaware Court Reiterates Directors' Duties Owed to Shareholders in Connection with Redemption of Stock as Liquidity Strategy

Delaware Court Holds that a Merger Wipes Out Derivative Standing

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RECENT DEVELOPMENTS

Delaware (continued)

Recent Decision Offers Guidance on Standard of Review for Equity Grants Under a Stockholder Approved Plan

2017 Proposed Amendments to Delaware General Corporation Law

Delaware Supreme Court Clarifies Standard for Merger Agreement "Efforts" Covenants

Delaware Supreme Court Addresses Contractual Fiduciary Duty Standard in Master Limited Partnership Dispute

Publications of Note

Global Survey on Directors Shows Increase in Cybersecurity Issues

Effect of Board Gender Diversity on Decision Making

EY Analyzes Drop in Number of U.S. Public Companies, Capital Market Trends

Paper Questions Efficiencies of Private Equity Governance

Non-Profit Group Creates Searchable Database of Political Contributions by S&P Companies

International

US-Style Proxy Access Shareholder Proposals Migrate to Canada

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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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TOPICS COVERED

Federal Regulatory Developments

Federal Case Law Developments

State Law Developments

International Law Developments

SROs

Investor Organizations (CII, PERS, etc.)

Management Organizations (Chamber, BRT)

Activist Investors

Proxy Advisor Organizations (ISS, Glass Lewis)

Rating Agencies (S&P, Moodys, Fitch)

Professional Organizations (Society, COSO, AICPA)

Academic Developments

Directors Institutes

Governance in Other Entities

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EDITORIAL IN SIGHT

Deregulation: The Market Will Fill the Void

The new administration is pushing deregulation. Two of President Trump's earliest Executive Orders require federal agencies to identify two existing regulations to be eliminated for every new regulation issued and to designate a "Regulatory Reform Officer" charged with overseeing regulatory reform initiatives. Businesses and industries have applauded the deregulatory focus, suggesting it will promote faster economic growth at a lower cost in the U.S. But deregulation could also have a negative impact on corporate governance processes, as businesses seek to shed compliance measures relating to regulations that are eliminated or revamped.

As part of its deregulatory focus, President Trump's administration has also pushed for the repeal of Dodd-Frank through two Executive Orders issued in April 2017, an initiative embraced by Republicans in the House of Representatives. In early June, the House passed the Financial Choice Act, which, if signed into law, would impact U.S. public companies on a wide range of governance issues. These include reforming the enforcement authority of the Securities and Exchange Commission (SEC), imposing limits on whistleblower awards, narrowing the Dodd-Frank requirement for a shareholder "say on pay" vote, limiting Dodd-Frank's compensation clawback requirement, repealing Dodd-Frank provisions requiring the SEC to adopt a CEO pay-ratio disclosure rule and a hedging disclosure rule, tightening shareholder proposal submission eligibility requirements, and prohibiting the SEC from adopting a universal proxy rule. The fate of Choice 2.0 remains to be seen, as it faces significant opposition in the Senate, but the focus remains on deregulation.

How could this deregulatory focus affect corporate governance at U.S. companies? At the SEC, an independent agency not specifically subject to the President's Executive Orders on deregulation, actions taken early in the new administration suggest a willingness to revisit regulations passed during previous administrations. Early this year, then Acting SEC Chair Piwowar directed the SEC to reconsider its conflict minerals rule disclosure guidance and implementation of the CEO pay-ratio rule. The SEC's resource extraction rule was also shelved. It also appears that some ongoing initiatives supported by many large asset owners and managers, including updating disclosure requirements with respect to environmental and social issues, such as climate change and diversity, are unlikely to be pursued. Where new SEC Chair Clayton stands on deregulation remains to be seen, but his background is in capital markets. Recent SEC pronouncements suggest that this may be where the SEC will be active, opening up avenues for capital formation rather than pushing new disclosure rules.

