

## Across the Board: Advising on the Right Governance Moves

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### Program Materials

1. PowerPoint Presentation

### Reference Materials

1. Dorsey Governance & Compliance Insider Blog: *Effective Date for Disclosure Simplification* (October 4, 2018)  
<https://governancecomplianceinsider.com/effective-date-for-disclosure-simplification/>
2. Webinar Playback: *Shareholder Proposals: Strategies and Tactics* (September 24, 2018)  
<https://www.dorsey.com/newsresources/events/videos/2018/09/webinar-playback-shareholder-proposals>
3. Dorsey Governance & Compliance Insider Blog: *SEC Withdraws No Action Letters on Proxy Advisory Firms* (September 13, 2018)  
<https://governancecomplianceinsider.com/sec-withdraws-no-action-letters-on-proxy-advisory-firms/>

4. Dorsey Governance & Compliance Insider Blog: *Marijuana Investments and Fraud Featured in SEC Investor Alert* (September 13, 2018)  
<https://governancecomplianceinsider.com/marijuana-investments-and-fraud-featured-in-sec-investor-alert/>
5. Seminar Playback: *SEC Guidance on Cybersecurity Disclosure and Policies* (June 5, 2018)  
<https://www.dorsey.com/newsresources/events/videos/2018/06/seminar-playback-sec-guidance-on-cybersecurity>
6. Dorsey eUpdate: *Failure to Disclose Leads to \$35 Million Penalty in the Yahoo! Cybersecurity Breach* (April 27, 2018)  
<https://www.dorsey.com/newsresources/publications/client-alerts/2018/04/failure-to-disclose-leads-penalty-yahoo>
7. Dorsey eUpdate: *SEC Issues New Cybersecurity Guidance* (March 1, 2018)  
<https://www.dorsey.com/newsresources/publications/client-alerts/2018/03/sec-issues-new-cybersecurity-guidance>
8. Dorsey eUpdate: *SEC Staff's Latest Guidance Presents Dilemma for Companies Seeking to Exclude Shareholder Proposals on Environmental and Social Issues* (January 3, 2018)  
<https://www.dorsey.com/newsresources/publications/client-alerts/2018/01/sec-staffs-latest-guidance-on-environmental>

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

**Materials are Available on [www.dorsey.com](http://www.dorsey.com) at**  
<https://www.dorsey.com/newsresources/events/event/2018/10/corporate-counsel-symposium-2018-materials>

## Across the Board: Advising on the Right Governance Moves

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

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Tuesday, October 30, 2018

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## Agenda

- **Diversity in the Boardroom**
- **Corporate Culture: Tremors or Seismic Shifts?**
- **Cybersecurity Preparedness, the Sequel**
- **A Tale of Two Tweeters: Social Media and the CEO**

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## Diversity in the Boardroom

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## Diversity In the Boardroom

**Incremental gains were made in board representation for women and ethnic minorities in 2017.**

- 22% of S&P 500 directors were women (vs 21% in 2016).
- 17% of S&P 200 directors were ethnic minorities (vs 15% in 2016).
- For the first time, over half of incoming directors were women or ethnic minorities.

**In terms of board refreshment, companies continue to steer clear of tenure limits, and they are increasing retirement ages.**

- The average tenure of independent directors on S&P 500 boards is 8.2 years, a slight decrease from 8.6 five years ago.
- 24 S&P 500 boards, 5%, specify a term limit for non-executive directors.
- Mandatory retirement ages have been increasing, with nearly all companies that have them (96%) setting mandatory retirement at 72 or older, compared with 67% 10 years ago.

*2017 Spencer Stuart US Board Index*

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## Diversity in the Boardroom

### Shareholder proposals led to additional diversity commitments.

- 30 proposals were filed but only three voted on.
- Adoption of a board diversity policy or a report on board diversity were proposed.
- Support averaged 25% of votes cast, a decline from 28% of votes cast in 2017; none passed.
- Withdrawals were negotiated based on adoption of new or revised policies, including the Rooney Rule, which commits the company to including diverse candidates.
- Support came from major investors (BlackRock, State Street, NYSCRF, Legal & General) and from ISS (100% of proposals).

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## Diversity in the Boardroom

### Institutional investors are voting against members of the nominating committees at companies with few or no women directors.

