DORSEY
always ahead

corporate counsel symposium

TWENTY-SEVENTH ANNUAL
CORPORATE COUNSEL SYMPOSIUM
THURSDAY, NOVEMBER 10, 2016

Ch-Ch-Ch-Changes: The Latest Challenges Facing Corporate Boards

Peter W. Carter	Delta Air Lines, Inc. Executive Vice President, Chief Legal Officer and Corporate Secretary Atlanta, Georgia
James L. Chosy	U.S. Bancorp Executive Vice President and General Counsel Minneapolis, Minnesota
Dannette L. Smith	UnitedHealth Group Incorporated Secretary to the Board of Directors and Senior Deputy General Counsel Minnetonka, Minnesota
Cam C. Hoang	Dorsey & Whitney LLP Partner Minneapolis, Minnesota (612) 492-6109 hoang.cam@dorsey.com
Robert A. Rosenbaum	Dorsey & Whitney LLP Partner Minneapolis, Minnesota (612) 340-5681 rosenbaum.robert@dorsey.com

Program Materials are available on www.dorsey.com at https://www.dorsey.com/newsresources/events/event/2016/11/corporate-counsel-symposium-2016

1. PowerPoint Presentation

2. *SEC Proposes Universal Ballots in Contested Elections*, Kimberley Anderson, Dorsey & Whitney LLP (November 1, 2016) https://www.dorsey.com/newsresources/publications/client-alerts/2016/10/sec-proposes-universal-ballots

3. *Webinar Playback: Shareholder Proposals: Strategies and Tactics*, Cam Hoang, Gary Tygesson and Violet Richardson, Dorsey & Whitney LLP (October 13, 2016) https://www.dorsey.com/newsresources/events/videos/2016/10/dorsey-webinar-shareholder-proposals

4. *SEC Proposes Amendments to Update and Simplify Disclosure Requirements*, Randal Jones and Daniel Nauth, Dorsey & Whitney LLP (August 8, 2016) https://www.dorsey.com/newsresources/publications/client-alerts/2016/08/sec-amendments-simplify-disclosure-requirement

5. *2016 Proxy Season Review: Shareholder Proposals*, Gary Tygesson and Cam Hoang, Dorsey & Whitney LLP (July 11, 2016) https://www.dorsey.com/newsresources/publications/client-alerts/2016/07/2016-proxy-season-review-shareholder-proposals

6. *SEC Issues Guidance to Tighten Use of Non-GAAP Financial Measures*, Gary Tygesson, Dorsey & Whitney LLP (May 18, 2016) https://www.dorsey.com/newsresources/publications/client-alerts/2016/05/tighten-use-of-non-gaap-financial-measures

7. *Board Refreshment: Investors Respond to Trends in Mandatory Retirement Age and Tenure with More Stringent Voting Policies*, Cam Hoang, Gary Tygesson and Imeabasi Ibok, Dorsey & Whitney LLP (April 11, 2016) https://www.dorsey.com/newsresources/publications/client-alerts/2016/04/investors-mandatory-retirement-age-and-tenure

8. *Companies Accelerate Adoption of Proxy Access as SEC Continues to Grant No-Action Relief,* Cam Hoang and Gary Tygesson, Dorsey & Whitney LLP (March 15, 2016) https://www.dorsey.com/newsresources/publications/client-alerts/2016/03/accelerate-proxy-access-sec-grant-no-action-relief

9. *SEC Grants No-Action Relief on Proxy Access Proposals*, Cam Hoang and Gary Tygesson, Dorsey & Whitney LLP (February 25, 2016) https://www.dorsey.com/newsresources/publications/client-alerts/2016/02/no-action-relief-proxy-access-of-implementation

corporate counsel symposium

DORSEY always ahead

Ch-Ch-Ch-Changes: The Latest Challenges Facing Corporate Boards

Peter W. Carter, Executive Vice President, Chief Legal Officer and Corporate Secretary, Delta Air Lines, Inc.

