

Corporate Governance in the Age of Covfefe: Counseling Boards Facing Turbulent Change

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Program Materials are available on www.dorsey.com at
<https://www.dorsey.com/NewsResources/Events/Event/2017/10/Corporate-Counsel-Symposium-2017-Materials>

1. PowerPoint Presentation
2. Dorsey eUpdate: *SEC Proposes Rules to Implement FAST Act Mandate to Modernize and Simplify Disclosure*, Whitney Holmes (October 20, 2017)
<https://www.dorsey.com/newsresources/publications/client-alerts/2017/10/sec-proposes-rules-to-implement-fast-act>
3. Webinar Playback: *Shareholder Proposals: Strategies and Tactics*, Cam Hoang, Gary Tygesson and Paula Kanne, Dorsey & Whitney LLP (October 16, 2017)
<https://www.dorsey.com/newsresources/events/videos/2017/10/webinar-playback-shareholder-proposal>

4. Dorsey eUpdate: *SEC Provides Further Guidance on Pay Ratio Disclosure*, Jason Brenkert, (September 28, 2017)
<https://www.dorsey.com/newsresources/publications/client-alerts/2017/09/sec-guidance-on-pay-ratio-disclosure>
5. Dorsey Governance & Compliance Insider Blog: *CEO Pay Ratio Rule Will Not Be Delayed*, Cam Hoang, (September 18, 2017)
<https://governancecomplianceinsider.com/ceo-pay-ratio-rule-will-not-be-delayed/>
6. Dorsey eUpdate: *Equifax Data Breach: Preliminary Lessons for the Adoption and Implementation of Insider Trading Policies*, Gary Tygesson and Cam Hoang (September 14, 2017)
<https://www.dorsey.com/newsresources/publications/client-alerts/2017/09/equifax-data-breach>
7. Dorsey eUpdate: *The Era of Private Ordering for Corporate Governance*, Gary Tygesson (August 28, 2017)
<https://www.dorsey.com/newsresources/publications/client-alerts/2017/08/age-of-private-ordering-for-corporate-governance>
8. Dorsey Governance & Compliance Insider Blog: *NYSE Rule Change Requires Ten Minutes Advance Notice of Public Announcement of Dividends or Stock Distributions*, Jason Brenkert (August 16, 2017)
<https://governancecomplianceinsider.com/nyse-rule-change-requires-ten-minutes-advance-notice-of-public-announcement-of-dividends-or-stock-distributions/>
9. Dorsey Governance & Compliance Insider Blog: *Investors' Climate Change Voting Records Face Scrutiny*, Cam Hoang (August 3, 2017)
<https://governancecomplianceinsider.com/investors-climate-change-voting-records-face-scrutiny/>
10. Dorsey Governance & Compliance Insider Blog: *SEC Updates Regulatory Flex Agenda, Tables Dodd-Frank Rules on Executive Compensation Disclosure*, Cam Hoang (July 24, 2017)
<https://governancecomplianceinsider.com/sec-updates-regulatory-flex-agenda-tables-dodd-frank-rules-on-executive-compensation-disclosure/>
11. Dorsey Governance & Compliance Insider Blog: *Proxy Access "Fix-It" Proposals Fizzle*, Gary Tygesson (June 27, 2017)
<https://governancecomplianceinsider.com/proxy-access-fix-it-proposals-fizzle/>
12. Dorsey eUpdate: *U.S. Corporate Governance Chapter Contribution to International Comparative Legal Guides*, Robert Rosenbaum and Cam Hoang (June 22, 2017)
<https://www.dorsey.com/newsresources/news/press-releases/2017/06/rosenbaum-hoang-comparative-legal-guides>