- NYC Pension Funds' Boardroom Accountability Project 2.0 prompted 85 companies to adopt board refreshment policies.
- BlackRock's 2018 proxy voting guidelines set an expectation of at least two women directors on every board.
- State Street in 2020 will begin voting against all governance committee members at companies that don't have at least one woman and haven't engaged in "successful dialogue" on this topic for three consecutive years.

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## Diversity in the Boardroom

### **Proxy advisory firms will recommend against nominating committee chairs on boards with no gender diversity.**

- Effective for meetings on or after Feb. 1, 2020, ISS has proposed to recommend voting against:
  - Nominating committee chairs at boards with no female directors, and
  - On a case-by-case basis, other directors who are responsible for the board nomination process.
- Effective for meetings after Jan. 1, 2019, Glass Lewis will recommend voting against:
  - Nominating committee chairs when the board has no female directors, and
  - Depending on other factors, such as size and industry and governance profile, against other nominating committee members,If the board has not provided sufficient rationale or disclosed a plan to address the lack of diversity on the board.

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## Diversity in the Boardroom

### **A new California law (SB 826) requires at least one female director by the end of 2019, and by the end of 2021, at least two female directors for companies with five directors, and at least three for companies with six or more directors.**

- 377 companies (25%) will have to add female director(s) to their boards in order to be in compliance by December 31, 2021.
- State and federal constitutional challenges are likely.
- Applies to all companies headquartered in California; does not matter where they are incorporated.

### **ISS's Annual Governance Principles Survey shows broad support for gender diversity.**

- More than 80% of investors (up from 69% last year) and
- more than 60% of non-investors (up from 54% last year) consider it to be problematic if there are no female directors on a public company board.

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## Diversity in the Boardroom

**Worker representation on boards is re-emerging as a governance topic.**

- The recently adopted UK Corporate Governance Code adopts a “comply or explain” approach, whereby boards of publicly traded UK companies must consider worker interests by:
  - appointing a director from the workforce;
  - establishing a formal workforce advisory panel;
  - designating an existing non-executive director to represent the interests of the workforce; and/or
  - putting in place alternative arrangements to engage with their workforces.
- The Warren-sponsored “Accountable Capitalism Act” would require 40% of boards in \$1 billion companies to be employee-elected.
- Senators have called for a discussion at the November 15th Proxy Process Roundtable agenda.

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## Diversity in the Boardroom

**Women directors are bringing a diversity of skills to boards.**

*(Source: ISS Analytics image omitted)*

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## Diversity in the Boardroom

Director skills matrices are reflecting a broader range of skills.

Of companies sampled:

- The longest matrix presented 17 skills/areas of experience.
- The shortest matrix presented five skills/areas of experience.
- The average number of skills/areas of experience was ten.

*Argyle – Trends in Investor Communications – October 2018*

## Diversity in the Boardroom

[Insert Your Organization Name]

### Board Matrix

This sample matrix can help boards and investors assess the level of experience each company director/officer has in various areas, as well as in the areas of gender, sexual orientation and racial/ethnic diversity, age and tenure.

Skills & Experience	Board of Directors							
	Director 1	Director 2	Director 3	Director 4	Director 5	Director 6	Director 7	Director 8
Board of Directors Experience	X			X				
10+ Years Industry Experience		X						X
CEO/Executive Head	X			X				
Investment			X			X		X
Human Capital Management/Compensation		X			X			X
Financial History/Accounting (Audit Committee)			X		X			X
Financial Expert or Audit			X		X			X
Government/State Policy	X			X				
Marketing/Sales			X		X			
Environmental Science/Policy/Regulation						X		
Academia/Thought Leadership								
Risk Management				X				
Corporate Governance		X						X
Technology/Talent					X			X
Business Other			X			X		X
Racial Ethnic		X	X					X
Gender					X			
Demographic Background					X			
Board Tenure								
Years	15	15	10	8	7	7	4	1
Board Composition (voluntary)								
LOBTD	X							
Gender								
Male		X	X	X	X	X	X	X
Female	X							
Non-Binary								
Race								
Years old	60	63	65	62	60	67	55	47
Racial/Ethnicity								
African American/Black	X							
Asian, Hawaiian, or Pacific Islander								
White/Caucasian		X	X	X		X	X	X
Hispanic/Latino					X			
Native American								
Other								

Source: NYC Comptroller's Sample Matrix for Director Skills, Boardroom Accountability Project 2.0

Available:  
<https://comptroller.nyc.gov/services/financial-matters/boardroom-accountability-project/boardroom-accountability-project-2-0/>



## Corporate Culture: Tremors or Seismic Shifts?

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## Corporate Culture: Tremors or Seismic Shifts?