To the extent existing corporate governance laws and regulations change or are eliminated, or corporate governance issues of interest to large asset owners and managers are not addressed, one question is whether these investors will use their voting policies and power to fill the void created. In recent years, large institutional shareholders and fund managers have successfully effected change by private ordering governance initiatives at publicly traded corporations. For example, following the gutting by a federal court of the SEC's adopted proxy access rules, the New York City Comptroller (on behalf of New York City pension funds) has led a shareholder proposal effort directed at public corporations seeking proxy access. The result has reset expectations about what the market requires and, in just over two years, well in excess of 50% of the S&P 500 has adopted proxy access bylaw provisions. More recently, 62.3% of Exxon Mobil's shareholders voted in favor of a nonbinding shareholder proposal seeking greater disclosure from the corporation about the risks of climate change on the company's business and its policies to



address those risks. Significantly, BlackRock voted in favor of the proposal, and both The New York Times and The Washington Post reported that it is likely that Vanguard and State Street, two of Exxon Mobil's largest institutional investors, did the same (although those two investors did not disclose their votes). The effect of the vote is not yet known, but it shows that institutional investors are proactively and broadly exercising voting rights to push disclosure about issues of importance to them, with or without the SEC's help.

Institutional investors are flexing their voting and economic power to generate returns for their investors, and they look to governance improvements as part of the investment process. Large shareholders are pursuing governance initiatives at U.S. public companies to build investor value consistent with their fiduciary responsibility to their investors, generating greater engagement, transparency and shareholder-friendly policies at major U.S. public companies. As a result, those who campaigned for less government may be getting what they asked for — a pullback of government involvement in the corporate process — but they are not likely to see a pullback on governance initiatives. Governance issues mediated or resolved through the political and regulatory process are unlikely to be revisited, and current issues like diversity on boards, climate change and ESG are not likely to be dropped even if the SEC refrains from acting. Instead, these issues will be addressed in the market.

Bruce Dravis, Ellen C. Grady, Jayne E. Juvan and Anne C. Meyer

SECURITIES AND EXCHANGE COMMISSION

SEC Adopts Requirement for Hyperlinked Exhibits in EDGAR

March 2017

The SEC adopted rule amendments that will require issuers making EDGAR filings of registration statements and periodic and current reports to include an active hyperlink to each filed exhibit identified in the exhibit index. The amendments provide an exception for exhibits filed in paper pursuant to a temporary or continuing hardship exemption under Regulation S-T, as well as those required to be submitted in paper under cover of Form SE. Additionally, the new hyperlink requirement will not apply to exhibits in eXtensible Business Reporting Language ("XBRL") and exhibits filed with Form ABS-EE.

With respect to registration statements registrants will be required to include an active hyperlink to each exhibit identified in the exhibit index (other than those filed in XBRL or with Form ABS-EE) not only in the version of the registration statement that becomes effective, but also in the initial registration statement and each subsequent pre-effective amendment.

Because the SEC's exhibit hyperlinking requirement would be feasible only if registrants are required to file in HTML, the SEC also adopted rule amendments that will require registrants to file the forms affected by the new hyperlinking requirement in HTML format. The rule amendments will take effect on September 1, 2017, though there is a one-year phase-in period for non-accelerated filers and smaller reporting companies that submit filings in ASCII format. Additionally, the SEC is delaying the compliance date (to a yet unknown date) for any Form 10-D that will require hyperlinks in any exhibit filed with Form ABS-EE.

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SEC Conforms Rules to JOBS Act Provisions; Adopts Inflation-Adjusted Thresholds for Emerging Growth Companies (“EGCs”) and Regulation Crowdfunding

March 2017

The SEC adopted technical amendments to conform certain rules and forms to modifications made by the JOBS Act to the Securities Act of 1933 and the Securities Exchange Act of 1934. Although the amendments made by the JOBS Act to the Securities Act and the Exchange Act were self-executing and went into effect as soon as the JOBS Act was signed into law, some of the SEC’s rules and forms for registration under the Securities Act and the Exchange Act, as well as Exchange Act periodic and current reports, Regulation S-K and Regulation S-X, did not reflect these JOBS Act provisions; the SEC’s technical amendments are designed to correct these discrepancies.

Notably, the SEC’s technical amendments affect even those issuers that are not EGCs, as they require modifications to the cover pages of Securities Act registration statements and Exchange Act periodic reports filed by all issuers.