13. Dorsey Governance & Compliance Insider Blog: *Say-on-Pay Voting Frequency — The Financial CHOICE Act Adds Uncertainty to the Process*, Kimberley Anderson (June 9, 2017)
<https://governancecomplianceinsider.com/say-on-pay-voting-frequency-%e2%80%95-the-financial-choice-act-adds-uncertainty-to-the-process/>
14. Dorsey Governance & Compliance Insider Blog: *Disclosure Alert: Consider Transitional Disclosure on Revenue Recognition Standard*, Gary Tygesson (April 7, 2017)
<https://governancecomplianceinsider.com/disclosure-alert-consider-transitional-disclosure-on-revenue-recognition-standard/>
15. Dorsey Governance & Compliance Insider Blog: *A Long and Winding Road Ends for Resource Extraction Disclosure*, Kimberley Anderson (February 17, 2017)
<https://governancecomplianceinsider.com/a-long-and-winding-road-ends-for-resource-extraction-disclosure/>
16. Dorsey Governance & Compliance Insider Blog: *Shareholder Proposals Restricting Board/Management Access to Preliminary Voting Results May Be Excluded*, Cam Hoang (January 13, 2017)
<https://governancecomplianceinsider.com/shareholder-proposals-restricting-boardmanagement-access-to-preliminary-voting-results-may-be-excluded/>

For more information on **Corporate Governance and Compliance** matters, see Dorsey's *Governance & Compliance Insider Blog* at <https://governancecomplianceinsider.com/>.

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Corporate Secretary, Delta Air Lines, Inc.*

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

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

Cam Hoang and Robert Rosenbaum, Dorsey & Whitney LLP

Tuesday, October 31, 2017

1

Agenda

- **Diversity in the Boardroom**
- **Emergence of Environmental and Social Proposals**
- **Cybersecurity Preparedness**
- **When the White House Attacks!**

2

Diversity in the Boardroom: Current State

- **At end of 2016:**
 - 21% of S&P 500 directors were women
 - 15% of S&P 200 directors were ethnic minorities
 - 8% of S&P 200 directors were non-US
- **During 2017 proxy season, there were a record number of board diversity proposals filed (37)**
 - 60% withdrawn following negotiations
 - Average support inched up to 28% from 25% in 2016
- **Expecting upward trends in number of proposals and support to continue in 2018**
 - Alphabet, Inc. (Google's parent co.) has already received one from Trillium Asset Management
 - Specifically requesting diversity on board's executive committee

3

Diversity in the Boardroom: Increasing Pressure from Institutional Investors

- **9.8.17: NYC Comptroller sends letters to 151 companies, 80% in S&P 500**
 - Asking for detailed board experience, skills and demographics
 - Also seeks engagement with governance committees regarding board composition and refreshment process
- **9.21.17: Midwest Diversity Coalition sends letters to unknown number of companies in region**
 - Asking for adoption of formal policy requiring all director searches to include women and minorities on initial candidate lists
 - *i.e.*, Importing the NFL's "Rooney Rule" into board recruitment
 - Identifies nine co's, including McDonald's, Costco, Home Depot and Oracle, which have already done so

4

Diversity in the Boardroom: Increasing Pressure from Institutional Investors

- **State St. Global** announced that, in 2017, it had voted *against* director candidates at 400 portfolio co's it identified as having poor board-level diversity practices
- **Vanguard** announced, on 8.31.17, that, a "well-composed, independent, diverse and experienced board" is among its "four pillars" for proxy voting on governance matters
 - Announced the same day: it would "take more public positions" on "emerging topics," including gender diversity (and climate risk disclosure)
- **BlackRock** announced its engagement priorities for upcoming proxy season
 - Board composition, including gender balance, is one of them
 - If companies make no progress "within a reasonable timeframe," it will hold governance committees accountable

5

Diversity in the Boardroom: Questions

- Is gender diversity on your governance committee's or Board's radar?
 - If so, how are you approaching the subject with either body?
- Have any of you received either the NYC Comptroller or the Midwest Diversity Coalition letter?
 - If so, what is your process for handling with your Board?
 - How do you intend to respond?
- Is board diversity on the agenda for your regular shareholder engagement outreach effort?
 - If so, who puts it on the agenda?
 - How are the discussions handled? (Is a governance committee member participating?)
 - How company-specific and sophisticated is the approach taken by your shareholders?