### **#MeToo is changing hiring and employment practices.**

- Nike began a review of its HR operations, made management training mandatory and revised internal reporting.
- Microsoft, Uber and Lyft have eliminated agreements that force employees to resolve harassment claims in arbitration.
- Fidelity created a response committee of executives and an outside attorney to provide an additional reporting channel for harassment claims. CEO Abigail Johnson moved her desk to the floor where key portfolio managers and traders sit.
- American Express rolled out training on building inclusive teams – 1,300 VPs+ this year and midlevel managers in 2019.
- Succession plans for each senior leader must include at least one woman and a minority at Northwestern Mutual Life.
- Other companies have brought in new leadership, laid off staff, and added women to interview teams.

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## Corporate Culture: Tremors or Seismic Shifts?

**Core mandates for Boards and Compensation Committees have traditionally focused on executive and director compensation.**

- Compensation philosophy
- Incentive and benefit plan design
- CEO and executive compensation
- Director compensation
- Succession planning
- Risk management of compensation policies and practices
- Communication of compensation policies and practices

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## Corporate Culture: Tremors or Seismic Shifts?

**Mandates are expanding, particularly where corporate culture is being questioned. Compensation committees are transforming into human resources committees that oversee:**

- Talent strategy
- Organizational culture
- Diversity and inclusion
- Employee engagement
- More active succession planning
- Risk management
  - Shortage of critical skills
  - Compliance/regulatory issues
  - Gap between talent and business goals
  - Employee engagement

**Audit committees are taking a serious look at code of ethics compliance and whistleblower procedures.**

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## Corporate Culture: Tremors or Seismic Shifts?

### High-performing boards are introducing organizational health and talent management into their agendas:

- Overseeing human capital at the HR committee
- Tying culture to ethics at the HR or audit committee
- Asking for results from employee engagement surveys
- Asking for information on diversity goals and on pay equity
- Bringing these discussions to board meetings, with information from HR, risk and finance functions
- Actively reviewing succession plans annually, identifying and filling gaps through development or recruitment
- Ensuring that there are talent development plans in place for executive officers

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## Corporate Culture: Tremors or Seismic Shifts?

***Digital Realty Trust v. Somers***: On February 21, 2018 SCOTUS resolved a dispute in the Circuit Courts by unanimously holding that, to obtain the protections of the Dodd-Frank Act's anti-retaliation protections, an employee must report alleged securities law violations *to SEC* (*i.e.*, internal company reporting was not sufficient).

- Anomalous result: Companies had lobbied SEC to permit such protections to apply to internal reporting, in order to stay ahead of the allegations and not be caught by surprise.
- Holding may result in more employees bypassing their employers and going straight to SEC.
- BUT: SOX whistleblower protections remain in effect and are statutorily broader than under DFA.

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## Corporate Culture: Tremors or Seismic Shifts?

**In order to protect the viability of their internal reporting systems after *Digital Realty Trust v. Somers*, employers may want to take steps to:**

- Emphasize their commitment not to retaliate against internally reporting employees
- Engage in prompt, thorough investigations of internal complaints
- Internally publicize those efforts and their anti-retaliation policies

**In addition, employers will want to ensure that they maintain accurate records to counter retaliation claims made by employees who report internally and subsequently report to SEC.**

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## Cybersecurity, the Sequel

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## Cybersecurity, the Sequel

**High-profile data breaches have resulted in insider trading charges against employees and lawsuits and penalties against officers, directors and companies.**

- **Yahoo! settlement:** Yahoo! successor Altaba Inc. reached a \$35 million settlement with SEC in April 2018 to resolve claims that it delayed telling investors about a massive data breach.
- **Equifax insider trading charges:** Former CIO of Equifax business unit allegedly used confidential information to conclude that Equifax had suffered a major data breach, and then exercised options and sold shares prior to public disclosure of the breach in September 2017.
- **Uber settlement:** Uber reaches a \$148 million settlement in September 2018 with the 50 states and Washington, DC for its failure to disclose a 2016 data breach and related cover-up efforts.

