

CCS | corporate counsel symposium

Thirty-Third Annual Corporate Counsel Symposium

Thursday, November 17, 2022

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THIRTY-THIRD ANNUAL CORPORATE COUNSEL SYMPOSIUM

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**Session materials are available on www.dorsey.com.
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Can We Turn the Impact of the Pandemic Into a Bias-Busting Slingshot? Women in the Law in 2022

Guest and Dorsey Panelists

Christine Esckilsen, Managing Director & Chief Human Capital Officer, Piper Sandler Companies

Katie Lichty, Assistant General Counsel (Animal Nutrition) + Lead IP Counsel, Land O'Lakes, Inc.

Dr. Artika Tyner, Ed.D., M.P.P., J.D., Planting People Growing Justice; Clinical Professor, University of St. Thomas School of Law

Nisha Verma and **Cate Heaven Young**, Dorsey & Whitney LLP

Program Materials

PowerPoint Presentation

Dorsey eUpdates and Blog Posts

Dorsey Blog: *What is the EEO-1 Report and What Are My Obligations?*, Marina Lyons (10/2/22)

Available at: <https://www.quirkyemploymentquestions.com/other/general/what-is-the-eeo-1-report-and-what-are-my-obligations/>

Dorsey eUpdate: *California Governor Gavin Newsom Signs Update to State's Pay Transparency Law, Setting Out New Pay Disclosure Requirements*, Gabrielle Wirth, Erica Haggerty Chen, Nisha Verma, Jessica Linehan & Pavlina Rafter (9/28/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/09/ca-gov-newsom-signs-pay-transparency-law>

Dorsey Blog: *What Types of Pay Equity Laws Should I Be Aware of and How Can I Best Comply?*, Jillian Kornblatt & Monica Delgado (9/22/22)

Available at: <https://www.quirkyemploymentquestions.com/other/general/what-types-of-pay-equity-laws-should-i-be-aware-of-and-how-can-i-best-comply/>

Dorsey Blog: *Workers' Compensation Coverage for Remote Employees' Injuries: What Happens When Every Day Is Bring Your Child (and Pets, and Neighbors) to Work Day?*, Jennifer Service, (9/13/22)

Available at <https://www.quirkyemploymentquestions.com/other/negligence/workers-compensation-coverage-for-remote-employees-injuries-what-happens-when-every-day-is-bring-your-child-and-pets-and-neighbors-to-work-day/>

Dorsey Blog: *Unlimited PTO in California – Is This Actually a Good Idea to Retain Employees?*, Melonie Jordan, Pavlina Kochankovska Rafter & Gabrielle Wirth (8/3/22)
Available at: <https://www.quirkyemploymentquestions.com/other/general/unlimited-pto-in-california-is-this-actually-a-good-idea-to-retain-employees/>

Dorsey Blog: *How does the new-ish Colorado statute requiring disclosure of salary information for job postings affect non-Colorado employers?*, Briana Al Taqatqa (6/6/22)
Available at: <https://www.quirkyemploymentquestions.com/featured/wage-and-hour-issues/how-does-the-new-ish-colorado-statute-requiring-disclosure-of-salary-information-for-job-postings-affect-non-colorado-employers/>

Dorsey Webinar Playback: *L&E Briefing: COVID, Long Haul COVID and Reasonable Accommodations*, Rebecca J. Bernhard, Katie Ervin Carlson & Jennifer Service (3/29/22)
Available at: <https://www.dorsey.com/newsresources/events/videos/2022/03/webinar-playback-le-briefing-long-haul-covid>

Dorsey eUpdate: *New York City's Wage Transparency Law Requires Salary Ranges to be included in Job Advertisements*, Laura Lestrade, Krista Bolles & Melissa Rahpan (2/28/22)
Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/02/nyc-wage-transparency-law>

Can We Turn the Impact of the Pandemic Into a Bias-Busting Slingshot? Women in the Law in 2022

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Webinar Attendees. Please check CHAT for announcements.

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Christine Esckilsen
Managing Director & Chief
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Katie Lichty
Assistant General Counsel (Animal
Nutrition) + Lead IP Counsel
Land O'Lakes, Inc.



**Dr. Artika Tyner, Ed.D.,
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Pandemic Snapshot: Women in Law

- **Pre-Pandemic**
 - **ABA Data: Women =**
 - 50% of law school graduates
 - 20% of equity partners
 - 2% of equity partners women of color
 - **ABA Data: People identifying “White” =**
 - 82% of overall lawyer demographics
 - Close to 90% of partners
 - White men hold close to 70% of all partner positions
 - **The majority of women lawyers have experienced being mistaken for a lower-level employee, demeaning comments, and lack of business development opportunities.**

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Pandemic Snapshot: Women in Law

- **Pandemic Impact 2020 and 2021**
 - In the early months, women lost significantly more jobs than men. Women with less education were disproportionately affected.
 - The pandemic put a spotlight on the issue of unequal family duties. Women frequently assumed additional roles related to child care and remote learning.
 - The majority of experienced female lawyers reported that they have full responsibility for arranging child care, and the majority of women leaving firms ascribed their decision to caretaking commitments.
 - Women left big law at a greater rate than men, but by a small margin.
 - The number of women leaving the practice of law in 2021 was less than the number of women leaving in 2019.

Pandemic Snapshot: Women in Law

- **Pandemic Impact 2020 and 2021, continued**
 - There were other seismic events during the pandemic that significantly impacted our communities, including large scale worldwide protests against racial injustice spurred by the killing of George Floyd and increased incidents of violence against members of Asian communities.
 - A significant percentage of lawyers of color cited racial injustice as having the most negative impacts on their careers and well-being. 68% of Black lawyers and 44% of AAPI lawyers were negatively impacted by racial injustice and incidents of Anti-Asian bias. (Thomson Reuters)
 - Lawyers of color in particular were dealing with managing emotions in the workplace—both their own and coworkers’—which created additional pressure and stress.

Pandemic Snapshot: Women in Law

- **Pandemic Impact 2022**

- Women’s employment gains have outpaced men’s in 2022, though still below pre-pandemic levels.
- Despite widespread concerns, lawyers were able to work productively from home, and many law firms reported a record year in 2020.
- We’ve experienced the “great resignation,” “great reinvention,” “quiet quitting,” and now the “great break-up,” where women leaders who are already underrepresented are switching jobs at higher rates, significantly more than men. They are leaving for more opportunity, flexibility, and commitment to inclusion.
- Only one in ten women want to work mostly on-site, and many women point to flexible and hybrid work options as one of their top reasons for joining or staying at an organization.

Reflection and Discussion

- **Does this description reflect your pandemic experience and the experience of your colleagues?**

Continued Momentum: Flexible Work Arrangements

- **The majority of women with children, and younger lawyers, would like to retain the ability to determine how often they work from home.**
- **The majority of companies plan to retain or expand their hybrid work options post-pandemic.**
- **Some organizations have allowed discretionary remote work, others require a set number of days in the office. Still others send mixed messages by formally allowing flexibility while signaling in-person work is preferred.**

Continued Momentum: Key Components of Flexible Work Arrangements

- **Give employees agency and choice rather than a “one size fits all” approach.**
- **Provide technical support for remote work.**
- **Implement and invest in policies and practices that keep lawyers engaged and connected to the organization and each other, regardless of work location.**
- **Develop transparent and specific guidelines around remote work.**
- **Track participation, retention, and other key metrics.**
- **Ensure that all people who work remotely have a clear path forward and equitable opportunity to succeed.**

Reflection and Discussion

- **What have you found beneficial in hybrid work models?**
- **In your experience, how can the model improve to foster inclusivity and increase talent retention?**
- **Have you experienced any instances where hybrid work models can be detrimental to DEI efforts?**

Continued Momentum: Sponsorship

- **Lack of in-person connection is listed as one of the most significant obstacles to career development.**
- **Women are disproportionately impacted by caregiving responsibilities and a lack of mentoring.**
- **Connect women attorneys with senior organizational leaders for mentorship and business development opportunities.**
- **One of the most effective solutions to address structural barriers reported by diversity leaders at law firms was the use of formal sponsorship programs.**

Continued Momentum: Development Opportunities

- Focus on inclusion and representation in pitches, RFPs, and creating teams for cases or projects (whether in-house or at firms).
- Women lawyers of color in particular must navigate exclusion from substantive assignments needed to build their craft and provide positive exposure to high-profile networking opportunities.

Continued Momentum: Foster and Reward an Inclusive Culture

- Women are doing more to support employee well-being and foster inclusion, but that work is going mostly unrewarded and unacknowledged in performance reviews and compensation.
- Women working in the office are almost 1.5 times more likely to experience demeaning and othering microaggressions compared to when they work mostly remotely.
- Underrepresented groups report inconsistency between statements and action related to diversity and inclusion.

Continued Momentum: Foster and Reward an Inclusive Culture

- **Educate, be aware of, and reduce ‘microaggressions’, ‘subtle acts of exclusion’ and implicit bias**
 - ‘Microaggressions’ or subtle actions of exclusion are verbal, nonverbal and environmental slights or insults, whether intentional or unintentional, which communicate hostile, derogatory, or negative messages targeting people based on marginalized group membership.
 - ‘Implicit bias’ involves a quick and often inaccurate judgment based on limited facts and personal life experiences.
 - All lead to a lowered sense of psychological well-being.
 - The most detrimental forms of microaggressions are usually delivered by well-intentioned individuals who are unaware of their harmful conduct.