James L. Chosy, Executive Vice President and General Counsel, U.S. Bancorp

Dannette L. Smith, Secretary to the Board of Directors and Senior Deputy General Counsel, UnitedHealth Group Incorporated

Cam C. Hoang and **Robert A. Rosenbaum**, Dorsey & Whitney LLP

Thursday, November 10, 2016

1

corporate counsel symposium

DORSEY always ahead

Agenda

- **Proxy Access 2.0**
- **Board Composition in an Age of Activism**
- **Cybersecurity Risk as Board-Level Issue**
- **CEO Succession Planning**

2

corporate counsel symposium

DORSEY always ahead

Proxy Access 2.0: Background

- **Dominated the landscape of shareholder proposals for the second consecutive year in 2016**
- **Extraordinary momentum for a proposal that did not see the light of day until 2013**
  - **Only 17 proposals voted on, and only 4 passed that year**
- **Similar to the sweeping movements:**
  - **For majority voting for election of directors**
  - **Successfully de-staggering Boards**

3

corporate counsel symposium

DORSEY always ahead

Proxy Access 2.0: Background

- **Some data to consider: 2014-2016***

	2016	2015	2014
Proposals voted on	105	103	21
Passed (% of those voted on)	56 (53.3%)	62 (59.1%)	9 (40.9%)
Failed (% of those voted on)	44 (41.9%)	41 (39.1%)	12 (54.5%)
Avg. % Votes cast in favor (excluding abstentions)	57.2%	55.1%	44.4%

- **39% of S&P 500 companies have now adopted proxy access procedures since 2013**
  - **264 Russell 3000 companies**

*** Includes both shareholder and management proposals. Data derived from SharkRepellent.net (last accessed on October 28, 2016)**

4

corporate counsel symposium

DORSEY always ahead

Proxy Access 2.0: Background

- Most observers expect continued activity in 2017
  - Particularly, with SEC's revised R.14a-8(i)(9) guidance in 2015 and developing guidance under R.14a-8(i)(10) in 2016
- What do we mean by "proxy access 2.0?"
  - First wave: proposals seeking adoption of proxy access bylaws
  - Second wave: proposals seeking to amend already adopted bylaws to provide for more shareholder-friendly terms
- Second wave of proxy access proposals began in 2015
  - Driven more by gadflies (McRitchie, Cheveddon) than institutions
  - Focus not only on "essential features," but also on more technical "fixes"

5

corporate counsel symposium

DORSEY always ahead

Proxy Access 2.0: SEC Guidance (via No-Action Letter Process)

- 2015 proxy season ended with SEC "cliffhanger" about how it would respond to issuer NAL requests under R.14a-8(i)(10) ("substantially implemented") to exclude various types of proxy access shareholder proposals
- Early in 2016 season, SEC Staff issued a series of NALs allowing exclusion if issuers had adopted (or were proposing to adopt) proxy access bylaws that fulfilled the "essential objective" of the shareholder proposal
  - Therefore, proposals seeking wholesale *replacement* of adopted bylaws were excluded under R.14a-8(i)(10)
  - The Staff has continued this line of NALs for newly adopted bylaws (*see, e.g., Cisco Systems*, and *WD-40 Co,* both issued September 27, 2016)

6

corporate counsel symposium

DORSEY always ahead

Proxy Access 2.0: SEC Guidance (via No-Action Letter Process)

- **Most common features of bylaws that appear to represent Staff's views on "essential objective" involve the "3/3/20/20" model:**
  - **3% of outstanding shares owned**
  - **Continuously held for 3 years**
  - **Permit nominations for up to 20% of the Board (but, at least two Board seats)**
  - **Limit on aggregation of ownership to no more than 20 shareholders**

7

corporate counsel symposium

DORSEY always ahead

Proxy Access 2.0: Investor Approach

- **Nonetheless, certain investors have their own views of the "essential elements" of proxy access, including:**
  - **25% of Board (but, at least two Board seats)**
  - **No shareholder aggregation limit**
- **In addition to the foregoing, certain investors are also seeking to amend existing bylaws to eliminate:**
  - **Re-nomination thresholds**
  - **3-day deadline to recall loaned shares for voting**
  - **Prohibition on proxy access during contested elections**
  - **Counting previously elected shareholder nominees toward limits on number of future proxy access candidates**
  - **Third-party compensation prohibitions**

