

VOLUME II, ISSUE IV

AUGUST, 2016

**CGC**

ABA Business Law Section Corporate Governance Committee

# INSIGHT

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



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## **CGC InSight Leadership**

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Jayne E. Juvan, Co-Editor | Anne C. Meyer, Co-Editor

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## RECENT DEVELOPMENTS

The ABA Business Law Section Corporate Governance Committee (CGC) has produced this quarterly newsletter, CGC InSight, to advise members of recent developments in the corporate governance field. Articles link to source material for reference or additional research. For quick access to any section or article, click through the headline below.

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## ABOUT CGC **INSIGHT**

The goal of CGC InSight is to give practitioners a quarterly “heads-up” summary of recent and pending developments affecting corporate governance. Each summary is linked to underlying source material for the practitioner’s reference or additional research. Members of the CGC InSight Editorial Board monitor developments in the substantive topic areas listed to the right. That list is not confined solely to legal topics, but looks to other institutions whose actions can influence corporate governance. Over time, we expect to add columns and commentary from practitioners in the field.

## GET INVOLVED

Members of the ABA CGC are encouraged to participate as members of the CGC InSight Editorial Board and in preparing summaries and other items for publication.

Article proposals and submissions are welcome, but will be printed only with the approval of the Editorial Board.

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## EDITORIAL **INSIGHT**

### The Business Case for Board Diversity

The importance of board diversity – boards that are diverse in skills, background and experience as well as gender, race and tenure – and the related topics of board composition and board refreshment, have been a focus of governance advocates, investors and corporate boards for many years.

While some skeptics view board diversity as a soft issue rooted in a social justice agenda, recent research by leading institutions is evidence that diversity in the boardroom, as well as on the senior management team, is correlated with better company performance and that diverse boards may be less susceptible to “group think” and other cognitive biases that can develop on boards with too much homogeneity.

For example, Catalyst recently released a study that found that Fortune 500 companies with the highest representation of women directors attained significantly higher financial performance, on average, than those with the lowest representation of women directors, based upon three identified financial measures: return on equity, return on sales and return on invested capital. In addition, institutions such as the Business Roundtable (“BRT”) view board diversity through a practical lens as good for business, by promoting the ability to effectively stay in touch with end markets and with customers. In April, the BRT announced that it is increasing its emphasis on promoting diversity in boardrooms of U.S. public companies and will be addressing the topic in its soon to be released updated Principles of Corporate Governance, which are generally accepted as setting a standard for best practices in effective, ethical corporate governance. The BRT’s updated principles will suggest concrete steps for companies and boards to increase the momentum on fostering board diversity, including developing a framework to identify diverse candidates and asking the board nominating committee to consider women and/or minority candidates for each open board seat.

Despite general acceptance of the value of board diversity, fundamental change in board composition of listed U.S. companies has been elusive. In early 2016, the Government Accountability Office released some sobering statistics on one element of board diversity – the number of women serving on boards of S&P 1500 companies from 1997 to 2014. While women now hold approximately 16% of board seats, doubled from 8% in 1997, the pace of change is slow. If women continue to join corporate boards at their current rate, it will take more than four decades for boards to reach a 50-50 gender split. The data also highlighted two issues that may be important to understanding why progress on board diversity appears to be slow. The first is low board turnover – the study found that since 1998, an average 4% of board seats in the S&P 1500 turn over each year. The second is tokenism – while 29% of companies in the S&P 500 that had no women on their boards added a woman in 2014, boards added significantly fewer second and third women (15% and 6%, respectively).

The lack of diversity on U.S. boards troubles SEC Chair White. In a June speech, Chair White urged CEOs and boards of public companies to “act aggressively to alter this landscape and to do so quickly.” While the SEC does not have the authority to mandate board diversity, the SEC staff



has been directed to propose new rules that would require more specific disclosure with respect to board diversity. Those rules, if ultimately adopted, may indeed provide investors and other constituents with more detailed information with respect to the composition of boards.