Continued Momentum: Foster and Reward an Inclusive Culture

- **Women lawyers have an impact on other women in their organizations whose jobs do not allow hybrid work models**
 - These workers often experience heightened challenges relating to obtaining and managing childcare, increased workloads at home, and microaggressions in the workplace.
 - Women lawyers can use their positions as leaders in organizations to bring awareness and sensitivity to the experiences of all women.
 - Examples include advocating for continued COVID leave, attendance or disciplinary policies that account for school closures and sick days, and implementing cultural changes designed to prevent adverse impacts on female workers.

Reflection and Discussion

- **We all are responsible for reducing bias in the workplace. How can we improve?**
- **How can women lawyers effectively advocate for changes that benefit women who can't work from home, without risking their positions as leaders in the organization?**

Continued Momentum: Foster and Reward an Inclusive Culture

- **Provide all employees, and particularly managers and senior lawyers, with additional training to foster and promote goals to improve the new workplace environment.**
 - Remote work has placed additional burdens on managers, and a majority of leaders indicate their companies expect managers to do more to promote inclusion and support career development and well-being.
 - Lawyers at senior levels in particular should be educated and trained about how much external issues impact women lawyers and lawyers of color.

Continued Momentum: Foster and Reward an Inclusive Culture

- **Demonstrate the value of diversity and inclusion by including D&I initiatives in performance reviews and award compensation for promoting diversity and providing mentorship and sponsorship.**
- **Increased representation in all levels of management, leadership, and business opportunities.**

Reflection and Discussion

- **As a leader in your organizations, how have you demonstrated value on diversity and inclusion?**
- **What opportunities for growth and improvement do you see?**

Continued Momentum: Foster and Reward an Inclusive Culture

- **The inability to bring their whole, authentic selves to work creates added invisible labor and stress maneuvering organizations.**
- **Hybrid work has given us a window into people's lives outside the office, and an opportunity to continue to bring more of our authentic selves to the workplace.**
- **With the ability to bring our authentic selves to the workplace comes the responsibility to respect the authentic selves of others.**

Reflection and Discussion

- **Have you experienced an increased opportunity to bring your authentic self to the office? How has that impacted your working relationships?**

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Anatomy of an Antitrust Merger Investigation

Guest and Dorsey Panelists

Dr. Tasneem Chipty, Managing Principal, Chipty Economics

Carla Framil Ferrán, General Counsel, Liberty Communications of Puerto Rico LLC

Anthony Badaracco, Michael Lindsay, Matthew Ralph and Jaime Stilson,
Dorsey & Whitney LLP

Program Materials

PowerPoint Presentation

Dorsey Publications and Blog Posts

Dorsey Blog: *Hell-or-High-Water Clauses in Uncertain Regulatory Times*, Hannah Tuttle (10/11/22)

Available at: <https://www.dorseydealdividends.com/hell-or-high-water-clauses-in-uncertain-regulatory-times/>

Dorsey Publication: *Increase in HSR Reportability Thresholds and Other HSR Developments*, Michael Lindsay, Jaime Stilson, Anthony Badaracco & David Racine (1/25/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/01/increase-in-hsr-reportability-thresholds>

Dorsey Publication: *New FTC Position on Debt and HSR Valuation*, Michael Lindsay, Anthony Badaracco, Stephen Weingold & Alyssa Schaefer (9/3/21)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2021/09/new-ftc-position-on-debt-and-hsr-valuation>

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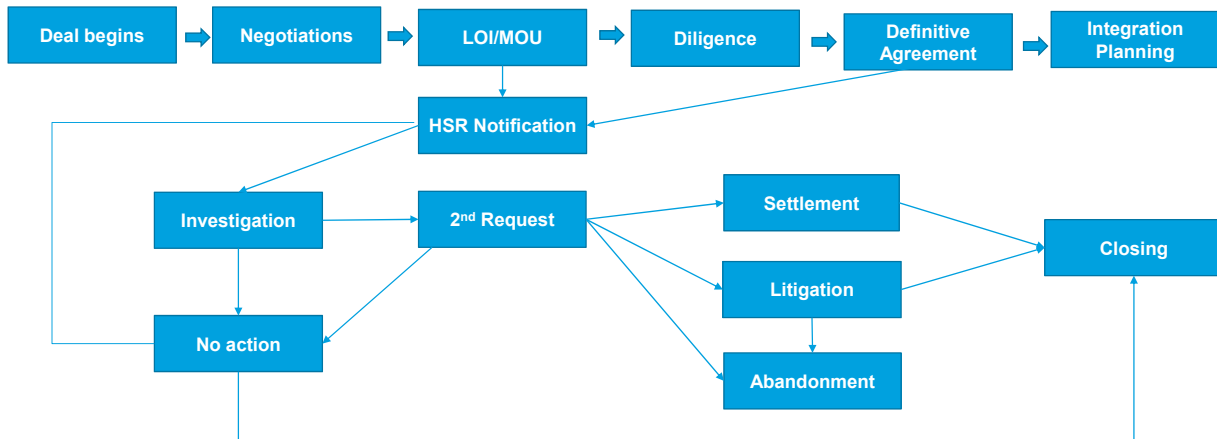
What is antitrust risk?

- **Horizontal risk**
 - Acquirer and Target are competitors at same level of distribution, in one or more lines of products or services, in the same geography
 - E.g., Retailer A acquires Retailer B
- **Vertical risk**
 - Target controls significant share of a critical distribution channel or of a component/service used by Acquirer and its competitors
 - E.g., Manufacturer acquires Wholesaler
- **Non-Traditional areas**
 - Effects in labor markets
 - Nascent competition

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Transaction and Investigation Timeline



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Before the Investigation

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Before Signing the Agreement

- **Identify and evaluate antitrust risk (if any)**
 - **If Seller:**
 - Review descriptions of “market” / competition in offering memoranda and other transaction documents
 - Does any potential buyer pose more antitrust risks than others?
 - If the high bidder poses greater risk, does the price difference justify the risk?
 - **If Buyer:**
 - Is the transaction likely to result in an antitrust investigation?
 - Are there better investment opportunities (after adjustment for antitrust risk)?
 - Will this acquisition preclude a *better* opportunity in the future?
 - **Identify synergies/efficiencies**
- **Allocate antitrust risk by contract**

Basic Antitrust Provisions

- **Contractual obligation to file HSR and other merger control notifications (and deadline for doing so)**
 - Identification of jurisdictions where filing is required
- **Duty of cooperation**
 - Sharing of information and drafts, communications with agencies
- **Compliance with “Second Request” (formal investigation)**
 - Deadlines (and potential extension of Outside Date)
 - Expense of compliance
- **Duty to litigate**
- **Obligation to propose/accept remedies**
- **Reverse termination fee**

Spectrum of Antitrust Risk Allocation

- Buyer bears no risk (and either party or both can terminate if Agency issues Second Request)
- Buyer must do anything and everything necessary to obtain antitrust clearance (“hell or high water”)
- Many points in between
 - Filing of non-binding LOI means seller bears all risk (but can walk for any reason)

Antitrust Risk Mitigation

- Provisions are deal-specific and highly negotiated
- Examples
 - Divest competing locations
 - Divest a competing line of business
 - Contractual obligation to divest might be limited (e.g., by maximum dollar amount of revenue)
 - Grant an IP license to a third party
 - Long-term contracts with third-party users (vertical risk)

Excerpt from Illumina-Grail Antitrust Provisions

- “[R]easonable best efforts shall include ... Parent and its Subsidiaries offering and agreeing to undertake Permitted Restrictions as reasonably necessary to obtain pre-merger clearance in as timely a manner as reasonably possible from Governmental Authorities under Antitrust Laws in the United States and, if applicable, the UK and Germany [I]n no event shall Parent or its Subsidiaries ... be required to agree to or accept (A) any commitment, undertaking or Order to divest, hold separate or otherwise dispose of any portion of its or their respective businesses or assets, including after giving effect to the Transactions, or (B) any limitation on the ability of Parent or its Subsidiaries to acquire or hold or exercise full rights of ownership of any capital stock of the Company or its Subsidiaries”

Source: Agreement & Plan of Merger among Illumina, Inc., SDG Ops, Inc., SDG Ops, LLC and Grail, Inc. § 7.07 Ex. 2.1 to Illumina Inc. Form 8-K of Sept. 21, 2020)

Communication Strategy

- **Counseling inside the company**
- **Positioning outside of the company**

Early Engagement of Economist

- If there is potential significant overlap or if there is agency interest in the industry
- Examples of early work
 - Identify efficiencies and potential theories of harm
 - Scope out the projects that could be conducted
 - Develop white papers for use during initial waiting period
 - Hard to get them done during the waiting period

The Investigation

Informal Stage

- **Initial contact from Agency**
 - Only one agency investigates
 - Typically Day 14 to 21 of HSR waiting period, but can be later
 - Sometimes parties will initiate contact, even before the waiting period
- **Respond to standard and deal-specific informal requests**
 - Org charts, strategic plans and marketing plans for past 3 years, product list (including overlaps), list of competitors and top 10 customers (with contact info) for overlap products, market share information for overlaps
- **Determine whether to “pull and refile”**
 - Effectively extends waiting period from 30 days to 60 days
 - Avoid or at least narrow a Second Request