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## Cybersecurity, the Sequel

**Google data exposure (vs breach)**

- **2015-2018:** Software glitches allow outside developers to access personal information of up to 500,000 Google+ users. In its investigation of the flaw, Google did not find any evidence that any of the developers improperly used or even accessed the user data.
- **Spring 2018:** Internal committee decides not to disclose the issue and cites multiple thresholds that were not met:
  - whether users to be informed could be accurately identified,
  - whether there was evidence of misuse, and
  - whether there were actions developers and users could take in responseInternal memo expresses concerns about regulatory scrutiny and reputational damage. CEO briefed.
- **October 2018:** Internal memo shared with WSJ. Alphabet announces data privacy measures, shuts down Google+. Two securities class action suits filed to date.

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## Cybersecurity, the Sequel

**Companies are losing millions to cyber scams, and SEC is investigating their internal controls.**

- SEC 21A Investigative Report dated October 16, 2018: Nine issuers that were victims of cyber-related frauds may have violated the federal securities laws by failing to have a sufficient system of internal accounting controls.
- Company personnel received “spoofed” or otherwise compromised e-mails supposedly from a company executive or vendor, causing the personnel to wire large sums or pay invoices to accounts controlled by the perpetrators of the scheme.
- SEC has determined not to pursue enforcement actions.

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## Cybersecurity, the Sequel

**Section 13(b)(2)(B)(i) and (iii) of the Exchange Act require that certain issuers maintain internal controls to ensure that:**

- transactions are executed in accordance with management’s “general or specific authorization,” and
- access to assets is permitted only in accordance with management’s general or specific authorization.

**Per the 21A Report, issuers investigated have said that they will:**

- enhance their payment authorization procedures, and verification requirements for vendor information changes,
- bolster their account reconciliation procedures and outgoing payment notification processes to aid detection of payments resulting from fraud, and
- enhance their training of responsible personnel about relevant threats, as well as about pertinent policies and procedures following the frauds.

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## Cybersecurity, the Sequel

**The regulatory regime continues to expand.**

### **May 2018: The EU's General Data Protection Regulation (GDPR) becomes effective**

- Extraterritorial effect: companies *offering* goods or services to EU residents are subject to the GDPR
- Elevates personal privacy to a “fundamental right”
- Serious sanction exposure: 4% of *worldwide* turnover/revenue
- Japan and the EU have decided to recognize each other's data protection regimes

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## Cybersecurity, the Sequel

**Some states have legislated on data protection requirements.**

- June 2018: California Consumer Privacy Act
  - The “mini GDPR”
  - Private right of action and regulatory enforcement
- Effective November 1, 2018: In Ohio, companies have an affirmative defense to tort claims if they have implemented a written cybersecurity program

**There are industry-sector reporting obligations for breach of personal information.**

- New York's Department of Financial Services Cyber Regulation (NYDFS) covers any “financial institution” doing business in New York
- NYDFS issued its first order against Equifax for its 2017 data breach, including corrective action on IT, audit, board and management oversight, vendor management, patch management and IT operations

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## Cybersecurity, the Sequel

### Overlapping disclosure requirements create complicated interplay.

- **GDPR:** Notice to Supervisory Authorities *within 72 hours* of discovery *unless* unlikely to result in risk to the rights and freedoms of natural persons
- **NYDFS:** Notice to Superintendent *within 72 hours* if
  - Reasonable likelihood of *material harming any material part of the normal operation(s) of the Covered Entity* or
  - Notice is required to *any government body* (see GDPR!)
  - Confidential notice allowed
- **When must a company:**
  - Disclose publicly?
  - Impose a trading blackout?
- **Is federal legislation coming?**

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## Cybersecurity, the Sequel

### Securities class actions and SEC enforcement trends are being watched closely.

- Focus on cybersecurity cases where the “facts are particularly bad and when the conduct really violates the statute very clearly.”
- Expect continued enforcement in the areas of insider trading, market manipulation and accounting fraud.
- “We’re not looking to bring dozens and dozens of cybersecurity cases every year.”