8

corporate counsel symposium

DORSEY always ahead

Proxy Access 2.0: R.14a-8(i)(10) Applied

- **In a series of letters this fall, SEC Staff has denied company requests under R. 14a-8(i)(10) to exclude shareholder proposals to amend existing bylaws to reflect some or all of above terms**
  - ***H&R Block* (July 21, 2016)**
  - ***Microsoft* (September 27, 2016)**
  - ***Apple Inc.* (October 27, 2016)**
- **Two other companies have submitted NAL requests under R. 14a8(i)(10) along same lines; no Staff response as of November 7, 2016**
  - ***Oshkosh* (submitted September 20, 2016)**
  - ***Walgreens Boots Alliance* (submitted September 19, 2016); also made R. 14a-8(c) ("multiple proposals") argument**

9

corporate counsel symposium

DORSEY always ahead

Proxy Access 2.0: The Fallout to Date

- **Investor reactions have been mixed to the second wave proposals:**
  - ***H&R Block* proposal received 30% support**
    - **But, that included support from CalSTRS, CalPERS and four other institutional pension fund investors**
  - ***Microsoft* 2016 approach:**
    - **After receiving shareholder proposal, it made four modifications to its bylaw and then unsuccessfully sought NAL relief**
    - **Its proxy statement argues that its bylaw, as revised, is "mainstream" and properly balances shareholder interests**
      - **It notes that bylaw was product of discussions with many shareholders and governance experts**
      - **It also sets forth its "strong corporate governance" structure**
    - **Its shareholder meeting will be held on November 30, 2016**

10

corporate counsel symposium

DORSEY always ahead

Proxy Access 2.0: ISS Weighs In

- **Under its new "QualityScore" index (*f/k/a* "QuickScore"), ISS will be scoring four questions focused on proxy access that were previously incorporated in its non-scored factor:**
  - ***What is ownership threshold?***
    - **Notes that 3% is most common**
  - ***What is ownership duration threshold?***
    - **Notes that longer than 3 years will be considered "excessive"**
  - ***What is shareholder nominee cap?***
    - **Notes that 20%-25% range is generally acceptable to investors**
  - ***What is aggregate limit on shareholders nominating group?***
    - **Notes that 20 is generally considered reasonable**

11

corporate counsel symposium

DORSEY always ahead

Proxy Access 2.0: Who Should Be Concerned?

- **Companies without proxy access bylaws: no prior proposals**
  - **Just as with majority voting and Board de-staggering, activists are moving down the S&P 500 and Russell 3000 lists to mid-cap and small-cap companies**
  - **Need to decide whether to:**
    - **Continue monitoring the situation**
      - **Will need to decide how to react if proposal is made in future**
    - **Pre-emptively adopt a bylaw**
      - **If so, need to consider carefully which terms to include/exclude**
    - **Prepare a form of bylaw to have "on the shelf"**
      - **Under existing R.14a8-(i)(10) precedent, this can be used to deflect a shareholder's initial adoption proposal**

12

corporate counsel symposium

DORSEY always ahead

Proxy Access 2.0: Who Should Be Concerned?

- **Companies without proxy access bylaws: prior precatory proposal passed**
  - **Need to engage with key shareholders before next proxy season to understand their views**
  - **Be prepared either to:**
    - **Adopt a bylaw before next proxy season or**
    - **Have good explanation, with sufficient shareholder support, for why you have not done so**
  - **Be aware of ISS and Glass-Lewis positions on "non-responsive" directors**
    - **May lead to negative voting recommendations for directors nominated for upcoming election**

13

corporate counsel symposium

DORSEY always ahead

Proxy Access 2.0: Who Should Be Concerned?

- **Companies with proxy access bylaws**
  - **Should expect a "second wave" proposal at some point**
  - **Should analyze current bylaw against known concerns of**
    - **Investors active in this arena, and**
    - **If applicable, your key institutional investors**
  - **Consider amending bylaw in advance of receiving proposal to eliminate troublesome secondary terms that are not "mission critical" to Board**

14

corporate counsel symposium

DORSEY always ahead

Proxy Access 2.0: What to Do Now

- Stay informed of developments, and keep your Board and governance committee up-to-date
- Be aware of terms used by others adopting/amending proxy access bylaws
- Follow SEC guidance on subject and related R.14a-8 procedural grounds for exclusion
- Learn proxy advisory firms' policies on issue
- Understand the preferences of your top shareholders; review their published policies, if any
  - Consider including topic in regular engagement meetings
- Review existing bylaws governing advance notice and director qualification provisions