6

Diversity in the Boardroom: Questions

- Are you getting any pressure from other sources regarding diversity in the boardroom?
- “Refreshment” seems to be the subject that opens the door to this topic
 - Is your Board actively considering refreshment (either separately or in conjunction with the subject of increasing diversity)?
 - If so, who is discussing the subject?
 - Has your Board taken specific steps to ensure refreshment is occurring?

7

Diversity in the Boardroom: Questions

- Related topic: global perspectives diversity
- Many large, US-based co’s are increasingly operating in jurisdictions in which having a deep understanding of local customs, practices, regulatory and legal environments is critical
- Is your Board focused on recruiting directors with an international background?
 - If so, how is it going about recruiting these candidates?
 - Must a candidate live in the jurisdiction?

8

Emergence of E&S Proposals: Current State

- **453 proposals submitted in 2017, nearly a 10% increase over 2016**
- **Trending topics include:**
 - **Workforce diversity**
 - Typically request breakdown of employees by race and gender across job categories
 - Also request disclosure of policies and programs to increase diversity in workplace
 - **Gender pay equity**
 - Typically request a report on pay gap between male and female genders, and plans to close that gap
 - Started in tech co world; expanding to financial services and consumer co's

9

Emergence of E&S Proposals: Current State

- **And, environmental/climate change matters**
 - Continues be largest subset of E&S proposals, and continuing to increase in number
 - Support for all such proposals surged from 38% to 45% overall, during 2017
 - Proposals passed, with significant institutional support, at ExxonMobil, Occidental and PPL Corp. (PA-based electric utility)
 - More recent proposals tend to be focused on Paris Accords and whether issuer will “sign on” to 2° Celsius limit on global warming
 - Even publicly traded institutional asset managers are receiving proposals from *other* such investors about their proxy voting policies and practices related to climate change

10

Emergence of E&S Proposals: Increasing Pressure from Institutional Investors

- **Several influential investors have publicly announced changes in their voting policies, resulting in greater support for environmental proposals**
 - **BlackRock and State St. Global** have stated that climate risk is a focus for company engagement
 - **Fidelity** has announced that it may support shareholder proposals calling for reports on sustainability, renewable energy and environmental impact issues
 - **UBS** now votes for a “large majority” of proposals requesting CO₂ emissions reports, explaining climate change risk to investors, or explaining what initiatives issuers are taking in support of the Paris Accords

11

Emergence of E&S Proposals: Questions

- **Are you seeing E&S proposals (especially around climate change and sustainability) as the “flavor-of-the-month” or something that is becoming more mainstream with your institutional investors?**
- **What are you doing to educate your Boards about these issues?**
- **What are your Boards doing, structurally, or by formalizing process, to address their oversight responsibilities around these issues?**

12

Emergence of E&S Proposals: Questions

- **Sustainability reporting is becoming quite common among the larger issuers**
 - Do you have sustainability reports?
 - Do you tie them into your SEC reports?
 - How significant an effort is the preparation of your sustainability report?
 - How does your legal dept. get involved?
- **Are you seeing any momentum around “human capital management” issues among your investors?**
 - More specifically, what about gender pay equity issues?