Ultimately, board diversity is not an issue that can be wrought through regulatory disclosure or pressure from investors in the guise of shareholder proposals and voting policies. Refreshing corporate boards can take considerable time and effort and is not an exercise that should be undertaken in haste. While studies correlate board diversity to strong economic performance, whether or not there is also causation will be tested as boards diversify. In the current business environment, the most successful, most dynamic companies can attract the best and most diverse board talent, thereby using their position to be leaders in best practices. Do diverse boards make these companies great or are these great companies that integrate diversity onto their board? The answer most likely is a little bit of both.

Diversity for diversity's sake is not in anyone's best interests. Among other things, board dynamics can be greatly impacted by board turnover and board diversity. The board, in its judgment, should have the flexibility to put together what it believes to be the best mix of people to oversee the company; each director should bring to the board an array of talents and be engaged, productive and effective. Similar to arbitrary age or term limits, forcing diversification of the board at the expense of thoughtfully evaluating individual director performance and overall board dynamics in the context of the company's business strategy, challenges and risks will not necessarily lead to a stronger or more effective board of directors. Strong and open communications are a hallmark of effective boards. Given basic human nature, onboarding diverse candidates may be more challenging to overall board dynamics, at least in the short term.

**Bruce Dravis, Ellen C. Grady, Jayne E. Juvan and Anne C. Meyer**  
CGC InSight Co-Editors

## **Boston Meeting Will Showcase “Best Practices” Panel**

[The September 2016 ABA Business Law Section meeting in Boston](#) will feature the CLE Program “Which Best Practice is Best? Meeting the Many Demands of Shareholders, Proxy Advisors, and Regulators.” This edition of InSight refers to current topics like the “Commonsense Principles of Corporate Governance” and the changes to the Business Roundtable's best practices recommendations, and this panel will cover these matters in depth, as reflected in the chart at this link <http://apps.americanbar.org/webupload/commupload/CL260000/relatedresources/comparison.pdf>.

Other panels sponsored by the Corporate Governance Committee are “The SEC vs. the Unicorn: Are High-Cap High-Tech Valuations a Fable?” and “CEO Succession & Crisis Management: Fiduciary Duty, Securities Disclosure, and Practice Approaches.”

[Registration for the ABA Boston meeting can be done here.](#)

## FEDERAL SECURITIES LAW DEVELOPMENTS

### SEC Amends Form 10-K to Permit Issuers to Include a Summary

*June 2016*

The SEC has approved an [interim final rule](#) required by the Fixing America's Surface Transportation Act ("FAST Act") to permit issuers to include a summary of business and financial information in their Annual Reports on Form 10-K, provided that the issuer includes for each item on the summary page a cross reference (by hyperlink) to the more detailed information included elsewhere in the Form 10-K. The SEC's rules prior to the amendment did not prohibit issuers from including voluntary information, such as a summary, but new Item 16 to Form 10-K now expressly allows an issuer to include such a summary. The amendments do not prescribe any length for the summary, specify the disclosure items that should be covered, or specify where the summary should appear in the Form 10-K. The SEC is providing issuers with the flexibility to decide which items to summarize, as long as the information is presented fairly and accurately. The SEC also requests comments on specific aspects of the interim final rule, including (1) whether a Form 10-K summary should be mandatory, (2) whether the Form 10-K summary (or a link) should be displayed on the issuer's EDGAR landing page, (3) whether there should be a length limitation on the summary, (4) whether the SEC should provide further guidance on preparation of the summary, (5) whether the SEC should mandate that the summary appear at the beginning of the Form 10-K and whether certain items should be required to be included or excluded, (6) whether issuers that do not include Part III information should be later required to amend the Form 10-K to update the summary to reflect the Part III information, (7) whether cross-reference methods should be allowed instead of or in addition to hyperlinks, and (8) whether other annual reporting forms (such as Form 20-F) should be similarly amended.