*SEC Cyber Unit Chief Robert Cohen – May 9, 2018*

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## Cybersecurity, the Sequel

### **Shareholder derivative claims initially attempted, but hard to win.**

- Shareholder claims against Target dismissed

### **Securities fraud claims are increasingly common and survive more easily.**

- Nine cases filed in 2017 (none in 2016)
- High profile breaches or data exposure (Equifax, Intel, Yahoo!, Advanced Micro Design, PayPal, Alphabet/Google)
- Claims based on difficulties with GDPR compliance that hurt quarterly results (Facebook and Nielsen Holdings)
- Potentially larger settlements

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## Cybersecurity, the Sequel

### **SEC released updated guidance on disclosure obligations on cybersecurity risks and cyber incidents.**

- Enhanced guidance on disclosure of cybersecurity issues, but within the existing disclosure framework; see Appendix for guidance on materiality and timing of disclosure.
- New focus on policies and procedures.

*Commission Statement and Guidance on Public Company  
Cybersecurity Disclosures - February 21, 2018*

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## Cybersecurity, the Sequel

### SEC Commissioner Kara Stein: Investors want more cyber disclosure!

- SEC “should not be focused on information overload or decreasing the amount or timeliness of information in the market, but rather should be focused on how to organize it and ensure that it is fairly presented.” Investors are asking for more information!
- Institutional investors, asset managers, state treasurers and others recently petitioned SEC to require disclosure of ESG information by publicly traded companies in a standardized format.

*Speech to the Council of Institutional Investors - October 2018*

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## Cybersecurity, the Sequel

### SEC guidance has a new focus on policies and procedures.

- Disclosure controls and procedures related to cybersecurity disclosure
- Insider trading policies and procedures
- Regulation FD and selective disclosure policies
- SEC guidance does not specify IT-related policies and procedures, but examples would include:
  - Network security
  - Security governance
  - Compliance
  - Risk management
  - Incident response
  - Business continuity

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## Cybersecurity, the Sequel

**In September, SEC Commissioner Stein discussed considerations for whether boards are exercising the appropriate level of oversight:**

- Is there an independent member with **expert knowledge of technology and cybersecurity**? If not, boards should retain independent experts to provide it with advice.
- **Independent directors should meet with the company's Chief Information Security Officer at least twice annually in executive session**, without members of management present so that they can have open, frank, and meaningful discussions about culture, tone, and the resources dedicated to both prevention and resiliency.

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## Cybersecurity, the Sequel

- Additionally, boards must also assess **whether disclosures to shareholders adequately and faithfully represent the significant cyber risks** that may impact investment decisions.
- With the increasing likelihood that breaches and attacks will happen, boards should be particularly **focused on the company's resiliency**. How will the company respond? How resilient is the infrastructure? What are the procedures for recovery and resumption?

*From the Data Rush to the Data Wars: A Data Revolution in Financial Markets  
September 27, 2018*

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## Cybersecurity, the Sequel

### Board Oversight Among S&P 100:

- 41% of companies included cybersecurity experience among the key director qualifications highlighted or considered by the board.
- 84% disclosed that at least one board-level committee was charged with cybersecurity oversight (70% disclosed audit committee oversight; 20% disclosed non-audit-focused committee oversight).
- 24% identified at least one management "point person(s)" for reporting to the board (e.g., the CISO or CIO).

*EY Cybersecurity Disclosure Benchmarking – September 2018*

- 32% of directors report being briefed on cybersecurity at least quarterly; 54% are briefed at least annually. 9% reported no briefings at all, on par with last year.

*BDO's 2018 Cyber Governance Survey of 145 Public Companies*

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## A Tale of Two Tweeters: Social Media and the CEO

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## A Tale of Two Tweepers: Social Media and the CEO

**July 3, 2012:** Netflix CEO Reed Hastings announces on his personal Facebook page that Netflix had more than one billion hours of streaming video in a month, without reporting the news through a press release or SEC filing.



**April 2, 2013:** After investigating, SEC cleared his conduct, saying that executives can use social media to announce key information in compliance with Reg FD so long as investors have been alerted about which social media will be used. SEC's August 2008 Guidance on Use of Company Websites applies.

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## A Tale of Two Tweepers: Social Media and the CEO

**August 7<sup>th</sup>:** Elon Musk tweets to his 22 million followers on taking the company private:

- “Am Considering taking Tesla private at \$420. Funding secured.”

According to SEC, the tweets cause Tesla's stock price to jump by over 6%, and lead to significant market disruption.

**Friday afternoon, August 27<sup>th</sup>:** Musk tweets that Tesla is “staying public,” with link to blog he authored with more detail.