“Second Request”

- **Issue internal preservation notice (if not already done)**
- **Identify maximum set of likely custodians**
- **Determine which parts of Second Request are reasonably achievable (and when) and identify the unduly burdensome requests**
- **Negotiate**
 - “Timing agreement”
 - Limitations on number of custodians and deponents in exchange for providing Agency more time after “substantial compliance”
 - Limitations on scope of Second Request
 - Search terms vs. Technology-Assisted Review (“TAR”)

Role of Economist

- **Areas of study**
 - Studying the extent to which parties compete with each other
 - Quantifying customer overlap
 - Understanding how pricing works (including discounts)
 - Analysis of entry
 - Extent to which past competition is indicative of future competition
- **Tasks**
 - Work with parties to build responses to Second Request data inquiries
 - Run analyses to anticipate what the agency will see in the parties' data
 - Help answer agency questions about the data
 - Model different divestiture scenarios

Party Witnesses

- **Company should identify different kinds of party witnesses**
 - Company advocates
 - Other voluntary interviewees
 - Others that agency will want to speak with
- **Typically (but not always), agency will conduct informal interviews first**
 - If litigation looks likely, depositions under oath
- **The most likely candidates for interviews include those with sales, marketing, and pricing responsibilities**

Non-Party Witnesses

- **Agency will contact customers and competitors**
 - Parties must identify top customers, competitors, and suppliers
 - Agencies will have other sources as well
- **Parties should develop strategy for engagement with potential nonparty witnesses**

“White Paper” – Advocacy for Clearance

- **Objective is to identify arguments and evidence that Agency staff will have to address with Agency management to win authorization to challenge the proposed transaction**
 - Listen to the Agency staff and discern the “hot” issues on their minds
- **Agency may ask for submissions**
- **Parties may also choose to submit voluntarily (including early in the investigation, before the Second Request)**
- **Substance can be purely factual or may involve economic analysis**

Settlement Discussions

- **Either side can initiate, but if agency staff has decided to recommend a challenge, staff may also invite settlement proposals**
 - Settlement may be bounded by transaction agreement
 - Staff, of course, will be aware of risk allocation provisions
- **Staff will likely request a “pause” of the timing agreement “clock”**
- **Weigh likelihood of settlement vs. outside closing date**

If No Settlement

- **Agency decides to clear the transaction**
- **Agency expresses opposition (“close at own risk” letter)**
- **Parties abandon the transaction**
- **Agency files action to challenge the transaction and prevent it from going forward**
 - Parties may unilaterally modify the transaction that they propose to proceed with
 - Litigating the “fix” or divestiture proposal

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Everything Everywhere All At Once: Advising Your Board in the Age of ESG

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

Trevor Gunderson, Vice President and Deputy General Counsel, General Mills, Inc.

Amy Schneider, Vice President, Corporate Secretary and Securities, Xcel Energy Inc.

Robert Rosenbaum and **Cam Hoang**, Dorsey & Whitney LLP

Program Materials

PowerPoint Presentation

Publications / Dorsey eUpdates & Blog Posts

Dorsey eUpdate: *SEC Issues FAQ Relating to Investment Adviser Considerations of DEI Factors*, David Tang (11/1/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/11/sec-faq-investment-adviser-considerations-of-dei>

Dorsey eUpdate: *SEC Adopts Mandatory Pay-versus-Performance Disclosure for 2023 Proxy Statements*, Cam Hoang & Dale Williams (9/13/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/09/pay-versus-performance>

Dorsey Blog: *Thoughts About ESG Investing in Your 401(k) Plan: The Problem Is Choice (Pop Culture Nod to the Matrix)* Michael Voves (7/26/22)

Available at: https://www.dorseyerisa.com/thoughts-about-esg-investing-in-your-401k-plan-the-problem-is-choice-pop-culture-nod-to-the-matrix/?utm_source=rss&utm_medium=rss&utm_campaign=thoughts-about-esg-investing-in-your-401k-plan-the-problem-is-choice-pop-culture-nod-to-the-matrix

The Banking Law Journal: *BANKS, CLIMATE RISKS, AND THE EMERGING REGULATORY FRAMEWORK*, Lanier Saperstein and Marc Kushner (6/22)

Available at: <https://www.dorsey.com/-/media/files/newsresources/news/2022/lanier-saperstein-and-marc-kushner.pdf>

Dorsey eUpdate: *The SEC and ESG*, Thomas Gorman (6/9/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/06/the-sec-and-esg>

Dorsey eUpdate: *SEC Requires Universal Proxy Cards for Contested Director Elections, Amends Other Proxy Disclosure Requirements for All Director Elections*, Cam Hoang (11/18/21)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2021/11/sec-proxy-cards-for-contested-director-elections>

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Agenda

- **ESG Dominates the Conversation**
 - But do consumers and employees care?
 - The anti-ESG movement
 - Greenwashing risks
 - Is ESG here to stay?
- **ESG Hot Topics**
 - Climate-related disclosures
 - Racial equity and civil rights audits
 - Board leadership structure
- **CEOs Taking a Stand**
- **Universal Proxy Card – Game-Changer??**

The Universe of ESG (According to SASB)

- Image intentionally omitted
- **Source: SASB Materiality Map**
Available at: <https://www.sasb.org/standards/materiality-map/> -

Consumers want to buy from responsible companies




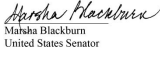

- Image intentionally omitted
- **Source: June 2022 Global Consumer Insights Pulse Survey**
Available at: <https://www.pwc.com/gx/en/consumer-markets/consumers-respond-to-waves-of-disruption/gcis-report-june-2022.pdf>



Directors don't see a link between ESG and the bottom line

- Image intentionally omitted
- **Source:** PwC 2022 Consumer Intelligence Series and Annual Corporate Directors' Survey.
- **Available at:** <https://www.pwc.com/us/en/services/governance-insights-center/assets/pwc-2022-annual-corporate-directors-survey.pdf>.

Anti-ESG Movement

- **September 20, 2022:** Senator Pat Toomey sends letter to more than a dozen ratings firms expressing concerns that ratings improperly influence capital investments and requests documents and other responses to 20 questions, focusing on compliance burdens for companies, data veracity, and other issues.
 - One commentator predicts this is a harbinger of federal regulation of such agencies.
- **November 3, 2022:** Five Republican Senators send letters to 51 large U.S. and global law firms strongly suggesting that they may be engaging in antitrust violations for collaborating on ESG initiatives.

	<p align="center">United States Senate WASHINGTON, DC 20510 November 3, 2022</p>	
<div style="display: flex; justify-content: space-between;"> <div style="width: 30%;"> <p>Dear [REDACTED]</p> <p>We are writing about your firm's Environmental, Social, and Governance (ESG) practice. Although businesses would certainly be wise to lawyer up before undertaking ESG initiatives, your firm has a duty to fully inform clients of the risks they incur by participating in climate cartels.</p> </div> <div style="width: 40%; border: 1px solid black; padding: 5px;"> <p>We are writing about your firm's Environmental, Social, and Governance (ESG) practice. Although businesses would certainly be wise to lawyer up before undertaking ESG initiatives, your firm has a duty to fully inform clients of the risks they incur by participating in climate cartels and other ill-advised ESG schemes.</p> </div> <div style="width: 30%;"> <p>would never endorse at the ballot box. Of particular concern is the collusive effort to restrict the supply of coal, oil, and gas, which is driving up energy costs across the globe and empowering America's adversaries abroad. Over the coming months and years, Congress will increasingly use its oversight powers to scrutinize the institutionalized antitrust violations being committed in the name of ESG, and refer those violations to the FTC and the Department of Justice. To the extent that your firm continues to advise clients regarding participation in ESG initiatives, both you and those clients should take care to preserve relevant documents in anticipation of these</p> </div> </div>		
<div style="display: flex; justify-content: space-between;"> <div style="width: 30%; border: 1px solid black; padding: 5px;"> <p>would never endorse at the ballot box. Of particular concern is the collusive effort to restrict the supply of coal, oil, and gas, which is driving up energy costs across the globe and empowering America's adversaries abroad. Over the coming months and years, Congress will increasingly use</p> </div> <div style="width: 40%; border: 1px solid black; padding: 5px;"> <p>would never endorse at the ballot box. Of particular concern is the collusive effort to restrict the supply of coal, oil, and gas, which is driving up energy costs across the globe and empowering America's adversaries abroad. Over the coming months and years, Congress will increasingly use</p> </div> <div style="width: 30%; border: 1px solid black; padding: 5px;"> <p>Sources: Rubio, Cotton Warn Law Firms to Prepare for Congressional Oversight of ESG Initiatives - Press Releases - U.S. Senator for Florida, Marco Rubio (senate.gov) and Grassley, Cotton, Colleagues Warn Law Firms About ESG Initiatives (senate.gov)</p> </div> </div>		
<p>© Dorsey & Whitney LLP. All rights reserved.</p>	<div style="display: flex; justify-content: space-around;"> <div style="text-align: center;">  Charles E. Grassley United States Senator </div> <div style="text-align: center;">  Marsha Blackburn United States Senator </div> </div> <div style="display: flex; justify-content: center; margin-top: 10px;">  Marco Rubio United States Senator </div>	<p>Sources: Rubio, Cotton Warn Law Firms to Prepare for Congressional Oversight of ESG Initiatives - Press Releases - U.S. Senator for Florida, Marco Rubio (senate.gov) and Grassley, Cotton, Colleagues Warn Law Firms About ESG Initiatives (senate.gov)</p>