13

Cybersecurity Preparedness: Current State

- **High-profile data breaches are in the news with great frequency. Recent examples include:**
 - **Equifax (see next slide)**
 - **Deloitte**
 - Announced on 9.25.17: Confidential emails and plans for 6 key clients stolen
 - Unconfirmed reports claim hackers had access to entire network for over a year
 - **DLA Piper**
 - Caught up in worldwide ransomware attack in 6.17
 - Forced to shutdown worldwide email network for over a week
 - **EDGAR system at SEC**
 - Testing system used by issuers (which used real financial data) was hacked in 10.16
 - After suspicious trading patterns ensued, SEC caught up to hack; did not disclose until 9.17

14

Cybersecurity Preparedness: Current State

- **Equifax hack:**
 - Affected 143 million consumers, and counting
 - 200,000 credit card numbers, SSNs and other “personally identifiable information”
 - Within one week of announcement, it lost \$4.9 billion in market value
 - Timeline:
 - Breach occurred in May 2017
 - Discovered on July 29, 2017
 - Publicly announced on September 7, 2017
 - Multiple lawsuits, as well as investigations
 - Including a securities class action lawsuit against certain executive officers and directors

15

Cybersecurity Preparedness: Current State

- **Regulatory regimes are expanding**
 - EU privacy law
 - China privacy law
 - Many US states
 - In 2002, Minnesota enacted a statute requiring internet service providers (ISPs) to take “reasonable steps to maintain the security and privacy of a consumer’s personally identifiable information”
 - Since then, 13 other states have required any entity that manages “personal information” to employ reasonable data security practices
 - State AGs are getting more active

16

Cybersecurity Preparedness: Current State

- **Federal and state regulators are increasing their oversight**
 - **New York Department of Financial Services now requires that companies notify the Superintendent of Financial Services within 72 hours of a “Cybersecurity Event”**
 - **FTC has fined companies for “unfair or deceptive act or practice,” including**
 - practicing “unreasonably poor cybersecurity” and
 - misleading consumers as to the level of security they can expect
 - **SEC established a new Cyber Unit within its Enforcement Div.**
 - **SEC Ch. Clayton has asked Congress for an additional \$100MM to fund upgrades to its systems and to hire additional personnel for its new Cyber Unit**

17

Cybersecurity Preparedness: Current State

- **Money quote from SEC Ch. Clayton:**
 - **“I am not comfortable that the American investing public understands the substantial risk that we face systemically from cyber issues and I would like to see better disclosure around that”**
- **Many recent surveys show cyber risk to be at top of directors’ list of “what keeps me awake at night”**

18

Cybersecurity Preparedness: Questions

- How big an issue is this for your management teams and your Board?
- How do you keep your Board informed?
 - Regular updates?
 - Current events?
 - New regulatory developments/proposals?
 - Industry/peer group comparisons?
 - Outside expert presentations?
 - Review of significant recent attacks (e.g., Equifax)?

19

Cybersecurity Preparedness: Questions

- Does your Board have a committee dedicated to monitoring and oversight of this risk?
 - If not, how does your Board fulfill its oversight duty?
- Does your Board get directly involved with your periodic “tabletop exercises?”
 - If not, do you update them on results/learnings?
- Are there other processes that you are considering to provide your Board with sufficient information and education in this area?

20

Cybersecurity Preparedness: Questions

- **Attempted breaches and hacks happen all the time**
 - What information is critical to share with boards?
 - When should information be disclosed to:
 - Your Board?
 - Regulators?
 - The public?
- **Careful disclosure to different audiences requires forethought and planning**
 - How is your legal department involved in that planning?
 - Is it part of a cross-functional crisis management team?

21

Cybersecurity Preparedness: Questions

- **Collateral Equifax issue: insider trading activity by three senior executives (including CFO)**
 - Facts: Each traded, without 10b5-1 plan, in days immediately after discovery and weeks prior to public disclosure of hack
 - Feds reportedly pursuing criminal investigation
- **How do you prevent that scenario? (*Is it preventable?*)**
 - As noted, breach attempts, and hacks, occurring multiple times per day
 - So, how do you, as the insider trading “gatekeeper,” determine when it is OK for a Section 16 officer to trade in an open window after IT has informed management of yet another breach?
- **More generally, how do you keep your Board informed about material litigation and other contingencies?**