15

corporate counsel symposium

DORSEY always ahead

Proxy Access 2.0: Related Topics

- SEC Staff views on use of graphics in shareholder proposals
  - *GE* NAL request denial (February 23, 2016)
    - No *per se* prohibition
  - Staff June 2016 Stakeholder Meeting:
    - Do not count against 500-word limit
    - Case-by-case analysis, using traditional lens of "false or misleading" or irrelevant or impugning character
  - Business Roundtable recently requested Staff to prohibit or "set reasonable limits" on use of images in proposals
- Universal proxy card for contested elections
  - SEC's October surprise (October 26, 2016 release)
  - Makes proxy access bylaw prohibition on use of access in contested situations even more relevant

16

corporate counsel symposium

DORSEY always ahead

Board Composition in an Age of Activism

- **Board composition covers:**
  - **Board tenure**
  - **Board diversity**
    - **Gender**
    - **Race, ethnicity**
    - **Experience**
    - **Expertise**
    - **Geography**
  - **Possible imposition of age limits**
  - **Possible imposition of term limits**
  - **Refreshment**

17

corporate counsel symposium

DORSEY always ahead

Board Composition in an Age of Activism

- **Basic data for S&P 500 in 2016:**
  - **Average Board size: 10.9 directors**
  - **Average ages: 63.1 (male) and 60.2 (female)**
    - **New directors: 57**
  - **Mandatory retirement age: 72 (most common), followed by 75**
    - **73% had a retirement age policy**
  - **Board seats held by women: 21.3%**
  - **Boards with at least one female member: 98%**
  - **Boards with at least one minority member: 79%**
  - **CEOs serving as Board chairs: 50.3% (down from 56.2% in 2012)**
  - **Almost 10% of directors were new in 2016 (up from 8.7% in 2013)**

18

corporate counsel symposium

DORSEY always ahead

Board Composition in an Age of Activism

- **Is lack of diversity a problem?**
  - **Per 2016 SpencerStuart global BOD survey:**
    - **Male (older, especially): "lack of qualified female candidates"**
    - **Female: diversity is not a priority in recruiting; traditional networks are male-dominated**
  - **2016 ISS policy survey of investors:**
    - **53% identified absence of newly appointed independent directors in recent years as indicative of a problem**
    - **51% flagged lengthy average tenure as problematic**
    - **68% believe that a high proportion of directors with long tenure is "cause for concern"**
    - **Investors identified additional factors of concern:**
      - **age of directors**
      - **a high degree of overlap between the tenure of the CEO and the tenure of the non-executive directors**
      - **lengthy average tenure, coupled with underperformance**

19

corporate counsel symposium

DORSEY always ahead

Board Composition in an Age of Activism

- **Diversity proposals receiving more support in 2016**
  - **Majority votes at two companies**
    - **Joy Global (52%)**
    - **FleetCore Technologies (72%)**
  - **Three other companies received proposals that were subsequently withdrawn after they agreed to add female directors**
    - **Comcast, Equifax and Simon Property Group**
  - **Two companies were targets for "withhold" campaigns against the Nom. and Gov. Comm. chair due to lack of Board diversity**
    - **Garmin and Nabors Industries**

20

corporate counsel symposium

DORSEY always ahead

Board Composition in an Age of Activism

- **Several influential institutional investors have adopted Board refreshment voting policies**
  - **CalPERS: adopted threshold for "excessive tenure" of 12 years for individual directors no longer considered independent**
    - **Adopted a "comply or explain" approach**
  - **Legal & General Investment Management: 15 years for similar "excessive tenure" threshold**
  - **State Street Global: relies on market averages for each industry and will vote against Governance Committee chair for failing adequately to address Board refreshment and director succession planning**