--Ellen Grady

### SEC Proposes Amendments to "Smaller Reporting Company" Definition

*June 2016*

The SEC has proposed [amendments to the definition of "smaller reporting company"](#) that, if adopted, would increase the financial threshold in the "smaller reporting company" definition to companies with less than \$250 million of public float, as compared with the \$75 million threshold under the current definition. Under the proposed amendments, companies that do not have public float would be permitted to provide scaled disclosures if their annual revenues are less than \$100 million, compared to the current threshold of less than \$50 million in annual revenues. If adopted, the change would expand the number of companies that qualify for the scaled down disclosures available to smaller reporting companies under the SEC's Regulations S-K and S-X, which the SEC believes would promote capital formation and reduce compliance costs for smaller registrants. The SEC's proposal would not change the \$75 million threshold in the "accelerated filer" definition. Public comments on the proposed amendments are due by August 30, 2016.

--Ellen Grady



## Chair White Speaks on SEC's Role in Corporate Governance and Board Diversity

*June 2016*

In a June [speech to the International Corporate Governance Network \(ICGN\) annual conference](#), Chair White highlighted the SEC's role in corporate governance, and SEC efforts to improve board diversity. Noting that it is not the role of the SEC to dictate corporate governance practices in the U.S., Chair White pointed out that the SEC has had an impact through its disclosure powers by requiring public companies to provide investors with the information they need to make voting and investment decisions. She noted that while investors may not play as significant a role in U.S. corporate governance as in many European countries, due to the largely state-based governance system, shareholder engagement has increased significantly in recent years. Chair White credited the SEC's disclosure rules and enforcement efforts with driving engagement on a broad range of issues. In her speech, Chair White also highlighted the need for greater board diversity in the U.S., noting that it is both the "right thing to do" and also makes good business sense. Since 2009, the SEC has had a rule requiring public companies to disclose whether (and if so, how) their nominating committees consider diversity and, if the company has a policy on board diversity, how that policy's effectiveness is assessed. Chair White stated that she did not regard company disclosures on this point to have changed significantly since the rule's adoption, and the SEC staff is now, at her direction, preparing a recommendation to the full Commission to amend the rule to require that companies include in their proxy statements more meaningful disclosure about board diversity. The goal of the rule change would be to provide disclosure to better inform investors' decision making. In the speech, Chair White also discussed the SEC staff's recent guidance on non-GAAP financial measures and sustainability disclosures (see the separate items here and here in the newsletter).

--Ellen Grady

## BREXIT Risk Factor Disclosure Likely

*June 2016*

Following the June 23, 2016, announcement of the United Kingdom ("U.K") advisory referendum to leave the European Union ("E.U."), U.S. public company issuers with operations in the U.K. and the E.U. will likely be adding a risk factor advising investors of the potential risks to issuers from the so-called "[Brexit](#)." Although the vote is advisory, and it will likely be years before the full effect of Brexit can be known, the vote has already disrupted global financial markets and currency exchange rate fluctuations. Many issuers will likely be highlighting the resultant global economic uncertainty in risk factor disclosure included in periodic reports and registration statements filed with the SEC.

## SEC Proposes Overhaul Of Mining Disclosures

*June 2016*

In an effort to respond to the ever-increasing globalization of the mining industry, the SEC has proposed [rules](#) that would overhaul the disclosure regime for mining companies listed in the U.S., reflecting the SEC's intent to align U.S. standards more closely with the standards of the Committee for Mineral Reserves International Reporting Standards and create uniformity for companies with cross-border operations. The SEC's proposed rules represent a complete reworking of Industry Guide 7 and would apply to foreign private issuers and domestic registrants, other than Canadian issuers reporting pursuant to MJDS. Public comments on the proposed rules are due by August 26, 2016.