		
<div style="border: 1px solid black; padding: 10px;"> <h2 style="margin: 0;">Anti-ESG Movement</h2> <ul style="list-style-type: none"> • Anti-ESG Organizations <ul style="list-style-type: none"> – ACRP: A law firm representing anti-ESG organizations, has sent several DE&I policy retraction demand letters threatening lawsuits as a consequence of non-retraction. – NCPWR <ul style="list-style-type: none"> • Submits anti-ESG proposals advancing the “conservative movement.” These anti-DE&I proposals have been put to a vote at 12 different companies, including Walmart, Twitter, and AT&T. These proposals received less than 5% support. • Commenced an initiative titled “Stop Bank of America’s Divisive ‘Woke at Work’ Agenda” asking people to sign on to ending Bank of America’s “radical and divisive ‘racial justice’ initiatives.” • Anti-ESG Movement in States <ul style="list-style-type: none"> – Florida Governor trying to enact rule that fiduciaries overseeing pensions cannot consider ESG unless material to risk and return. – Texas released list of 10 financial firms and 350 investment funds it deems to be “boycotting energy companies,” clearing the way for Texas officials to bar the companies from state business. </div>		
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Greenwashing Risks

- **Greenwashing lawsuits are trending:**
 - **May 2022:** SEC charged BNY Mellon Investment Advisor for making statements or implying that all investments in certain mutual funds had undergone an ESG quality review, even though that was not always the case. BNY Mellon agreed to pay a \$1.5 million penalty.
 - **September 2022:** Class-action lawsuit filed against KLM for marketing that customers who purchase carbon credits offset and reduce the environmental impact of flying.
 - **Ongoing lawsuit against ExxonMobil by Mass. AG** alleging Exxon misled investors as to the effects of burning fossil fuels on climate change and as to the steps it was taking to reduce carbon emissions.
- **The SEC has established an ESG Taskforce within its Division of Enforcement.**

Is ESG here to stay?

Top 10 Reasons Why the Answer is “Yes”

- **ESG Offers a Fuller View of Risk**
- **Identifying the Risks Leads to Opportunities**
- **Rise of Stakeholder Capitalism Is Good for Companies**
- **Regulations Are Leading to Improvements**
- **Sustainable Investing Is Growing ...**
- **... Particularly Among Women and Young Investors**
- **Performance Is on Par**
- **More Shareholders Are Voting**
- **Countering the Broad Consensus on ESG Would Be Difficult**
- **ESG May Be Better for Investor Outcomes**

Source: Leslie Norton of Morningstar, 10 Reasons Why ESG Won't Be Stopped,
Available at: <https://www.morningstar.com/articles/1123647/10-reasons-why-esg-wont-be-stopped>

**CLE Code
for
Attendees in States that Require a Code**
(Tip: The CLE code is different than the event code assigned by states)

**ESG Hot Topics:
Climate-Related Disclosures**

In March 2022, the SEC released its proposed rules on climate-related disclosure:

- Its most extensive rulemaking in recent history,
- which is almost certain to be legally challenged.
- The compliance costs, as estimated by the SEC, are \$500,000-\$600,000 a year for most reporting companies. Chamber of Commerce (and others) say it's higher.

Disclosure would include:

- Climate-related risks and their actual or likely material impacts on the registrant's business, strategy, and outlook;
- The registrant's governance of climate-related risks and relevant risk management processes;
- The registrant's greenhouse gas ("GHG") emissions, which, for accelerated and large accelerated filers and with respect to certain emissions, would be subject to assurance;
- Certain climate-related financial statement metrics and related disclosures in a note to its audited financial statements; and
- Information about climate-related targets and goals, and transition plan, if any.

ESG Hot Topics: Racial Equity and Civil Rights Audits

- Shareholder proposals for audits received strong support in the 2022 proxy season:

# of Proposals Voted On	Average Support	# of Proposals w/ Majority Support
22	44.9%	8

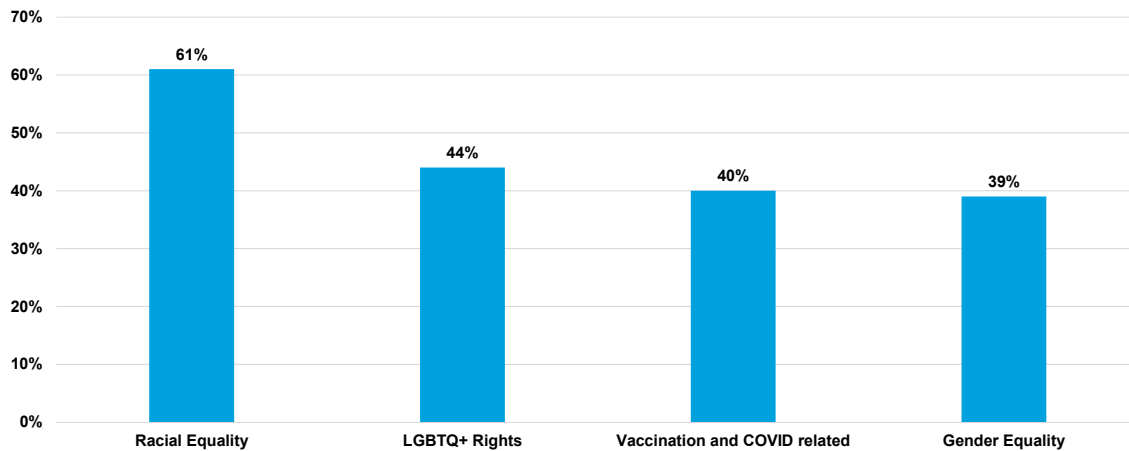
- Pushback from anti-ESG proponents, as discussed previously.

ESG Hot Topics: Board Leadership Structure

- For 2023 proxy season: SEC staff reviewing rationale for board leadership structure and its impact on risk management.
- Representative comments:
 - Provide reasons why board leadership structure is appropriate, addressing company-specific circumstances.
 - When Chair/CEO roles are split, provide circumstances where roles would be combined.
 - Describe the role of the chair or lead director's experience is brought to bear in connection with risk oversight.
 - Provide expanded disclosure on board oversight of risk.

Comments are to enhance future disclosure vs requiring revised disclosure.

Issues on which US Companies Most Frequently Take a Public Stance



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Source: Conference Board survey of 300 public, private and non profit companies

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CEOs Taking a Stand

- **Reproductive Rights post-Dobbs:**
 - 61% of companies cited the issue's relationship "to the company's core values" as criteria in determining whether to speak publicly.
 - Only 29% of companies cited relationship to its business as one of the reasons for speaking out.
- **Suits filed against Unilever, Wells Fargo and Starbucks based upon public positions, with shareholder plaintiffs on both sides of the DE&I debate.**

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Universal Proxy Card (“UPC”)

- SEC adopted new Rule 14a-9, effective September 9, 2022
 - SEC Release with final rule: [34-93596.pdf \(sec.gov\)](#)
- R. 14a-9 mandates use of UPC in all contested director elections
- Requires *all* parties to include *all* candidates (*i.e.*, those nominated by Board *and* those nominated by dissidents) on same proxy card
- Each party will be able to express support, and solicit votes, for other party’s individual candidates in its proxy materials

Universal Proxy Card (“UPC”)

- Rule designed to enable shareholders to pick and choose among *all individual* candidates, rather than *between slates* of nominees.
- Much speculation about whether rule will:
 - *increase* number of contests, and
 - make contests more about *individual directors* rather than *slates of directors* (*i.e.*, much more focus on directors deemed “most vulnerable”).
- ISS predicts that R. 14a-9 will lead to “elective surgery.”
 - Some commentators fear that ISS and Glass-Lewis will have even more power, as they move toward a regime of recommending individual directors.