In addition to adopting the technical amendments, the SEC amended the definition of “emerging growth company” to account for inflation. An EGC was previously defined as an issuer with “total annual gross revenues of less than \$1 billion.” The SEC calculated the inflation-adjusted EGC gross revenue threshold to be \$1.07 billion. The SEC also adjusted for inflation the dollar amounts used in connection with the exemption from the registration requirements of Securities Act Section 5 for certain crowdfunding transactions.

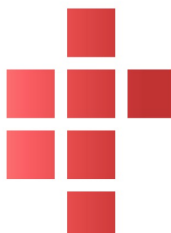
SEC’s Acting Chairman and Division of Corporation Finance Issue Updated Statements on Conflict Minerals Rule

April 2017

On April 3, 2017, a federal court entered final judgment in the conflict minerals case in accordance with the 2014 decision of the U.S. Court of Appeals for the D.C. Circuit that found the SEC’s conflict minerals rule and the Dodd-Frank provision on which it is based “violate the First Amendment to the extent that [they] require regulated entities” to disclose that their products have not been found to be “[Democratic Republic of the Congo] conflict free.” In a statement issued on April 7, Acting Chairman Michael S. Piowar noted that the SEC must now “determine how to address the Court of Appeals decision – including whether Congress’s intent . . . can be achieved through a descriptor that avoids the constitutional defect identified by the court – and how that determination affects overall implementation of the Conflict Minerals rule.”

Piowar instructed the SEC staff to begin work on a recommendation for future SEC action, taking into account, among other things, comments received in response to his January 31, 2017 request for comment on the rule. In a statement issued on the same day, the Division of Corporation Finance added that, given the uncertainty regarding how the SEC will resolve the issue, it will not recommend enforcement action to the SEC if companies subject to the rule only file disclosure on Form SD under the provisions of the rule requiring a reasonable country of origin inquiry. This enforcement position applies equally to those issuers that are required, under the rule, to conduct due diligence on the source and chain of custody of their conflict minerals.

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New York Stock Exchange (“NYSE”) Submits Proposal to SEC to Require Advance Notice of Dividend Announcements

April 2017

The NYSE filed a proposed rule change with the SEC to require listed companies to provide notice to the Exchange at least ten minutes prior to making any public announcement with respect to a dividend or stock distribution. Section 202.06 of the NYSE’s Listing Manual currently provides that when a listed issuer plans to release material news between 7:00 a.m. and 4:00 p.m. Eastern Time, “the company must notify the Exchange by telephone at least ten minutes prior to release of the announcement, to inform the Exchange of the substance of the announcement and the method by which the company intends to comply with the immediate release policy” and must provide the NYSE with a copy of the announcement, if in writing. The primary effect of the NYSE’s proposed rule change would be to require companies listed on the NYSE to provide ten minutes’ advance notice to the Exchange with respect to a dividend or stock distribution announcement made at any time, including outside the hours of operation of the NYSE’s “immediate release policy.” The NYSE’s proposal is subject to the SEC’s approval. The SEC is currently soliciting comments with regard to the proposal, to be received by the SEC no later than 21 days following the proposal’s publication in the Federal Register.

SEC Charges Executives in Connection with Accounting Failures

April 2017

The SEC charged two former executives at a government contractor that was subject to an SEC enforcement action earlier this year and had paid a \$1.6 million penalty for accounting failures. According to the SEC’s allegations, one executive of L3 Technologies, Inc., David Pruitt, circumvented internal accounting controls and caused the company to improperly recognize \$17.9 million in revenue from a contract with the U.S. Army by creating invoices that were not actually delivered at the same time that the revenue was recorded. The additional revenue allegedly allowed employees to barely satisfy an internal target for management incentive bonus payments. The SEC also alleged that Pruitt took steps to conceal from L3’s corporate office and external auditor the fact that the invoices were not delivered. The SEC’s case against Pruitt will be heard by an administrative law judge. The SEC separately instituted and settled a cease-and-desist order against another executive, Mark Wentlent, due to his alleged failure to follow up on red flags that Pruitt had caused the company to improperly recognize revenue. Wentlent agreed to pay a \$25,000 penalty to the SEC.