## SEC Adopts Final Rules on JOBS Act Registration Requirements

*May 2016*

The SEC has adopted final [rule amendments](#) implementing changes to the requirements for registration and termination of registration under Section 12(g) of the Securities Exchange Act of 1934, as amended (the "Exchange Act") and the suspension of reporting obligations under Section 15(d) of the Exchange Act mandated by the JOBS Act and the FAST Act. Among other things, the amendments reflect a higher threshold -- 2,000 holders of record or 500 holders of record that are not "accredited investors" -- for registration, termination of registration and suspension of reporting. When a private company is required to register a class of equity securities under Section 12(g), it essentially goes public without the benefit of an IPO. The JOBS Act provisions are intended to provide greater flexibility to pre-IPO companies to issue equity securities, particularly under employee compensation arrangements, without triggering Exchange Act registration and reporting requirements.

--Anne Meyer

## SEC Amends Rules of Practice for Administrative Proceedings

*July 2016*

The [SEC has adopted amendments](#) to its rules of practice governing SEC administrative proceedings to provide additional flexibility in those proceedings. The amendments will, among other things, extend the potential length of the prehearing period from the current four months to a maximum of 10 months for certain cases, allow parties additional rights to notice depositions in certain proceedings, clarify the types of dispositive motions that may be filed at various stages of the proceedings, and make additional clarifying and conforming changes to the rules. The SEC's release also specifies the applicability of the amended rules to pending proceedings. The SEC's use of SEC administrative proceedings has been widely criticized and challenged in recent years, particularly on due process grounds, because such proceedings limit discovery, have different evidentiary rules



than the Federal Rules of Evidence, and do not have any right to a jury. [In the press release announcing adoption of the amendments](#), Chair White stated that the amendments will continue “to promote the fair and timely resolution of the proceedings,” but it is not clear whether the changes will address the concerns of critics who seek to limit the SEC’s use of such proceedings.

--Ellen Grady

## **SEC Focus On The Use Of Non-GAAP Financial Measures**

*May/June 2016*

The SEC has issued [twelve new C&DIs](#), following recent public statements from members of the SEC staff warning against perceived abuses of non-GAAP financial measures. The new C&DIs touch on several key issues, including:

- misleading non-GAAP financial measures;
- prominence of non-GAAP financial measures;
- non-GAAP revenue recognition;
- use of non-GAAP per share measures;
- presentation of “free cash flow”;
- income tax effects related to adjustments;
- EBITDA reconciliation; and
- presentation of “funds from operations.”

In her June speech before the ICGN, Chair White reiterated concerns about presentation practices which may make non-GAAP disclosures misleading and urged issuers to consider whether their non-GAAP financial reporting is subject to appropriate controls and audit committee oversight. Issuers should expect renewed focus on the use of non-GAAP financial measures, in filed documents as well as other public disclosures, by SEC staff. Following the issuance of the new C&DIs, the Center for Audit Quality (“CAQ”) released a Q&A guide to non-GAAP financial measures, which is intended to provide guidance to audit committees in taking a renewed look at their company’s presentation of non-GAAP financial measures, focusing on transparency, consistency and comparability. The release is available on the CAQ’s website at [www.thecaq.org](http://www.thecaq.org)

--Anne Meyer

## Chair White Addresses ESG Disclosures

*June 2016*

In her June [speech](#) before the ICGN, Chair White also discussed the SEC's role in sustainability disclosure. She noted that the SEC's authority to require additional disclosure with respect to environmental, social and governance ("ESG") disclosures is limited, even though many of these matters may be of increasing importance to a growing number of investors and other constituents. The SEC's recent concept release on Regulation S-K indicates that the SEC is considering whether it should require specific line-item environmental and social policy disclosure in issuers' periodic reports and is seeking input on whether there are specific issues of this type that are necessary for informed voting and investment decisions, which would represent a shift in the SEC's approach to ESG disclosure. Chair White observed that while many companies consider ESG information to be immaterial, or directed at corporate behavior rather than disclosure to investors, an increasing number of companies are voluntarily providing ESG reports outside of SEC filings.