Universal Proxy Card (“UPC”)

- **UPC rule may lead to more systematic, annual reviews of:**
 - Board’s skills matrix, including a gap analysis as circumstances change over time
 - Performance of individual directors, including whether each director is continuing to supply relevant contributions to Board deliberations and activities
- **Rule will require Board to provide more particularized information supporting its rationale for (re-)electing *each* of its nominees**
- **Companies should consider reviewing and updating their advance notice bylaw provisions, both to conform to the new Rule and to provide appropriate process for nominations by shareholders**

Appendix

- **Officer Exculpation in Delaware**

Officer Exculpation in Delaware

- **Effective August 1, 2022, DGCL §102(b)(7) was amended to permit limitation or elimination of monetary damages for breaches of duty of care of officers, similar to (but not as broad as) protection for directors**
 - Amendment for directors occurred in 1986, following DE S. Ct. *Van Gorkum* decision
- **Amendment applies to direct actions (including stockholder class actions) against officers**
- **Amendment does NOT extend to actions brought by or in the name of corporation (i.e., derivative actions)**

Officer Exculpation in Delaware

- **Just as with directors, as amended, DGCL §102(b)(7) does NOT exculpate officers for breaches of duty of loyalty**
- **Officers statutorily covered by amendment are:**
 - President, CEO, COO, CFO, CLO, Controller, Treasurer or CAO
 - Any NEO in SEC-filed documents, and
 - Any individual who, by contract, has consented to be so identified
- **In order to be effective, officer exculpation must be included in Certificate of Incorporation**
 - Therefore, all existing DE companies must obtain stockholder approval of any such exculpation clause

Officer Exculpation in Delaware

- On November 4, 2022, ISS released its proposed benchmark voting policy changes for 2023
 - It is proposing to “generally recommend for” charter amendment proposals providing for exculpation of officers (limited to those identified in the DGCL)
- Glass-Lewis has not taken a position, but notes, more generally, its support for “reasonable” liability protections for officers, including indemnification and insurance
- Institutional investors’ proxy guidelines vary, but do not yet address officer exculpation specifically; we expect guidelines to be updated

Officer Exculpation in Delaware

- Newly formed DE companies are likely to include such a provision in their certificates as a matter of course
- Existing DE companies, particularly, publicly held companies, must consider carefully the:
 - need to take such action and
 - the likely reaction of their key investors

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The Fine Line Between Fast and Too Fast: Impacts of Updated Regulatory Guidance on Cyber Incident Reporting in the Financial and Critical Infrastructure Sectors

Guest and Dorsey Panelists

Alison Atkins, Assistant General Counsel and Vice President, Cybersecurity, U.S. Bank National Association

Jennifer Smestad, Vice President, General Counsel and Corporate Secretary, Otter Tail Power Company

Robert Cattnach and Jennifer Coates, Dorsey & Whitney LLP

Program Materials

PowerPoint Presentation

Dorsey eUpdates and Blog Posts

Dorsey Blog: *California AG Announces First CCPA Settlement and There is More Enforcement to Come*, Deb Howitt & Austin Chambers (10/3/22)

Available at: <https://www.thetmca.com/california-ag-announces-first-ccpa-settlement-and-there-is-more-enforcement-to-come/>

Dorsey eUpdate: *Cybersecurity, False Statements and Omissions*, Thomas Gorman (4/27/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/04/cybersecurity-false-statements-and-omission>

Dorsey eUpdate: *Utah's New Privacy Law: Will This New Balance Become the Norm?*, Robert Cattnach & Gloria Park (3/21/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/03/utah-new-privacy-law>

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November 17, 2022

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Guest and Dorsey Speakers



Alison Atkins
Assistant General Counsel and Vice
President, Cybersecurity,
U.S. Bank National Association



Jennifer Smestad
Vice President, General Counsel,
and Corporate Secretary
Otter Tail Power Company



Robert Cattanaach
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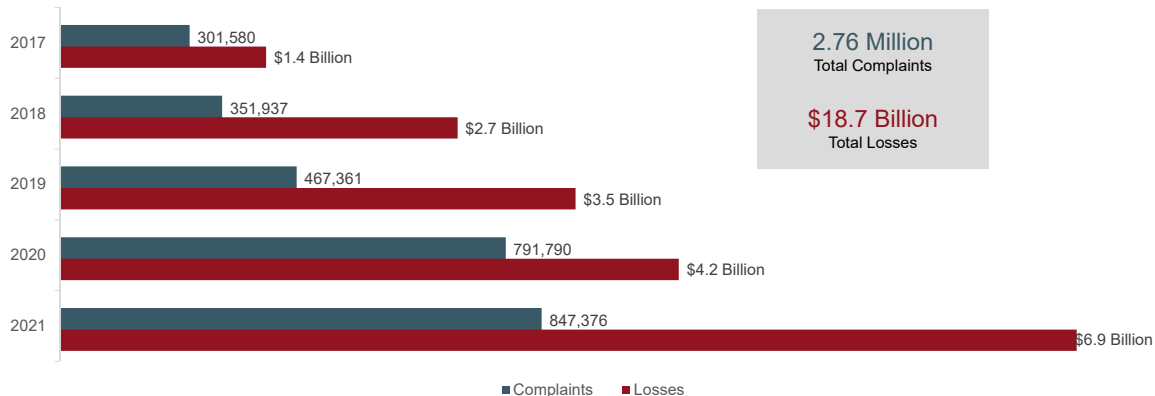
Introduction and Background

- **What is driving the federal government to engage?**
 - Estimates are that cybercrime, if it were a country, would constitute the third largest GDP in the world, after the US and China
 - Absence of any meaningful international cooperation prevents extra-territorial reach of law enforcement
 - FBI received nearly 850,000 complaints totaling \$6.9B in losses in 2021, highest on record

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Complaints and Losses over the Last Five Years



*FBI 2021 Internet Crime Report

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Cybercriminal Targeting Has Pivoted

- Hacks of large consumer-oriented companies are passé
- Ransomware gets all the headlines, but –
 - Business Email Compromise (BEC) gets all the money!
- Ransomware losses reported to FBI in 2021: \$50 Million
- BEC losses reported to FBI: **\$2+ BILLION**
 - FBI proven effective at recovering fraudulent transfers (RAT)
 - Ransomware rarely clawed back

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Consequences of Shift to Ransomware and BEC

- **No consistency for reporting**
 - State breach notification laws may not be triggered
- **Lack of critical information sharing within private sector**
- **Hampers federal regulators and law enforcement:**
“We can’t fight what we can’t see”
- **Trends likely to continue**

Why Does This Shift Matter?

- **Many ransomware incidents go unreported**
 - Reputational harm and embarrassment
 - Some states have prohibited public sector ransomware payments
 - US Department of Treasury’s OFAC has issued guidance that ostensibly makes such payments illegal (questionable jurisdictional basis)
- **BECs may not trigger classic consumer breach notifications**
 - Embarrassment to senior executives that took the bait even more pronounced
- **Complicates incident response equation**

Aggressive Federal Response to Perceived “Underreporting”

- **Concerns that companies are exercising too much discretion**
- **Need for better ‘early warning’ for national security response**
- **Inevitable confusion over what is ‘material’ and ‘reportable’**
- **Risk: shifts the focus of incident response from putting out the fire and finding the cause to C.Y.A.?**

Result: Cascade of Regulations, Heightened Enforcement, Legislative Initiatives

- **Prudential Regulator Guidance Financial Institutions (May 2022)**
- **Critical Infrastructure Reporting Omnibus Budget Bill (CIRCA) (June 2022)**
- **SEC Regulations on Incident Reporting (Proposed February 2022)**
 - Wells notice to Solar Winds alleging inadequate cybersecurity disclosures and public statements, inadequate disclosure controls and procedures.
- **Langevin Amendment to 2023 NDAA, would create reporting requirements for Systematically Important Entities**
 - May not make it in final bill (if there even is one!)

What Is the Intended Effect?

- **Limits private sector discretion for reporting**
 - Already subject to hindsight enforcement: Uber’s CISO convicted of misprision of a felony for classifying a ransom payment as a ‘bug bounty’ and instructing executives not to report
- **Accelerates the timeline for reporting incidents:**
 - Engages federal resources sooner for individual events
 - Allows more unified and timely response at the national level
 - Promotes awareness of emerging threats and helps agencies react before threats become systemic

What Are the *Unintended* Consequences?

- **Impossible for most companies to assess an incident within the new timelines**
- **Companies will face a Hobson’s choice:**
 - “Over-report” to avoid potential enforcement
 - Creates noise in the system – EU’s experience with Article 33
 - Questionable ‘benefits’ of reporting based on incomplete data
 - Or force private sector to take advantage of opportunities for interpretation
 - Need to determine “materiality” before the clock starts
 - Could lead to even greater inconsistencies
- **Shifts priority from responding to assessing nuances of reporting**

Key Features of Prudential Regulator Requirements

- Has a ‘computer security incident’ caused *actual harm* to the bank’s systems or data Confidentiality, Integrity, Availability (CIA)?
- Has it *materially* disrupted or degraded the bank’s operations?
- Must notify Prudential Regulator within 36 hours of materiality determination
 - Telephone or email sufficient
 - Typically financial institutions know their regulator personally
 - Can request to keep confidential
 - *But* what other obligations will ‘confidential’ reporting trigger !?!

Service Providers/Vendors Further Complicate the Equation

- Service Providers must notify the financial institution “as soon as possible.”
- Easy default for the vendor: when in doubt, notify your customer
 - Shifts the burden of assessing materiality to a party that doesn’t have access to all of the facts
- Creates potentially serious problems for regulated entities
 - Don’t Assume your vendor has reported!
- “Your vendor notified you, why didn’t you notify your regulator?”
- May require significant rethinking of notification obligation triggers and timing in 3rd party agreements

Standards for Materiality

- ***Ability to carry out its banking operations, activities, or processes, or deliver banking products and services to a material portion of its customer base, in the ordinary course of business;***
- ***Business line(s), including associated operations, services, functions, and support, that upon failure would result in a material loss of revenue, profit, or franchise value; or***
- ***Operations, including associated services, functions and support, as applicable, the failure or discontinuance of which would pose a threat to the financial stability of the United States.***
- **Arguably reconcilable with SEC materiality standards?**
- ***But...***

Examples (*not included in actual text of regulations*)

- **Distributed Denial of Services (DDOS) > 4 hours**
- **[Service Provider] Widespread system outages – recovery time indeterminable**
- **Service upgrade causing widespread system outages to customers**
- ***Activation of business continuity or disaster recovery plan***
- **A ransom malware attack that encrypts a core banking system or backup data**

These kinds of events may not be material under more traditional SEC analysis

What Are the Practical Implications of the Prudential Regulator Requirements

- Shifts focus on *reporting* when the Incident Response team should be focused on *remediating*
- Reporting and incident response timeline management
- Contract amendments for Banking Service Providers
- Courtesy notifications becoming the rule?