ABA BUSINESS LAW SECTION

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SEC Charges CEO with Failing to Disclose Perks to Shareholders

May 2017

The SEC initiated and settled an enforcement action against the former CEO of a marketing company, MDC Partners, Inc., for failing to properly disclose his perks to shareholders. According to the SEC's cease-and-desist order, shareholders were informed in annual filings that then-CEO Miles S. Nadal received an annual perquisite allowance of \$500,000 in addition to other benefits as the chairman and CEO of the company. The SEC's investigation found, however, that without disclosing information to investors as required under the securities laws, MDC Partners paid for Nadal's personal use of private airplanes, charitable donations in his name, yacht and sports car expenses, cosmetic surgery and other perks. In total, Nadal allegedly received an additional \$11.285 million in perks beyond his disclosed benefits and \$500,000 annual allowance. Nadal has since resigned and returned \$11.285 million to the company. He has agreed to pay \$5.5 million to settle the charges with the SEC and to be barred from serving as an officer or director of a public company for five years. MDC Partners agreed to pay \$1.5 million earlier this year for settling charges relating to its role in the perk disclosure failures.

After Confirmation by U.S. Senate, Jay Clayton Sworn in as SEC Chairman

May 2017

Jay Clayton was sworn into office as Chair of the SEC on May 4. Unlike recent SEC Chairs, who have had an enforcement background, Clayton was a transactional attorney, who, as a partner at Sullivan & Cromwell LLP, advised public and private companies on securities offerings, mergers and acquisitions, corporate governance and other matters. Clayton replaces outgoing SEC Chair Mary Jo White, a former prosecutor who left the SEC in January. The SEC now has three sitting commissioners. President Trump has not yet nominated individuals to fill the two remaining open commissioner seats.

SEC Appoints Director of Division of Corporation Finance and Fills Additional Senior Roles

May 2017

The SEC appointed William H. Hinman as the new director of the Division of Corporation Finance. Mr. Hinman was a partner in the Silicon Valley office of Simpson Thacher & Bartlett LLP, where he advised public and private companies in corporate finance matters. He has experience advising a wide range of issuers and underwriters in capital-raising transactions and corporate acquisitions. Mr. Hinman has also advised public companies and their boards on public reporting, governance, and other corporate matters, and he has significant experience with derivatives, novel securities and private placements. In addition to Mr. Hinman, the SEC has appointed additional senior officials. The SEC has named Robert B. Stebbins General Counsel of the agency. Mr. Stebbins has practiced law at Willkie Farr & Gallagher LLP since 1993, focusing on mergers and acquisitions, private equity and venture capital, investment funds, and capital markets transactions. He has also advised clients on SEC compliance issues and corporate governance matters. In addition, Jaime Klima has been named Chief Counsel to Chairman Jay Clayton, Lucas Moskowitz has been named the agency's chief of staff, and Sean Memon has been named the agency's deputy chief of staff.

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DELAWARE LAW

Two Recent Opinions Provide Guidance on Application of *Corwin v. KKR Financial Holdings LLC*

April 2017

Two recent decisions from the Court of Chancery provide guidance on the application of *Corwin*, which held that when “a transaction not subject to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders, the business judgment rule applies.”

Plaintiffs in *In re Columbia Pipeline* alleged that management of Columbia Pipeline Group (“CPG”) had breached its duty of loyalty when it “engineer[ed] a spinoff and sale of the Company as part of a self-interested plan to cash in on lucrative change-in-control benefits” prior to CPG’s acquisition by TransCanada Corporation. The merger agreement was approved by the board of directors. More than 95% of the Company’s stockholders voted to approve the merger. Plaintiffs argued that *Corwin* did not require application of the business judgment rule because there were material omissions in the proxy statement soliciting shareholder approval for the transaction. The Court found that the defendants’ motivation to generate change-in-control benefits from a spinoff was sufficiently disclosed to shareholders. Applying *Corwin*, the Court found that CPG stockholders had approved the transaction in an informed, uncoerced vote. Therefore, the business judgment rule applied and the Court dismissed the complaint with prejudice.