21

corporate counsel symposium

DORSEY always ahead

Board Composition in an Age of Activism

- **Several influential institutional investors have adopted Board refreshment voting policies**
  - **BlackRock: may vote against any or all of independent chair, lead director, Gov. Comm. chair and/or longest-tenured director, due to**
    - **"Lack of responsiveness" to Board composition concerns**
    - **"Evidence of Board entrenchment"**
    - **"Insufficient attention to Board diversity" and/or**
    - **Failure to address Board succession planning**
  - **NYC Pension Plans: may oppose incumbent nominees who serve on the Gov. Comm. if Board has failed to ensure adequate director succession planning and Board refreshment**

22

corporate counsel symposium

DORSEY always ahead

Board Composition in an Age of Activism

- **ISS new "QualityScore" adds three new factors focused on Board tenure, refreshment and diversity:**
  - ***What proportion of non-executive directors has been on Board for less than 6 years?***
    - **Increasing credit for increasing proportion, up to 1/3 of Board**
  - ***Does Board have any mechanisms that encourage refreshment?***
    - ***E.g.*, "rigorous annual evaluation of directors," mandatory retirement age or term limits**
    - **Note that, for 2017 season, this will be a *non-scored* factor**
  - ***What is proportion of women on Board?***
    - **This is in addition to existing ISS factor that evaluates *number* of women on Board**

23

corporate counsel symposium

DORSEY always ahead

Board Composition in an Age of Activism

- **What is your Board doing to refresh/diversify its membership?**
  - **Periodic review of Board composition and search priorities, with Board skills matrix?**
  - **More robust evaluations, including 360° evaluations of all directors by all directors and senior management?**
  - **More consistent communications with director-search firms?**
    - **With search firms that focus on minority or women candidates?**
- **Are you considering the use of:**
  - **Term limits?**
  - **Mandatory retirement age?**
  - **Other mechanisms to achieve a "soft exit"?**

24

Cybersecurity and the Board

- **Cybersecurity is a top issue of concern for Boards**
  - **Top of mind issue for directors (2016 SpencerStuart's worldwide directors survey)**
  - **Taking up more and more time of directors (2016 BDO U.S. public company directors)**
  - **Recent *Salesforce* leak raises stakes for individual directors**
    - **Director Colin Powell's emails were hacked, revealing range of potential M&A targets for Salesforce from confidential Board presentation**
- **Particularly true for largest financial institutions**
  - **On September 13, 2016, NY's Governor announced proposed regulations of NY's Dept. of Financial Services**
    - **"Cybersecurity Requirements for Financial Services Companies"**
    - **Requires covered institutions to have cybersecurity programs, policies, procedures and controls; very comprehensive**
    - **Compliance may be as early as June 30, 2017**

corporate counsel symposium
DORSEY always ahead

Cybersecurity and the Board

- **Particularly true for largest financial institutions (part 2)**
  - **On October 21, 2016, three federal agencies overseeing U.S. financial system issued an "advance notice of proposed rulemaking for comment**
    - **Goal is to create "enhanced cyber risk management standards"**
      - **Would extend beyond large financial institutions to certain non-banks and to third-party service providers of the large institutions**
    - **Covers five categories of cyber standards:**
      - **Cyber risk governance**
      - **Cyber risk management**
      - **Internal dependency management**
      - **External dependency management**
      - **Incident response, cyber resilience and situational awareness**

corporate counsel symposium

DORSEY always ahead

Cybersecurity and the Board

- **How is your Board addressing risk management issue?**
  - **Directors w/specific expertise?**
  - **CISO/CIO regularly reporting to Board/committee?**
  - **Management updates on specific cyber topics relevant to your industry?**
  - **Requiring management to game-play scenarios?**
  - **Updates from outside experts?**
  - **Review of management's cyber response protocols?**
  - **Periodic reviews of internal policies governing use of company computers, PDAs, use of social media?**

27

corporate counsel symposium

DORSEY always ahead

CEO Succession Planning

- **Data from The Conference Board's recent annual review of S&P 500 CEO succession practices:**
  - **56 succession events occurred in 2015**
    - **About 10% used interim CEOs (for 2-10 months)**
  - **Succession from inside is becoming more common**
    - **In 2014, 85% were promoted after at least 1 year with company**
  - **Rare for new CEO to be named Board Chair**
    - **For 3rd year in row, only 10% of incoming CEOs in 2015 were also appointed as Chair of Board**
  - **Advance notice is becoming more common**
    - **About 70% of 2015 succession announcements were made before effective date of succession**
  - **Large (assets of $10BB or more) financial services firms provide more CEO succession planning disclosure**
    - **About 83% (vs. less than 50% of non-financial companies)**