Cyber Incident Reporting for Critical Infrastructure Act of 2022 (CIRCA)

- Created: Omnibus Budget Bill March 2022
- Applies to “covered entities” – electric sector is 1 of the 16 industries with critical infrastructure
- Report 2 types of cyber events:
 - 72-hour deadline for reporting “covered cyber incidents”
 - 24-hour deadline for reporting ransom payments
 - Vendor “shall advise the impacted covered entity of the responsibilities of the impacted covered entity regarding reporting ransom payments”
- 24 months to promulgate proposed rules (NPRM)
- Final rules must be issued within 18 months of the NPRM

Stated Objectives

- Spot trends
 - Share information
 - “Render assistance”
 - Warn other potential victims
 - Not used for enforcement
 - *But* can refer to ‘appropriate’ federal agencies
- **GOAL:** Enhance protection of key national assets – healthcare, financial institutions, nuclear power, electric grid, critical manufacturing, water and telecommunications assets.

Process Underway

- **CISA Director’s Request For Information (RFI) Sept 12, 2022**
 - (60 day submission period expired November 14th);
- ‘Listening sessions’ (last one Kansas City November 16th)
- **What are we learning from the process?**
 - Focus of formal comments submitted thus far: Leverage existing reporting methods that are already required through NERC.
 - Be mindful of one-size-fits-all versus actual risk assessments.
 - Different priorities for different critical infrastructure segments
- **What could enforcement look like?**
 - Subpoenas by CISA.
 - Referral to DOJ for non-compliance.
 - Classic risk of hindsight enforcement (‘you should have seen this coming’).

Key Elements to Be Developed

- **What starts the 72-hour clock?**
 - “Reasonable Belief” that a covered/substantial cyber incident has occurred
- **Process for submitting reports**
- **Report contents**
 - Supplemental reports
 - What constitutes “substantial new or different information”
- **CISA’s “balanc[ing] the need for situational awareness with the ability of the covered entity to conduct cyber incident response and investigations”**
- **Categorical triggers for (some/all?) industry sectors?**
- **Reconciling with existing triggers and processes (non-public) e.g. NERC-CIP protocols for electric grid**

SEC Draft Disclosure Guidelines

- **Published March 2022 – highly controversial**
 - SEC reopened comment period
 - Likely final rule to be issued in first half 2023
- **4-day deadline to disclose “material” incidents’**
- **What constitutes “materiality”**

“there is a substantial likelihood that a reasonable shareholder would consider it important in making an investment decision, or if it would have significantly altered the ‘total mix’ of information made available”

Matrixx Initiatives, Inc. v. Siracusano

What Disclosures Are Necessary?

- Amend Forms 10-Q and 10-K to update prior disclosures
- Include:
 - Past and potential impacts
 - Status of remediation efforts
 - Forthcoming changes to cybersecurity posture.
- Also requires disclosure of any series of individually nonmaterial cybersecurity incidents that became material when taken as a whole.
- Regulation SK
 - Policies and procedures to identify and manage cyber risk.
 - Management's role in implementing cyber policies and procedures.
 - Board expertise and oversight of cyber risk.

Examples Provided – Are They Always Material?

- Compromised the confidentiality, integrity, or availability of an information asset (data, system, or network)
- Degradation, interruption, loss of control, damage to, or loss of operational technology systems
- Unauthorized party accessed, altered, or has stolen:
 - Sensitive business information
 - Personally identifiable information
 - Intellectual property, or
 - Information that has resulted in a loss or liability for the registrant
- Malicious actor has offered to sell/disclose sensitive data or demanded payment to restore data that was stolen or altered

Shareholder Litigation and SEC Enforcement

- **Alphabet 1 F. 4th 687 (9th Cir. 2021)**
- **Shareholder claim: Google failed to disclose a substantial breach**
 - Google Identified cyber incidents **as risks** in prior SEC filings
 - Post breach, claimed ‘no material changes in risk factors’
 - Cited SEC interpretive guidance to support
- **District Court declined to dismiss, upheld on appeal**
- **Challenge for plaintiffs: History establishes that while stock price typically plummets immediately after breach is reported, it eventually rebounds to pre-breach levels before claim goes to trial**

Disclosure Controls: Soft Underbelly for SEC?

- **In re First Am. Fin. Corp. (C.D. Cal. Sep. 22, 2021)**
 - Blogger alerts First American to vulnerability
 - First American promptly discloses via 8K filing
 - IT **was aware** of the vulnerability earlier, **didn’t tell management**
 - Shareholder suit against C-Suite: previous SEC filings misrepresented security status
 - Dismissed: No allegation execs had **actual knowledge** of vulnerabilities
 - Risk disclosures too vague to create individual liability
 - SEC commenced enforcement against First American for inadequate disclosure controls and procedures (*i.e.* management **should have** known)
 - **No allegation by SEC that vulnerability was material**
 - First American settled with SEC for \$<500,000

Conflicting Definitions for “Materiality” Create Significant Challenges

- **Advance analysis, planning, and practice will be essential for incident responses**
- **Prudential Regulators and CISA understandably pressing for lower thresholds for reporting incidents**
- **No attempt to reconcile with SEC’s definition of materiality**
 - The SEC’s proposed regulations lower materiality threshold
- **Potential for conflict and confusion inevitable**
- **“Just to be safe” vendor notifications will complicate even more**

Other Challenges Created by Cross Triggers

- **When does reporting to Prudential Regulator presumptively trigger SEC filings?**
 - Prophylactic trading blackout for executives even if no public SEC filings?
- **Same for CISA reporting?**
- **NY DFS – must be notified if any notice to other supervisory authority**
- **Utility Regulators – some state PUCs may require reporting**
- **Contractual obligations to Business Partners**

Impacts on Incident Responses

- **Critical changes required for IR planning and execution**
- **Acknowledge: Different notifications for different audiences**
 - Document basis of decisions to report, *and not report*
 - Separate decision paths triggered for SEC reporting to ensure consistency
- **Cannot address numerous reporting contingencies in real time**
- **Weighing the consequences**
 - Do you disclose if the vulnerability has not been fixed?
- **Integrating the communication workflows**
- **Implications of international obligations**

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Professional Discipline of In-House Counsel: Who Complains, What are the Areas of Ethical Exposure and What Happens?

Guest and Dorsey Panelists

Abigail Cerra, Senior Counsel, Wells Fargo & Company

Sydney Crowder, Vice President & Group Counsel – Litigation and Investigations, Ameriprise Financial, Inc.

Kenneth Jorgensen, Dorsey & Whitney LLP

Program Materials

PowerPoint Presentation

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Guest and Dorsey Speakers



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Senior Counsel
Wells Fargo & Company



Sydney Crowder
Vice President & Group Counsel
– Litigation and Investigations
Ameriprise Financial, Inc.



Kenneth Jorgensen
Partner
Dorsey & Whitney LLP

Ethics Complaints Against In-House Counsel

Who files ethics complaints?

What are they about?

How serious is the discipline?

Who files ethics complaints against In-House Counsel and what are they about?

- **Employees** – most often arising out of employment disputes or internal investigations. Content of Corporate Miranda Warnings.
- **Opposing parties** (usually those unrepresented) – unhappy with the outcome of a transaction or litigation. In smaller companies they may involve conflict of interest alleged by minority members/shareholders.
- **Opposing Counsel** – these typically involve communications with a represented party or allegations of Unauthorized Practice of Law by in-house counsel.

How Serious is the Discipline?

- **Professional Discipline** against in-house counsel is rare.
- **When it happens, it is usually private discipline** (e.g., admonition) for violations involving communication with represented or unrepresented persons.
- **Serious discipline** is usually reserved for cases where the conduct is willful – affirmative misrepresentation or fraud, practicing with a suspended license, or criminal behavior.

Some Hypothetical Cases.

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Current employee with discrimination complaint who is represented by counsel

- Employee has performance issues, and complaints about other employees. Complains to HR Director.
- Employee also has made a Qui Tam complaint.
- HR asks for counsel's assistance in drafting response to employee. in-house counsel advises HR about the response which is sent directly to employee.
- Employee files ethics complaint against in-house counsel alleging in-house counsel ghostwrote the letter and therefor communicated directly with the employee regarding matters for which the employee was represented.

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Rule 4.2, Rules of Professional Conduct

- **Comment** - *Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.*
- Is ghostwriting advising or is it an improper direct communication by the lawyer to a represented client without consent? This is one of the issues that was investigated in the ethics complaint.
- **ABA Informal Opinion 461** - lawyer can suggest that client directly communicate with opposing represent; lawyer can advise client concerning the communication; and lawyer can draft a document (e.g., settlement) for the client to deliver to the represented adversary.