In contrast, in *In re Saba Software*, the Court held that *Revlon*, not the business judgment rule, applied with respect to the acquisition of Saba because “the stockholder vote approving the transaction was neither fully informed nor uncoerced.” Saba’s stock traded on the NASDAQ. In September 2014, the SEC filed a complaint against Saba and two of its former executives alleging that one of Saba’s subsidiaries had engaged in a fraudulent scheme to overstate its pretax earnings by \$70 million from 2007 to 2011. Saba, thereafter, repeatedly promised regulators, its stockholders and the market that it would issue restated financial statements. Saba, however, failed to timely issue restated financial statements, and the SEC revoked the registration of Saba’s common stock. Following this disclosure, Saba’s stock price fell from \$13.49 to \$8.75. Saba’s board then approved a merger for \$9 per share. Five days later, the SEC deregistered Saba’s stock. Next, Saba’s stockholders voted to approve the merger. Shortly thereafter, a former Saba stockholder brought suit against Saba’s board of directors for breach of fiduciary duty. The defendant directors moved to dismiss, arguing that the business judgment rule applied under *Corwin* since a majority of stockholders approved the transaction. The Court disagreed, holding that the stockholder vote was neither informed nor uncoerced, and that the complaint pled a non-exculpated claim for breach of fiduciary duty because, among other things, the board failed to provide information regarding the reasons why Saba was unable to issue restated financial statements, which the Court described as “not a purposeful decision” but a “factual development that spurred the sales process and, if not likely correctible, would materially affect the standalone value of Saba going forward.”

Delaware Court Reiterates Directors' Duties Owed to Shareholders in Connection with Redemption of Stock as Liquidity Strategy

April 2017

In The Frederick Hsu Living Trust v. ODN Holding Corporation, the Court of Chancery allowed breach of fiduciary duty and other claims to proceed, over a motion to dismiss, against a private equity fund, and directors of one of its portfolio companies in connection with a contractual obligation to redeem preferred stock held by the fund. The Complaint alleged that the private equity fund caused the company to engage in a series of transactions designed to allow the company to redeem shares of preferred stock rather than act in the best long-term interest of all shareholders. The Court held that it may be a breach of the directors' fiduciary duty to cause the corporation to sell off parts of its business to satisfy a liquidation preference of its preferred stockholders. In particular, the Court noted several key findings including: (1) a board of directors does not generally owe fiduciary duties to holders of preferred stock; (2) despite a contractual obligation, a board may breach its fiduciary duties by redeeming preferred stock in the short-term (to the detriment of common stockholders) rather than growing the business over time (to the benefit of common stockholders), thereby reducing the present value of the preferred stock; (3) abstaining from a board vote may not shield a director from liability if the director "played a role in the negotiation, structuring or approval of the proposal"; and (4) independent directors voting in favor of the holders of preferred stock may be found to have acted in "bad faith" and thereby lose the benefit of the business judgment rule.

Delaware Court Holds that a Merger Wipes Out Derivative Standing

May 2017

The Court of Chancery in In re Massey Energy Company Derivative and Class Action Litigation, dismissed a derivative action brought by former stockholders of Massey against its former directors and officers for allegedly causing the company to willfully disregard safety regulations. Despite finding that shareholders had stated a "viable" claim that the directors had breached their duty of oversight under In re Caremark International, Inc. Derivative Litigation, the Court nevertheless held that the former shareholders lacked standing to maintain their derivative suit because they no longer held shares of the corporation due to an intervening merger.

The Court held that under the "continuous ownership rule," shareholders of Delaware corporations must hold shares at the time of the alleged wrong and continuously thereafter throughout the litigation in order to have standing to maintain derivative claims. The plaintiffs were divested of their shares in connection with a merger of Massey while the litigation was pending causing the former shareholders to lose their standing upon being divested of their status as shareholders of Massey. The former shareholders also asserted a purported "direct claim" of "inseparable fraud." As to "inseparable fraud," the former shareholders relied on the Delaware Supreme Court's decision in Arkansas Teacher Retirement System v. Caiafa, 996 A.2d 321, 322-32 (Del. 2010), which stated that "Delaware law recognizes a single, inseparable fraud when directors cover massive wrongdoing with an otherwise permissible merger." The Court of Chancery, however, found that the misconduct alleged could only constitute a derivative claim because the allegations "implicated" the directors' "normal duty" to the corporation to manage its affairs and the allegations of harm are "prototypical examples of corporate harm that can be pursued only derivatively." The Court also concluded that plaintiffs'

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allegations that the merger was “necessitated” by the misconduct were unavailing because “inseparable fraud” is not an exception to the “continuous ownership rule for maintaining derivative standing.”