28

CEO Succession Planning

- Event can be result of long-term plan
- But, event can also occur quite unexpectedly and without warning, due to
  - Death or significant illness
  - Unexpected resignation
  - Activity coming to light and leading to termination for cause
  - Company crisis making current CEO untenable
- General counsel must be prepared to
  - Advise Board (initially, might be just Chair or Lead Director)
    - Legal (fiduciary) duties
    - Process for selection of successor
      - Internal, external, Board member? Interim or permanent?
      - Has Board confidentially designated an internal, emergency successor?
      - Agree on confidential Board meeting and communications protocol
    - Disclosure timeline and risks
      - Communications plans

corporate counsel symposium
DORSEY always ahead

CEO Succession Planning

- General counsel must be prepared to (continued)
  - Have external experts available:
    - Counsel: Employment, benefits, securities (disclosure)
    - Public relations, investor relations
      - Preparation of communication plans (internal and external)
      - Preparation of crisis management plan (if necessary)
  - Understand disclosure obligations
    - Item 5.07(b) of Form 8-K
    - Form of press release
- Developing issue: "right" of GC to real-time information about health and healthcare management of CEO

corporate counsel symposium

DORSEY always ahead

CEO Succession Planning

- **Best practices at Board level:**
  - **Prepare written succession plan**
  - **Review at least annually**
  - **Use CEO to develop internal talent**
    - **Receive periodic reports on talent development**
  - **Periodic interviews of/exposure to leading internal candidates**
    - **Assess against skills needed, development plans**
  - **Use recruiting firm periodically to assess external candidates on confidential basis**
  - **Create solid transition plan**
  - **Retiring CEO to remain on Board, if at all, for short period of time**

31

corporate counsel symposium

DORSEY always ahead

Appendix

- **Proxy Access 2.0: ISS Views on Key Terms**
- **Proxy Access in Practice: View from Overseas**
- **Non-GAAP Financial Measures Disclosure**
- **SEC Disclosure Effectiveness Initiative**
- **SEC's Universal Proxy Card Proposal**
- **Whistleblower Update: SEC Enforcement**
- **Auditor Independence: SEC Enforcement**

32

corporate counsel symposium

DORSEY always ahead

Appendix:
Proxy Access 2.0: ISS Views on Key Terms

- **Certain restrictions viewed as "potentially problematic," especially when used in combination, include:**
  - **Prohibitions on resubmission of failed access nominees**
  - **Restrictions on third-party compensation of access nominees**
  - **Restrictions on use of proxy access and proxy contest procedures for same meeting**
  - **How long and under what terms an elected access nominee will count towards permitted number of access candidates**
  - **When access right will be fully implemented and accessible to qualifying shareholders**

33

corporate counsel symposium

DORSEY always ahead

Appendix:
Proxy Access 2.0: ISS Views on Key Terms

- **Two types of restrictions are considered "especially problematic" because, in ISS' view, they are so restrictive as to effectively nullify the proxy access right:**
  - **Counting individual funds within a mutual fund family as separate shareholders for purposes of an aggregation limit**
  - **Imposing post-meeting shareholding requirements for nominating shareholders**

34

corporate counsel symposium

DORSEY always ahead

Appendix:
Proxy Access in Practice: A View from Overseas

- In general, proxy access has been used sparingly and in situations where management and Boards have not been responsive to shareholder demands
- Over past three years, it has been used in
  - Canada: once (successfully)
  - Australia: 11 times, but only once successfully
  - United Kingdom: 16 times -- successfully on 8 occasions, unsuccessfully 6 times, and twice nominees' names were withdrawn

35

corporate counsel symposium

DORSEY always ahead

Appendix:
Non-GAAP Financial Measures Disclosure

- SEC Staff updated its C&DIs on disclosure of non-GAAP financial measures on May 17, 2016
- Staff has issued over 150 comment letters since update
- Most common comments:
  - Present most directly comparable GAAP financial measure "with equal or greater prominence"
  - Explain why company believes its non-GAAP measures provide useful information to investors regarding company's financial condition and results of operations
  - Label non-GAAP measures properly as such
  - Do not make misleading adjustments
  - Provide additional detail on reconciliations
  - Reconcile non-GAAP financial guidance that is "available without an unreasonable effort"