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## A Tale of Two Tweepers: Social Media and the CEO

**Thursday, September 27<sup>th</sup>:** SEC charges Musk with securities fraud, alleging that, when he made these statements, he knew that the transaction was uncertain and subject to numerous contingencies. He had not:

- Discussed specific deal terms, including price, with any potential financing partners, and his statements about the possible transaction lacked an adequate basis in fact; and
- Investigated whether it would be possible for all current investors to remain with Tesla as a private company via a “special purpose fund”

SEC sought a permanent injunction, disgorgement, civil penalties, and a bar prohibiting Musk from serving as an officer or director of a public company. Tesla’s stock price drops by 14%.

SEC proposes settlement, but Musk refuses. Mark Cuban calls and urges him to settle with SEC.

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## A Tale of Two Tweepers: Social Media and the CEO

**Saturday, September 29<sup>th</sup>:** SEC announces settlements with Musk and Tesla.

- Musk must step down as Tesla’s Chairman for at least three years and be replaced as Chairman by an independent director;
  - To resume Chairmanship, stockholders must vote to approve
- Tesla must appoint two additional independent directors;
- Tesla must establish a permanent committee of independent directors, with an SEC-approved charter and membership, to oversee Musk’s communications;
- Tesla must also adopt additional controls and procedures, including hiring a securities lawyer approved by SEC staff to “ensure compliance;” and
- Musk and Tesla must each pay \$20 million to harmed investors under a court-approved process.

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## A Tale of Two Tweepers: Social Media and the CEO

Tesla's stock price increases by 17%.

**October 17<sup>th</sup>:** Shareholder derivative claim filed in Delaware Chancery Court, alleging directors breached fiduciary duties by “consciously disregarding and failing to ensure” that CEO’s public statements were “proper and accurate.”

**SEC intended to teach a lesson about the responsible use of social media by senior executives, but has Mr. Musk learned his lesson?**

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## A Tale of Two Tweepers: Social Media and the CEO

**October 4<sup>th</sup>:** Prior to mandatory court approval of proposed settlement, Mr. Musk tweeted yet again:



**Elon Musk** Verified account @elonmusk 16m16 minutes ago  
More Just want to that the Shortseller Enrichment Commission is doing incredible work. And the name change is so on point!

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## Investors Take the Lead on ESG

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## Investors Take the Lead on ESG

**433 ESG proposals were submitted in 2018, a slight decrease from 2017, but by far still the largest category.**

- **Climate change proposals**
  - 72 proposals filed but only 20 voted on
  - Reports on business impact of the Paris Accord on global warming, methane emissions management, adoption of GHG reduction goals
  - Support averaged 32.8% of votes cast, like in 2017
  - Passed at Anadarko Petroleum, Kinder Morgan, Range Resources and Genesee & Wyoming
  - Support from major institutional investors (BlackRock, State Street, Vanguard, Fidelity) and from ISS (90% of proposals)

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## Investors Take the Lead on ESG

- **Workforce diversity proposals**
  - 23 proposals filed (up from 17 in 2017) but only seven voted on
  - Typically request a breakdown of employees by race and gender across job categories, and disclosure of policies and programs for increasing diversity in the workplace
  - Support averaged 38% of votes cast, up from 29% of votes cast in 2017
- **Gender pay equity proposals**
  - 24 proposals filed (up from 19 in 2017) and only one voted on
  - Typically request a report on the pay gap between male and female employees and plans to close that gap
  - 15% of votes cast for the one proposal
  - Targets were tech, financial services and retail companies

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## Investors Take the Lead on ESG

**New York sued Exxon on its environmental risk disclosure.**

***People v. Exxon Mobil*, N.Y. Sup. Ct., complaint filed Oct. 24, 2018**

- Fraud lawsuit in state court in New York, accusing the company of misleading investors about how future regulations could impact its business, and specifically, Exxon's use of so-called proxy costs for carbon to calculate the financial impact of future regulations on the business.
- "Exxon built a facade to deceive investors into believing that the company was managing the risks of climate-change regulation to its business when, in fact, it was intentionally and systematically underestimating or ignoring them, contrary to its public representations," AG said in a statement.
- New York seeks an order prohibiting Exxon from continuing to make misrepresentations and forcing the company to correct its past claims. The state also seeks unspecified money damages and a disgorgement of all profit derived from the alleged fraud.