Not All State Ethics Authorities Agree with the ABA

- **Minnesota** - agrees lawyer can suggest client directly contact adversary; prohibits lawyer from scripting the communication for the client; and prohibits drafting documents for delivery.
- **New York Rule 4.2**: “a lawyer may cause a client to communicate with a represented person ... and may counsel the client with respect to those communications, *provided the lawyer gives reasonable advance notice to the represented person’s counsel that such communications will be taking place.*”
- Although New York agrees with the ABA position and condones the lawyer drafting documents for delivery to the adversary, it imposes the additional notice to opposing counsel requirement.

How Do You Respond when HR asks for Assistance with the Response?

- Ghostwrite?
- Outline the Response?
- Advise HR generally about the issues?
- Tell HR you cannot help with the content of the response.
- What if you don't know the forum (state) in which the dispute might be litigated?

Investigations and Corporate Miranda Warnings

In-House Counsel asked to conduct internal investigation – with likely result to fire management employee for harassment

- In-house counsel meets with unrepresented employee who is alleged victim of harassment. In-house counsel tells employee he has been asked by the company to conduct “an independent investigation.”
- Manager is fired. Employee later hires lawyer to bring harassment claim against company. In-house counsel is involved in responding to the claim.
- Employee files ethics complaint alleging in-house counsel “misrepresented himself” as an independent investigator.

Rule 1.13 (e) – Corporate Miranda Warning

- (e) In dealing with an organization’s directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.
- How far must Counsel go when the investigation could have dual purposes – firing manager and obtaining information for use in defense of an employee claim?
- What if the employee wants her own counsel present for the investigation interview?

The Small Company Dilemma

Don't lose sight of who is the client.

Bookkeeper Theft from Small Company

- Audits disclose bookkeeper has embezzled funds from small company.
- In-house counsel makes demand to bookkeeper for return of funds.
- Bookkeeper responds that CEO has also been embezzling funds.
- In-house counsel asks for proof/evidence of theft. Bookkeeper produces no evidence the company's auditors did not discover any CEO theft.
- Bookkeeper retains counsel who presents in-house counsel with emails evidencing outrageous sexual harassment of by CEO. Offers to have client obtain a family loan to repay embezzled funds and release any claim for sexual harassment if company agrees not to report matter to criminal authorities.
- In-house counsel confronts CEO about harassing emails.

The Rest of the Story....

- **CEO convinces in-house counsel the settlement offer is good for the company – funds are returned, company avoids sexual harassment suit. CEO also prevails upon in-house counsel not to tell the Board about the harassing emails.**
- **Board agrees to settle the matter with broad release that does not inform board about the harassment allegations.**
- **Two years later auditors find evidence of CEO theft. During the Board's investigation, it finds the sexually harassing emails and also communications relating the settlement.**
- **Board files ethics complaint against in-house counsel.**

Remember Who You Do, and Who You Don't Represent

RULE 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

And Your Obligations When Corporate Constituents Engage in Organization Damaging Behavior

- (b) If a lawyer for an organization knows that an officer...is engaged in action ... that is a violation of a legal obligation to the organization ... and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.
- Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

In-House Counsel Discipline Cases

In-House Counsel: Letting Your License Lapse and Practicing Beyond the License Limitations

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In-House Counsel Failure to Pay License Fee

- DeBacker was the former general counsel for Dana Corporation in Ohio. He was not licensed in Ohio but permitted to work as in-house counsel under Ohio rules that required payment of an annual registration fee and an active license elsewhere.
- DeBacker failed to pay his annual registration fees in Kansas and Oklahoma where he was licensed.
- DeBacker was named in a Corporate Counsel magazine article as one of several GCs who were not actively licensed. After the article, he attempted to reinstate his Oklahoma license.

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DeBacker was denied reinstatement and suspended from the practice of law in Oklahoma for one year.

- DeBacker also had to pay all past due registration fees and the costs of the Oklahoma reinstatement proceeding denying his reinstatement.
- Rule 8.5 (a), Rules of Professional Conduct states “A lawyer admitted in [Oklahoma] is subject to the disciplinary authority of [Oklahoma], regardless of where the lawyer’s conduct occurred.
- Even though DeBacker’s unauthorized practice was in Ohio, he was still subject to the discipline authority of Oklahoma.
- *In re DeBacker*, 184 P.3d 506 (Okla. 2008)

***In re Altschuler*, 879 N.W.2d 929 (Mem.) (Minn. 2016)**

- Altschuler was admitted to Minnesota with a limited in-house counsel license.
- A Minnesota in-house counsel license by its terms expires when the lawyer leaves the corporate employer for which the in-house counsel license was issued.
- Altschuler left her corporate employer and began working in a private law firm. Eighteen months later she applied for full admission to Minnesota.
- Altschuler was issued a public reprimand for engaging in the unauthorized practice of law with the private law firm after her in-house counsel license expired upon her departure from her prior corporate employer.

In re Meyers, (Georgia 12/11/17)

Assisting or Facilitating the Company Client's Representative (who was a lawyer in Defrauding the Company)

Meyers: A practicing lawyer for 34 years without any record of discipline.

- John F. Meyers was billing partner for a J.M. Huber subsidiary which employed DiTano as its in-house counsel.
- DiTano told Meyers that the Company permitted in-house counsel lawyers to perform legal work outside the Company as long as it was not done on Company time and did not cause conflicts.
- Meyers agreed to perform some of that work for DiTano—who, according to the 2013 lawsuit, had formed his own law practice without J.M. the Company's knowledge. Meyers was at the Seyfarth Shaw firm sent bills to Meyers' law firm.

The Seyfarth invoices to DiTano's law firm do not get paid.

- **When the Seyfarth invoices did not get paid, DiTano instructed Meyers to invoice the Company and change the time entry descriptions to make it difficult for the Company to discern the work was not performed for the Company.**
- **Meyers denied conspiring with DiTano to defraud the Company and claimed that DiTano told him the Seyfarth billed work would ultimately benefit the Company.**
- **After the Company discovered the fraud, Seyfarth reimbursed the Company for all services not provided to the Company. Meyers reimbursed Seyfarth for the amount refunded and written off.**

Disbarment and Suspension

- **DiTano was disbarred but then appeared as a witness in the lawyer discipline proceeding against Meyers.**
- **Although the Georgia lawyer discipline board recommended disbarment, Meyers was suspended for two-years.**
- **The court cited the restitution made by Meyers as a mitigating factor warranting a sanction less than disbarment.**
- **By the time Meyers was suspended, he had left Seyfarth and joined the Barnes & Thornburg law firm.**

Red Flags

- My employer (and the firm's client) allows me to pursue personal business for which I can use your services.
- Many times this is ok, but sometimes not. Confirm with the Company client that related legal services for the employee are not prohibited. Example: Company IP employee (and firm contact) wants to use law firm to prosecute patents or trademarks in the same technology or business area as the Company/Employer.
- Changing Clients and time descriptions on bills is almost always going to be a problem.

Not Discipline but instead Disqualification

Dynamic 3D Geosolutions v. Schlumberger, 2015 U.S. Dist. Lexis 67353 (W. D. Tex).

Opposing Your Former In-House Counsel Employer

- **Charlotte was IP Counsel for Schlumco for several years rising to the position of Deputy General Counsel.**
- **At Schlumco, Charlotte worked on licensing a product called Petrel.**
- **In 2013 Charlotte left Schlumco and became Associate GC of Acacia.**
- **As Acacia's lawyer Charlotte met with the owners of the "319 Patent" in order to assess whether the patent should be acquired for assertion against other companies. Also present was Acacia's licensing VP.**
- **After acquiring the patent, Charlotte reviewed the 319 Patent in anticipation of litigation. She and the VP later hired the Collins Edmond law firm to advise Acacia about the 319 Patent.**

More Facts

- **The Collins Edmonds firm made recommendations to Charlotte and the VP to acquire the patent and sue several companies, including Schlumco. Charlotte approved the recommendations.**
- **Acacia then sued Schlumco alleging Petrel infringed the 319 Patent. Some of Petrel's alleged infringing features existed while Charlotte was at Schlumco.**
- **Schlumco then moved to disqualify Charlotte, all in-house counsel at Acacia, and the Collins Edmonds law firm.**

A Complete Wipeout for Acacia and Its Lawyers

- **Charlotte, Acacia's in-house counsel department and the Collins Edmonds law firm are all disqualified and the case is dismissed without prejudice.**
- **Texas Rule of Professional Conduct 1.09**
- (a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client ... if it is the same or a substantially related matter.
- (b) ... [W]hen lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

The Court finds

- **Charlotte's work at Schlumco on Petrel was substantially related to the 319 Patent Infringement suit because she worked to license Petrel and the infringing features of Petrel existed during this time.**
- **Although Acacia claimed Charlotte had been screened, the court found she had met with the Acacia VP and participated in the decision to acquire the 319 Patent and authorize the infringement suits. Therefore, it was presumed confidential information was shared with the in house lawyers.**
- **There were multiple communications between Charlotte, the VP, and other in house lawyers with the Collins Edmonds lawyers.**

Thank you for attending!