22

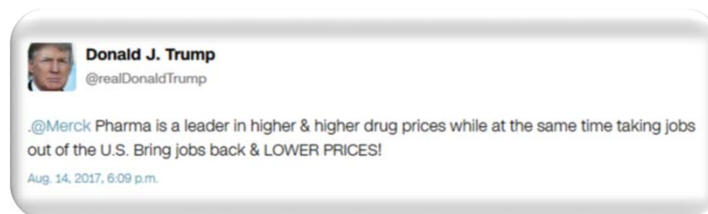
When the White House Attacks!

- This President has not been shy about lashing out at CEOs and companies who have irked him in some way
- Companies in a variety of industries have been the recipient of the “2:00 a.m. Tweet,” including....

23

When the White House Attacks!

- Merck and its CEO, for CEO’s resignation from White House Advisory Committee
 - Drug pricing and overseas hiring criticized



24

When the White House Attacks!

- Nordstrom, for dropping his daughter's line of clothing
 - Company acted “unfairly” and “terribly”



25

When the White House Attacks!

- Media and Internet companies, including NBC News, NY Times and Facebook, for releasing what he considers to be “fake news”
 - One Tweet suggested that Administration may pull NBC's license to operate



26

When the White House Attacks!

- **Apple, when it refused to create new software to assist FBI to crack bomber's iPhone**
 - **Boycott of products urged**



27

When the White House Attacks!

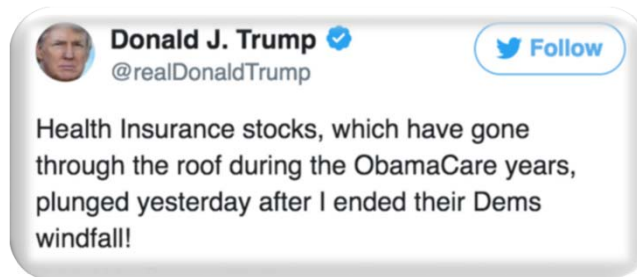
- **Multiple manufacturing companies, including Toyota, for building plants in Mexico vs the United States**
 - **Threatens border tax**



28

When the White House Attacks!

- **Health insurance companies**
 - After signing executive order to eliminate ACA insurance stabilization payments, Tweets about drop in stock prices



29

When the White House Attacks!

- **If not, is preparing for a possible Tweet a subject of discussion at your Board?**
 - If so, how do you help to guide discussion?
 - If not, why not?
- **More generally, what advice do you have for GCs whose CEO or company has just been Tweeted about?**

30

QUESTIONS?

31

**Appendix:
Governance and Compliance eUpdates**

SEC Provides Further Guidance on Pay Ratio Disclosure

<https://www.dorsey.com/newsresources/publications/client-alerts/2017/09/sec-guidance-on-pay-ratio-disclosure>

CEO Pay Ratio Rule Will Not Be Delayed

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The Era of Private Ordering for Corporate Governance

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32

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NYSE Rule Change Requires Ten Minutes Advance Notice of Public Announcement of Dividends or Stock Distributions

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33

Appendix: Governance and Compliance eUpdates

ISS Peer Group Submission Window Closes This Friday, for Companies with Fall/Winter Meetings

<https://governancecomplianceinsider.com/iss-peer-group-submission-window-closes-this-friday-for-companies-with-fallwinter-meetings/>

SEC Commissioner Addresses Prospects for CEO Pay Ratio

<https://governancecomplianceinsider.com/sec-commissioner-addresses-prospects-for-ceo-pay-ratio/>

Proxy Access “Fix-It” Proposals Fizzle

<https://governancecomplianceinsider.com/proxy-access-fix-it-proposals-fizzle/>

Partners Robert Rosenbaum and Cam Hoang Contribute Chapter on U.S. Corporate Governance to 2017 International Comparative Legal Guides

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34

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35

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36