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## Investors Take the Lead on ESG

**Investors face external pressure on ESG issues from other investors and from legislators.**

California law SB 964 requires CalPERS and CalSTRS to:

- Until January 31, 2035, analyze climate-related financial risks in their public market portfolios, to the extent that the risks are identified as material
- By January 1, 2020, and every 3 years thereafter, publicly report on the climate-related financial risk of its public market portfolio

The law does not require action unless the board determines in good faith that the action is consistent with its fiduciary responsibilities.

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## Investors Take the Lead on ESG

**There's been a proliferation of ESG reporting standards and ESG ratings to help companies and investors measure their practices against peers:**

- GRI's Sustainability Reporting Standards
- Sustainability Accounting Standards Board (SASB)
- DowJones Sustainability Index
- ISS's QualityScore
- MSCI ESG Research
- Sustainalytics ESG Reports (on Yahoo! Finance)

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## QUESTIONS?

## APPENDIX

## Cybersecurity Preparedness, the Sequel: SEC Disclosure Guidance

- **The standard for disclosure remains MATERIALITY:**
  - Is there a substantial likelihood that a reasonable investor would consider the information important in making an investment decision or that the disclosure of the omitted information would have been viewed by the reasonable investor as having significantly altered the total mix of information available? (*TSC Industries v. Northway*)
  - As part of a materiality analysis, a company should consider the indicated probability that an event will occur and the anticipated magnitude of the event. (*Basic v. Levinson*)

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## Cybersecurity Preparedness, the Sequel: SEC Disclosure Guidance

- **According to the 2018 SEC guidance, the materiality of cybersecurity risks or incidents depends on:**
  - their nature, extent and potential magnitude, and
  - the range of harm that such incidents could cause, including reputation, financial performance, customer and vendor relationships, and the possibility of litigation or regulatory investigations or actions

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## Cybersecurity Preparedness, the Sequel: SEC Disclosure Guidance

- **Omitted information can be material**
- **Materiality is a judgment call:** No bright lines, unlike the state law notification requirements
- **Technical and compromising information should not be disclosed**
- **SEC staff may contact company counsel for an analysis of why a breach was not material**, when they see a news report that a hack has occurred (according to recent Congressional testimony by Bill Hinman, SEC Chief of Division of Corporation Finance)

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## Cybersecurity Preparedness, the Sequel: SEC Disclosure Guidance

### Timing of Disclosure

- **Ongoing investigation is not a basis for delaying disclosure:** SEC recognizes that a company may require time to discern the implications of a cybersecurity incident...however, an ongoing internal or external investigation – which often can be lengthy – would not on its own provide a basis for avoiding disclosures of a material cybersecurity incident.

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## Cybersecurity Preparedness, the Sequel: SEC Disclosure Guidance

### Timing of Disclosure

- **Disclosure prior to securities offering:** Where a company has become aware of a material incident or risk, SEC expects appropriate disclosure sufficiently prior to the offer and sale of securities and steps to prevent insider trading.
- **Use Current Reports:** Timely disclosure may require a current report on Form 8-K. Item 8.01 may be used to report information not otherwise called for by the form, but of importance to security holders.

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## Cybersecurity Preparedness, the Sequel: SEC Disclosure Guidance

### Timing of Disclosure

- Companies may have a **duty to correct** prior disclosure that the company determines was untrue, or where the company omitted a material fact necessary to make the disclosure not misleading, at the time it was made.
- Companies may have a **duty to update** disclosure that becomes materially inaccurate after it is made (for example, when the original statement is still being relied upon by reasonable investors).

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## Cybersecurity Preparedness, the Sequel: SEC Disclosure Guidance

### Timing of Disclosure

- But the 2018 Guidance cites a case holding that there is **no duty to update before the next quarterly report** (*Higginbotham v. Baxter Intern., Inc.* (7<sup>th</sup> Cir. 2007))
- Obviously, there will be exceptions, such as a current report prior to a securities offering.