36

corporate counsel symposium

DORSEY always ahead

Appendix:
SEC Disclosure Effectiveness Initiative

- **Initiative mandated by JOBS and FAST Acts to promote timely, material disclosure and facilitate investor access**
- **September 2015: request for comment on financial disclosure requirements**
- **April 2016: Reg. S-K concept release outlines and seeks comment on three broad areas of potential reform:**
  - **Overall disclosure framework:**
    - **Principles-based vs. prescriptive disclosure requirements**
    - **Fundamental level of materiality**
  - **Existing and potential disclosure requirements:**
    - **Core company business information**
    - **Company performance, financial information and future prospects**
    - **Risk and risk management, including risks associated with cybersecurity, climate change and arctic drilling**
    - **Registrant's securities**
    - **Exhibits**

37

corporate counsel symposium

DORSEY always ahead

Appendix:
SEC Disclosure Effectiveness Initiative

- **Three broad areas of potential reform (continued):**
  - **Existing and potential disclosure requirements (continued):**
    - **Industry guides**
    - **Public policy and sustainability**
    - **Scaled disclosure requirements**
    - **Frequency of interim reporting**
  - **Presentation and delivery:**
    - **Cross-referencing**
    - **Incorporation by reference**
    - **Hyperlinks**
    - **Company websites,**
    - **Standardized formatting**
    - **Layered disclosure**
    - **Structured data**

38

corporate counsel symposium

DORSEY always ahead

Appendix:
SEC Disclosure Effectiveness Initiative

- **July 2016: proposed amendments to eliminate duplicative requirements in Reg. S-K and Reg. S-X**
- **Executive compensation and corporate governance, Edgar modernization, and audit committee disclosure reform also contemplated**
- **Sen. E. Warren: Initiative was "designed to reduce disclosures to ease the burden on issuers – not to address actual investor concerns."**

39

corporate counsel symposium

DORSEY always ahead

Appendix:
SEC's Universal Proxy Card Proposal

- **On October 26, 2016, SEC voted 2-1 to propose use of a universal proxy card for contested director elections at annual meetings**
- **Would require:**
  - **Defined notice periods between issuer and dissident to identify each party's nominees**
  - **Dissidents to solicit at least majority of shares entitled to be voted**
  - **Defined time frame for dissident to file its proxy statement**
  - **Each party to reference, in its proxy statement, other party's proxy statement for information about that party's nominees**
  - **Special formatting rules for proxy card to ensure fairness**

40

corporate counsel symposium

DORSEY always ahead

Appendix:
SEC's Universal Proxy Card Proposal

- **Proposal would also require inclusion on proxy card of an:**
  - **"against" voting option, where it would have legal effect**
  - **"abstain" voting option, where majority vote standard applies**
- **SEC's stated purpose was to "level the playing field" for all shareholders, whether or not they attend a meeting**
  - **Without a universal ballot, only attendees can split their votes between management and dissident candidates**
- **Comment period ends 60 days after proposal is published in Federal Register**

corporate counsel symposium

DORSEY always ahead

Appendix:
Whistleblower Update: SEC Enforcement

- **SEC highlighting on its website that total payouts to whistleblowers have now surpassed $100 million**
- **SEC continues to seek out opportunities to deliver message that protection of whistleblowers is a key priority for the agency**
  - **Looking for examples of retaliation and "pre-taliation"**
    - **Latter cases involve no evidence of *actual* prevention of communication to SEC**
- **SEC brought its second retaliation case, against International Game Technology, on September 29, 2016**
    - **First "stand-alone" retaliation case**

corporate counsel symposium

DORSEY always ahead

Appendix:
Whistleblower Update: SEC Enforcement

- **Key facts:**
  - **Employee with years of positive performance reviews informs senior management and SEC about possible financial statement irregularities**
  - **Within weeks of reporting, he is removed from significant work assignments; 3 months later, he is fired**
  - **IGT required to pay fine of $500K**
- **A couple of points of note:**
  - **Employee did not oversee IGT's accounting functions**
  - **IGT conducted appropriate investigation (using outside counsel) and concluded that financial statements did not contain misstatements. SEC, apparently, did not dispute that conclusion**
  - **Highlights SEC's perspective that termination of *even an incorrect whistleblower* violates the Dodd-Frank Act**