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Stormy Waters: Navigating Disruptions in International Trade and Investment

Guest and Dorsey Panelists

Jennifer Okerlund, Director Counsel, International Trade, Target Corporation

Glenn Salvo, Senior Corporate Counsel, The Mosaic Company

Christopher Bercaw, Catherine Pan and Larry Ward, Dorsey & Whitney LLP

Program Materials

PowerPoint Presentation

Dorsey eUpdates and Blogs

Dorsey eUpdate: *Key Takeaways From President Biden's Executive Order 14083 on Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States ("CFIUS")*, Justin Huff, Lawrence Ward, T. Augustine Lo, Nelson Dong & Dave Townsend (9/23/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/09/takeaways-from-bidens-eo-14083>

Dorsey eUpdate: *The CHIPS and Sciences ACT of 2022 - The Impact on China*, Catherine Pan & Ting Zhou (9/19/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/09/the-chips-and-sciences-act-of-2022>

Dorsey eUpdate: *CFIUS Annual Report - A Banner Year for Filings and Inquiries to Parties of Non-Notified Transactions*, Justin Huff, Lawrence Ward, T. Augustine Lo, Nelson Dong & Dave Townsend (8/11/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/08/cifus-cy-2021>

Dorsey eUpdate: *U.S. Customs and Border Protection Releases Importer Guidance for Uyghur Forced Labor Prevention Act Implementation*, Nelson Dong, Lawrence Ward, Dave Townsend & T. Augustine Lo (6/21/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/06/us-customs-and-border-protection>

Dorsey eUpdate: *U.S. Treasury Department Clarifies Previous Prohibitions on New Investments in Russian Equities and on Export of Trust, Accounting and Management Consulting Services to Russia*, Nelson Dong, Lawrence Ward, Dave Townsend & T. Augustine Lo (6/13/22)

Available at: [U.S. Treasury Department Clarifies Previous Prohibitions on New Investments in Russian Equities and on Export of Trust, Accounting and Management Consulting Services to Russia | News & Resources | Dorsey](https://www.dorsey.com/newsresources/publications/client-alerts/2022/06/us-treasury-department-clarifies-previous-prohibitions-on-new-investments-in-russian-equities-and-on-export-of-trust-accounting-and-management-consulting-services-to-russia)

Dorsey eUpdate: *U.S. Bars Accounting, Trust and Corporate Formation, and Management Consulting Services and Adds Export Restrictions to Russia*, Nelson Dong, Lawrence Ward, Dave Townsend & T. Augustine Lo (5/18/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/05/national-security-law>

Dorsey eUpdate: *United States Bans Russian-Affiliated Ships from Entering Any U.S. Port*, Nelson Dong, Lawrence Ward, Justin Huff, Dave Townsend & T. Augustine Lo (4/25/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/04/us-bans-russian-affiliated-ships>

Dorsey eUpdate: *U.S. Government Sanctions Sberbank and Alfa Bank, Prohibits All New Investments in Russia, Imposes New Export Restrictions against Russian Civil Aviation & Ends PNTR Status for Russia and Belarus*, Nelson Dong, Lawrence Ward, Justin Huff, Dave Townsend & T. Augustine Lo (4/11/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/04/us-government-sanctions-sberbank-and-alfa-bank>

Dorsey eUpdate: *U.S. Expands Russian Energy Sector Sanctions, Proposes Major Tariff Hikes on Nearly All Russian-Origin Goods & Imposes New Sanctions on Belarus*, Nelson Dong, Lawrence Ward, Dave Townsend & T. Augustine Lo (3/11/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/03/us-expands-russian-energy-sector-sanctions>

Dorsey eUpdate: *FinCEN Urges Financial Institutions to Guard Against Attempts to Evade Sanctions*, Erin Bryan, Nelson Dong, Joseph Lynyak & Lawrence Ward (3/9/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/03/fincen-urges-financial-institutions>

Dorsey eUpdate: *United States Imposes More Sanctions to Block Russian Access to U.S. Banking System and U.S. Goods, Technology or Software*, Nelson Dong, Lawrence Ward, Dave Townsend & T. Augustine Lo (3/1/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/03/us-imposes-more-sanctions-to-block-russian-access>

Dorsey eUpdate: *U.S. and Allied Countries Impose Sanctions Targeting Russian Financial Sector and Ukraine Separatist-Territories*, Nelson Dong, Lawrence Ward, Dave Townsend & T. Augustine Lo (2/23/22)

Available at: <https://www.dorsey.com/newsresources/publications/client-alerts/2022/02/us-and-allied-countries-impose-sanctions>

Stormy Waters: Navigating Disruptions in International Trade and Investment

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November 17, 2022

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Guest and Dorsey Speakers



Christopher Bercaw
Partner
Dorsey & Whitney LLP



Jennifer Okerlund
Director Counsel,
International Trade
Target Corporation



Catherine Pan
Partner
Dorsey & Whitney LLP



Glenn Salvo
Senior Corporate Counsel
The Mosaic Company



Larry Ward
Partner
Dorsey & Whitney LLP

Topics

- **The Ukraine War and U.S. sanctions against Russia and Belarus**
Bullet
- **U.S. national security measures: CFIUS, CHIPS Act, China tariffs**
- **Humanitarian crises: global pandemic, famine and forced labor**
- **Q&A**

The Ukraine War and U.S. sanctions against Russia and Belarus

- Sanctions
- Trade disruption



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Tariffs

- Trump Administration tariffs
- Biden's relaxation of Tariffs against Europe
- Impact on US-China trade



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National security, export and import controls and values-based trade

- More aggressive U.S. national security posture
- Restrictions on trade and investment
- CHIPS and Science ACT of 2022
- Uyghur Forced Labor Prevention Act



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Questions

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The New Economy in Flux: Leadership Lessons for In-House Counsel

Guest Speaker

April Rinne, Founder & Chief Change Navigator, April Worldwide

Author of the book *FLUX: 8 Superpowers for Thriving in Constant Change*

Program Materials

Handout



Dorsey & Whitney Corporate Counsel Symposium
The New Economy in Flux: Leadership Lessons for In-House Counsel
November 2022 / CLE credit

What is Flux? Flux is both a noun and a verb. As a noun, it means “continuous change.” As a verb, it means “to learn to become fluid.” Today’s world and the future are in flux, and it’s time to learn how to flux.

What is a Flux Mindset? The state of mind that sees all change – big or small, expected or unexpected, and especially the difficult or unwelcome stuff – as an opportunity to learn, grow, and improve. A Flux Mindset is essential for responsible leadership, decision-making, and well-being.

Context: Why does this matter?

- A Flux Mindset is for everyone. Both individuals and organizations can develop one.
 - Think about how this session can help your colleagues, partners, associates, neighbors, family, friends, kids... everyone.
- Mindset drives strategy, not the other way around.
- Creating an organizational culture of “fluxiness.”
- There is far more in flux than not, so this isn’t just about the economy or workplace. It’s about how we show up for life!

4 Skills for Seeing Change

1) Your orientation towards change

- This goes beyond what we “do” about change or how we “react” to uncertainty. In today’s world, it’s time to rethink how we *see* and *relate to* these things, full stop.
- This also goes beyond “change management.” Change management is a useful tool, but it is woefully incomplete for today’s reality. We need an upgrade.
- This affects *everything*: Personal, professional, organizational, and societal implications.

2) Your speed relative to change

- How do we pace ourselves for a future of more uncertainty, change, and flux?
- Running-ever-faster isn’t only related to burnout and exhaustion. It also compromises leadership, innovation, inclusion, clarity, creativity, and human connection.
- To thrive in a fast-paced world, slow your own pace. True optimization requires being rested and replenished.

3) Your levers for change

- When change or uncertainty really hits, nothing matters more than trust.
- Trust: Cognitive vs. Emotional. Operational vs. Cultural.
- Default setting: Trust or mistrust? Seeds of today's trust crisis.
- What does it mean to "design from trust" – especially in the law, which has been designed from mistrust?
- How trust factors into hybrid work, teamwork, the Great Resignation, career development, and more.

4) Your openness to make change

- The #1 leadership skill needed today is comfort with ambiguity. Yet this is not what most people have been taught about leadership. How do we reconcile this disconnect?
- How to let go of outdated beliefs, assumptions, practices, and models.
- How to let go of the illusion that we can predict or control "the" future, and rather lean into many different possible futures (future scenario planning).
- Letting go actually empowers yourself and others. It allows you to create space for new ideas, new solutions, and new possibilities.

4 Foundational Questions for Navigating Change & Uncertainty

1. Am I seeing (this change) from a place of hope or fear?
2. Am I running too fast to see what's happening... or what really matters?
3. Am I starting with trust?
4. What am I willing to let go of to get us to a better place?

Additional Questions for Hybrid Work / Return to the Office

- 1) What and who are we optimizing for? Focus on the team, not the entire company.
- 2) How do we track, improve, and iterate as a team? This is a process of continual experimentation and evolution. We are still in early innings (+ flux is here to stay).
- 3) Are we turning these skills into practices for life?

Additional Resources

- [A Futurist's Guide to Preparing Your Company for Constant Change](#) (HBR)
- [Niksen, the Dutch concept of 'doing nothing'](#)
- [The Real Meaning of Freedom at Work](#)
- [Back to Office? Stay Remote? Go Hybrid? Bosses shouldn't just go with their guts, and consensus may not work.](#)
- [Stop Offering Career Ladders. Start Offering Career Portfolios.](#)

Where can I learn more? <https://fluxmindset.com>