Recent Decision Offers Guidance on Standard of Review for Equity Grants Under a Stockholder Approved Plan

April 2017

In In re Investors Bancorp, Inc. Stockholder Litigation, the Delaware Court of Chancery dismissed a stockholder derivative suit against the directors of Investors Bancorp, Inc. in connection with the directors’ decision to grant themselves restricted stock and stock options under an equity compensation plan previously approved by a stockholder vote. The plan set limits for the size of grants, and the grants in question were within those limits. The board had previously adopted an equity compensation plan, which reserved a set amount of shares of the company’s stock for restricted stock awards and stock options for the company’s officers, employees, and non-employee directors. The plan also set separate limits on the numbers of shares that may be awarded to any one employee and to non-employee directors. The plan was overwhelmingly approved by shareholders. Following shareholder approval of the plan, the board approved stock and restricted stock options to all of the directors, including two employee directors within the plan limits.

The Court noted that the “key issue” was “whether the stockholder approval of the [equity plan] will be deemed ratification of the awards under the plan.” In this regard, the Court held that “approval of plans with ‘specific limits’ . . . will be deemed as ratification of awards that are consistent with those limits,” and “this plan included director-specific limits that differed from the limits that applied to awards to other beneficiaries under the plan.” The Court held that the stockholder approval of equity plans, with director specific limits, and awards within those limits, constituted “ratification of the awards,” rendering them subject to the “business judgment rule’s presumptive protection” and reviewable only as “waste.”

2017 Proposed Amendments to the Delaware General Corporation Law

March 2017

The Corporate Council of the Corporation Law Section of the Delaware State Bar Association has released legislation proposing to amend the General Corporation Law, which is expected to be introduced to the Delaware General Assembly. If enacted, the amendments will, among other things, (i) provide statutory authority for the use of electronic networks or databases for the administration of corporate records, (ii) eliminate the requirement that stockholder consents be individually dated, (iii) update and synchronize the various provisions of the DGCL dealing with the authorization of mergers and consolidations involving different types and forms of entities, and (iv) make other technical changes to provide clarification.

If enacted, all of the amendments (other than those relating to the written consents) will be effective on August 1, 2017. The amendments relating to stockholder action by written consent will be effective only for actions taken by consent having a record date on or after August 1, 2017.

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Delaware Supreme Court Clarifies Standard for Merger Agreement “Efforts” Covenants

March 2017

In The Williams Companies, Inc. v. Energy Transfer Equity, L.P., the Delaware Supreme Court provided further guidance regarding how Delaware courts will construe “efforts” covenants in merger agreements. The Williams majority affirmed a Court of Chancery decision allowing Energy Transfer Equity (ETE) to terminate its merger with Williams when ETE’s tax counsel determined it could not issue a tax opinion that was a condition precedent to the closing of the merger. The Court of Chancery found that ETE complied with its covenants to use “commercially reasonable efforts” to obtain the tax opinion and to use “reasonable best efforts” to consummate the transaction because ETE took no affirmative acts to prevent the opinion’s issuance. The Supreme Court disagreed with this reasoning. Based on the Court of Chancery’s earlier decision in Hexion Specialty Chemicals, Inc. v. Huntsman Corporation, the Supreme Court clarified that ETE had an affirmative obligation to take all reasonable steps to obtain the tax opinion and otherwise complete the transaction. The Supreme Court therefore held that the lower court erred by focusing on the absence of any evidence that ETE had caused its counsel to withhold the required opinion. Despite this finding, the Supreme Court affirmed the Court of Chancery’s decision. As the Supreme Court recognized, once a covenant breach is established, the burden is on the breaching party to show that the breach did not materially contribute to the failure of the transaction. Although the Court of Chancery failed to analyze whether ETE met this burden, the Supreme Court concluded that the Court of Chancery’s determination that ETE’s tax counsel’s decision was made in good faith, independent of any conduct by ETE, was sufficient to sustain the Court of Chancery’s decision.

Writing in dissent, Chief Justice Strine agreed that the Court of Chancery applied the incorrect standard in analyzing the “efforts” covenants, but rejected the majority’s view that the Court of Chancery’s finding regarding the good faith and independence of ETE’s tax counsel could act as a substitute for a proper analysis or was sufficient given other contradictory evidence in the record.