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## Governance and Compliance eUpdates

Dorsey's Governance & Compliance Insider Blog tracks developments, trends and best practices

<https://governancecomplianceinsider.com/>

[Effective Date for Disclosure Simplification](https://governancecomplianceinsider.com/effective-date-for-disclosure-simplification/)

<https://governancecomplianceinsider.com/effective-date-for-disclosure-simplification/>

[SEC Withdraws No Action Letters on Proxy Advisory Firms](https://governancecomplianceinsider.com/sec-withdraws-no-action-letters-on-proxy-advisory-firms/)

<https://governancecomplianceinsider.com/sec-withdraws-no-action-letters-on-proxy-advisory-firms/>

[Marijuana Investments and Fraud Featured in SEC Investor Alert](https://governancecomplianceinsider.com/marijuana-investments-and-fraud-featured-in-sec-investor-alert/)

<https://governancecomplianceinsider.com/marijuana-investments-and-fraud-featured-in-sec-investor-alert/>

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## Governance and Compliance eUpdates

### [Failure to Disclose Leads to \\$35 Million Penalty in the Yahoo! Cybersecurity Breach](https://www.dorsey.com/newsresources/publications/client-alerts/2018/04/failure-to-disclose-leads-penalty-yahoo)

<https://www.dorsey.com/newsresources/publications/client-alerts/2018/04/failure-to-disclose-leads-penalty-yahoo>

### [SEC Issues New Cybersecurity Guidance](https://www.dorsey.com/newsresources/publications/client-alerts/2018/03/sec-issues-new-cybersecurity-guidance)

<https://www.dorsey.com/newsresources/publications/client-alerts/2018/03/sec-issues-new-cybersecurity-guidance>

### [SEC Staff's Latest Guidance Presents Dilemma for Companies Seeking to Exclude Shareholder Proposals on Environmental and Social Issues](https://www.dorsey.com/newsresources/publications/client-alerts/2018/01/sec-staffs-latest-guidance-on-environmental)

<https://www.dorsey.com/newsresources/publications/client-alerts/2018/01/sec-staffs-latest-guidance-on-environmental>

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## 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)

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

### [CEO Pay Ratio Rule Will Not Be Delayed](https://governancecomplianceinsider.com/ceo-pay-ratio-rule-will-not-be-delayed/)

<https://governancecomplianceinsider.com/ceo-pay-ratio-rule-will-not-be-delayed/>

### [Equifax Data Breach: Preliminary Lessons for the Adoption and Implementation of Insider Trading Policies](https://www.dorsey.com/newsresources/publications/client-alerts/2017/09/equifax-data-breach)

<https://www.dorsey.com/newsresources/publications/client-alerts/2017/09/equifax-data-breach>

### [The Era of Private Ordering for Corporate Governance](https://www.dorsey.com/newsresources/publications/client-alerts/2017/08/age-of-private-ordering-for-corporate-governance)

<https://www.dorsey.com/newsresources/publications/client-alerts/2017/08/age-of-private-ordering-for-corporate-governance>

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## Governance and Compliance eUpdates

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

<https://governancecomplianceinsider.com/nyse-rule-change-requires-ten-minutes-advance-notice-of-public-announcement-of-dividends-or-stock-distributions/>

**Investors' Climate Change Voting Records Face Scrutiny**

<https://governancecomplianceinsider.com/investors-climate-change-voting-records-face-scrutiny/>

**SEC Updates Regulatory Flex Agenda, Tables Dodd-Frank Rules on Executive Compensation Disclosure**

<https://governancecomplianceinsider.com/sec-updates-regulatory-flex-agenda-tables-dodd-frank-rules-on-executive-compensation-disclosure/>

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**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**

<https://www.dorsey.com/newsresources/news/press-releases/2017/06/rosenbaum-hoang-comparative-legal-guides>

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## Governance and Compliance eUpdates

**Say-on-Pay Voting Frequency — The Financial CHOICE Act Adds Uncertainty to the Process**

<https://governancecomplianceinsider.com/say-on-pay-voting-frequency-%e2%80%95-the-financial-choice-act-adds-uncertainty-to-the-process/>

**Disclosure Alert: Consider Transitional Disclosure on Revenue Recognition Standard**

<https://governancecomplianceinsider.com/disclosure-alert-consider-transitional-disclosure-on-revenue-recognition-standard/>

**A Long and Winding Road Ends for Resource Extraction Disclosure**

<https://governancecomplianceinsider.com/a-long-and-winding-road-ends-for-resource-extraction-disclosure/>

**Shareholder Proposals Restricting Board/Management Access to Preliminary Voting Results May Be Excluded**

<https://governancecomplianceinsider.com/shareholder-proposals-restricting-boardmanagement-access-to-preliminary-voting-results-may-be-excluded/>