43

corporate counsel symposium

DORSEY always ahead

Appendix:
Whistleblower Update: SEC Enforcement

- **Recent "pre-taliation" cases**
  - ***BlueLynx Holdings* (August 10, 2016): severance agreement issue**
    - **Form contained confidentiality language requiring departing employee to inform company prior to disclosing certain information to any third party, without exempting reporting to governmental agencies (which, SEC found, violated DFA)**
    - **Form also contained same type of impermissible waiver of recovery provision as in Health Net agreement (*see below*)**
      - ***plus* potential loss of severance and other benefits**
    - **Note: In addition to revising form, and paying fine, BlueLynx required to take reasonable steps to inform all parties that agreement did not prohibit disclosures to SEC or receipt of whistleblower awards**
  - ***Health Net* (August 16, 2016): severance agreement issue**
    - **Form impermissibly eliminated individual's right to any monetary recovery based on reporting to government agencies (although it did not prohibit such reporting)**
    - **Note: Same remedies as in *BlueLynx* applied to Health Net**

44

corporate counsel symposium

DORSEY always ahead

Appendix:
Whistleblower Update: SEC Enforcement

- ***Anheuser-Busch InBev*** **(September 28, 2016): actual cessation of communications with SEC**
  - **Key facts:**
    - **Indian subsidiary employee reports possible FCPA violations**
    - **is terminated**
    - **begins communicating with SEC**
    - **then negotiates settlement agreement with AB InBev**
      - **includes $250K liquidated damages if he breaches agreement**
    - **He then stops communicating with SEC**
  - **SEC concluded that liquidated damages clause improperly muzzled former employee, violating DFA**
  - **In addition to a fine, SEC ordered AB InBev to add to its separation agreements with confidentiality restrictions explicit language acknowledging that:**
    - **Those agreements do not restrict departing employees from reporting possible violations of law to any governmental agency or entity, and**
    - **Departing employee does not have to inform AB InBev of such reporting**

45

corporate counsel symposium

DORSEY always ahead

Appendix:
Whistleblower Update: SEC Enforcement

- **Takeaways**
  - **SEC is aggressively protecting whistleblowers**
  - **Retaliation can occur even if employee is wrong about underlying whistleblower claim**
  - **Be cautious in taking any action that could be perceived as retaliation against an individual who has reported alleged misconduct internally**
  - **Review and revise severance agreements with employees to avoid *BlueLynx/Health Net* problem**
  - **Note that SEC remediation plan may include notifying former employees of their rights to inform government agencies of violations of law**

46

corporate counsel symposium

DORSEY always ahead

Appendix:
SEC Enforcement of Auditor Independence

- **E&Y case (September 19, 2016): first time SEC has brought enforcement action for auditor independence failures due to close personal relationships between auditors and client personnel at two different clients**
  - ***First case*: E&Y asked partner to improve relationship at "troubled account;" after extensive entertainment and personal contacts, he had an inappropriately close personal friendship w/CFO and son. E&Y aware of excessive spending, but did not follow-up**
  - ***Second case*: audit team member engaged in romantic relationship w/financial executive at client. Supervisor heard rumors, but did not follow-up**
  - **SEC noted that E&Y's procedures did not "specifically inquire about non-familial close personal relationships that could impair the firm's independence"**
  - **Penalties: total of $9.3MM paid by E&Y; individuals at E&Y suspended from practicing as accountant before SEC for at least 3 years (and paid minor fines)**

47

corporate counsel symposium

DORSEY always ahead

Appendix:
SEC Enforcement of Auditor Independence

- **Raises questions not only about internal monitoring at auditor, but also about client's responsibilities**
  - **Could potentially raise issues about client's audit committee's oversight of auditor independence**
    - **Should audit committee now be asking questions of audit partners and internal financial personnel about extent of travel, entertainment and other personal contacts between audit team and client team?**
  - **Should company add a new question to its annual D&O questionnaire?**

48