Delaware Supreme Court Addresses Contractual Fiduciary Duty Standard in Master Limited Partnership Dispute

March 2017

In Brinckerhoff v. Enbridge Energy Co., Inc., the Delaware Supreme Court reversed, in part, the Court of Chancery’s decision and held that a limited partnership agreement’s generalized modification of fiduciary duties did not supplant the specific standard of conduct found in a separate provision of the agreement. Additionally, the Delaware Supreme Court reversed course on the rigorous, waste-like standard for bad faith conduct it had adopted when analyzing the same limited partnership agreement just four years before in Brinckerhoff v. Enbridge Energy Co., Inc., and instead adopted the more lenient standard set forth in Norton v. K-Sea Transp. Partners, L.P.

PUBLICATIONS OF NOTE

Global Survey on Directors Shows Increase in Cybersecurity Issues

March 2017

NYSE Governance Services and Spencer Stuart conduct an annual survey of public company director views on the state of operating and governance issues facing US public companies. The 2017 survey represents the 14th annual survey, which was prepared with the participation of more than 600 board members.

Key findings included:

- One-third of the directors surveyed favor complete repeal of the Dodd-Frank Act, and a majority (58%) favor amendment of some provisions;
- Nearly 40% of directors surveyed say they discuss cybersecurity during every board meeting, and nearly half serve on companies that have, or are recruiting, a board member with cyber expertise;
- The main topics at board meetings are strategy, regulatory compliance and capital allocation; and
- Approximately half of the directors surveyed think length of service on the board does not affect board autonomy.

Effect of Board Gender Diversity on Decision Making

January 2017

The Conference Board Director Notes online publication The Effect of Gender Diversity on Board Decision-making by Darren Rosenblum and Daria Roithmayr summarizes a significant body of worldwide academic research into the impacts on decision making in the corporate boardroom created by implementing gender diversity in board recruitment. The article also sets out data gathered from interviews with French board members and stakeholders affected by the 2011 French quota requirement to include women on boards.

In the interview discussion, the authors note that the French experience in adding women to corporate boards “improved the quality of participation by asking questions and introducing new points for discussion; reduced confrontationalism; improved attention to a more accurate measurement of risk faced by organizations; and broke down [] cronyism and group think,” among other outcomes.

EY Analyzes Drop in Number of U.S. Public Companies, Capital Market Trends

May 2017

In its report Looking Behind the Declining Number of Public Companies: An Analysis of Trends in US Capital Markets, Ernst & Young looks at trends in the number and size of public and private offerings in the United States, and the trend for foreign companies to seek listings on U.S. exchanges.

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While the number of public companies is down from the level of the 1990s, the companies that go public in the modern era tend to be larger and raise more money (on a constant dollar basis) than their counterparts of 20 years ago. The number of public companies at any time can fluctuate, decreasing as a result of mergers or delistings, and increasing as a result of IPOs. During 2016, IPO activity declined from prior years, in part because of an uncertain trading market environment in 2016, and in part because private financing trends allow companies to have greater flexibility in the timing of conducting IPOs.

The report concludes that “US public capital markets are fundamentally healthy and remain the preferred choice for US and many foreign companies that seek to go public. The dynamics in the private capital market have changed significantly, at least temporarily, and allow companies to grow larger and stay private longer. The amount of private investment has grown immensely and takes many forms, including venture capital, private equity and debt financing. Companies that make it to a public offering in recent years have tended to be more mature and have solid business prospects, in contrast to the prior boom-bust cycles.”

Paper Questions Efficiencies of Private Equity Governance

April 2017

Prof. William J. Magnuson, writing in the Minnesota Law Review, advances the view that while private equity ownership can include greater monitoring and control of an operating company management by the ownership group than exists in the traditional corporate context, the structure of private equity firms creates its own set of agency costs for the investors in the private equity firm. His article, The Public Cost of Private Equity, also considers whether historic returns from private equity funds are sustainable.

Non-Profit Group Creates Searchable Database of Political Contributions by S&P Companies

May 2017

While proposals for the SEC to adopt regulations for mandatory reporting on political contributions by public companies have not moved forward, private activities to obtain and disclose political spending advance. The Center for Political Accountability, a non-profit (“Center”), has created a searchable database for political spending by 305 of the S&P 500 companies, available at <http://www.trackyourcompany.org/>.

In an interview with PwC Managing Director Paul DeNicola, the Center’s president Bruce Freed, said, “the Center and its shareholder partners have entered into agreements with over 150 of the S&P 500 companies to adopt [political] disclosure and accountability policies. Our index shows that 305 companies in the S&P 500 have some level of disclosure of their corporate political spending, and 111 have “robust” board oversight of political spending. A growing number of companies are also disclosing

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trade association memberships or payments made to those associations for political purposes.”

Freed said, “We have found that companies want to adopt policies in this area, and if they have them already, they want to improve them. . . . Directors need to be much more knowledgeable and play a much more active role in this area. It is very, very important for managing risk: reputational risk, legal risk, and business risk. . . . One thing that surprises us in our conversations with companies is that even at the management level, it sometimes seems like the right hand doesn’t know what the left is doing when it comes to contributions.”

INTERNATIONAL

US-Style Proxy Access Shareholder Proposals Migrate to Canada

April 2017

Two of Canada’s largest financial institutions – the Toronto-Dominion Bank (TD Bank) and the Royal Bank of Canada (RBC) – received the first shareholder proposals requesting the banks to adopt a proxy access by-law. The proposals, which were submitted by an individual retail shareholder, were largely inspired by the US market standard for proxy access. Shareholders owning at 3% of the company’s voting shares continuously for at least three years would have the right to submit director nominees, up to 25% of the board, to be included on the bank’s proxy. Both banks recommended against the shareholder proposal, but committed to engage with shareholders on proxy access. In the end, TD Bank’s proposal received 52.2% shareholder support and the proposal submitted to RBC was narrowly defeated with 46.8% of shareholders voting in favor.

Proxy access follows majority voting and say-on-pay as examples of US governance developments migrating to Canada. Yet the emergence of proxy access in Canada is different and deserves further consideration. Unlike the US, shareholders in Canada already have some form of statutory proxy access rights. The corporate statutes allow a shareholder or group of shareholders holding at least 5% of the company’s voting shares the right to requisition a meeting to elect directors or nominate directors for election by submitting a shareholder proposal to be included in management’s proxy materials. Unlike proxy access bylaws, the corporate statutes do not limit the number of directors that shareholders may nominate in their proposal. However, certain procedural limitations and restrictions imposed in soliciting proxies result in the shareholder proposal right being rarely used by shareholders. The Canadian Coalition for Good Governance (Canada’s equivalent to the Council of Institutional Investors) also believes that the current statutory right is inadequate. CCGG released a policy statement in May 2015 proposing its own enhanced proxy access regime, which incorporates a different ownership threshold (3% or 5%) depending on the company’s market capitalization, imposes no holding period and caps the number of director nominees to the lesser of three directors or 20% of the board.

The strong support from shareholders will likely mean that more shareholder proposals for enhanced proxy access will be on annual meeting agendas during Canada’s 2018 proxy season. However, shareholders and companies should engage in a broader dialogue about board composition and the director nomination process before rushing to adopt a US solution that does not incorporate the Canadian context and shareholder rights that are already available.

SELECTED LAW FIRM MEMORANDA AND OTHER ARTICLES OF INTEREST

PWC: [How Your Board Can Be Ready for Crisis](#)

Jones Day: [Red Light for New Activist Strategy](#)

Weil: [Investor Support Heating Up for Climate Change Proposals](#)

Cozen: [SEC Expands Confidential Review Process for Draft Registration Statements](#)

Sidley: [Corporate Social Responsibility, Corporate Sustainability, and the Role of the Board](#)

Corporate Counsel: [100 Days In: 10 Issues for General Counsel to Consider](#)

GOVERNANCE CALENDAR

2017

September 14-16

Business Law Section Annual Meeting

Sheraton Chicago Hotel & Towers and The Gleacher Center
Chicago, IL

November 17-18

Business Law Section Fall Meeting

Ritz-Carlton Washington DC
Washington, DC

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, 2018

Business Law Section Fall Meeting

Ritz-Carlton Washington DC
Washington, D.C.