--Anne Meyer

## STATE LAW DEVELOPMENTS

### Court of Chancery Reaffirms that Fiduciary Duties in Limited Partnership Agreements May Be Eliminated

*March 2016*

In the Delaware Court of Chancery decision in *Dieckman v. Regency GP LP*, 2016 WL 1223348 (Del. Ch. March 29, 2016), the Chancery Court reaffirmed that general partner fiduciary duties in a limited partnership agreement may be modified or eliminated, which, in this case, also eliminated the common law duties of disclosure replacing them with only the more limited obligations explicitly provided in the agreement. Accordingly, the Court held that the challenged merger of the limited partnership with an affiliate was not subject to further review by the Court and dismissed the claim of breach of the limited partnership agreement, finding that the limited partnership agreement eliminated all fiduciary duties, including the duty of disclosure, and that the general partner had satisfied the sole disclosure requirement in the limited partnership agreement. The Court stated that, in light of the limited partnership agreement's elimination of fiduciary duties, it would be inappropriate to reinsert the duty of disclosure or any other common law disclosure requirements into the unit-holder approval safe harbor. The Court further noted that the implied covenant of good faith and fair dealing did not create any additional disclosure obligations, given the express elimination of fiduciary duties in the agreement. In *Dieckman*, the limited partnership agreement required only that the members be provided with a copy or summary of the merger agreement, which were provided.

--Brett M. McCartney



## **Mere Registration to Do Business Does Not Create Delaware Jurisdiction**

*April 2016*

The Delaware Supreme Court held that a non-Delaware corporation could not be subject to general jurisdiction in Delaware merely because it registered to do business in Delaware and appointed an agent for service of process in Delaware. In *Genuine Parts Company v. Cepec*, --- A.3d ----, 2016 WL 1569077 ([Del. Apr. 18, 2016](#)), Delaware's Supreme Court reversed the Superior Court of Delaware's holding that a non-Delaware corporation was subject to general jurisdiction in Delaware. The trial court had held that an auto parts chain with only a few stores in the State was subject to personal jurisdiction for an asbestos claim. In reversing the trial court, the Supreme Court held that, after the United States Supreme Court's recent decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), Delaware's registration statutes must be read as a requirement that a foreign corporation must appoint a registered agent to accept service of process, but not as a broad consent to personal jurisdiction in any cause of action. A corporation must do more than register to do business in Delaware or have a registered agent to accept service of process to become subject to general jurisdiction in Delaware. As the Supreme Court pointed out, a different result might have encouraged other states to assert general jurisdiction over foreign corporations solely on the basis of their registration to do business in the state.

--Brett M. McCartney

## **Dell Appraisal: Merger Consideration Not Best Evidence of Fair Value**

*May 2016*

In what is viewed by the M&A community as a departure from recent appraisal cases, the Court of Chancery's recently ruled in *In re Appraisal of Dell Inc.*, 2016 WL 3186538 ([Del. Ch. May 31, 2016](#)), that the negotiated merger consideration was not the best evidence of fair value. In other recent appraisal decisions, the Court of Chancery had relied heavily or entirely on the transaction price. In contrast, in *Dell*, the Court of Chancery analyzed the going-private merger spearheaded by Michael Dell and members of Dell's management group. Dell's stockholders received \$13.75 per share as a result of a lengthy sale process that included a 45-day go-shop provision and only modest deal protections. The Court noted that Dell was a difficult company to value as it was in the midst of executing a business plan that would transform it from primarily a personal computer company selling to end-users into an integrated company with substantial additional business lines selling software and services to enterprise customers. During the appraisal litigation, the Company argued that Dell's fair value was \$12.68 per share, while the petitioners argued that the fair value was \$28.61 per share.

The Court stated that the mere fact that the process followed by Dell met fiduciary standards did not necessarily equate to fair value for appraisal purposes. The Court concluded that while the special committee led a sale process that "easily would sail through if reviewed under enhanced scrutiny,"

a number of factors undermined the reliability of the merger price as evidence of fair value, including (1) a pre-signing phase that had limited competition, when the presence of a realistic threat of competition during the period would have been most important in driving up the price, (2) the bidder's reliance on a leveraged buy-out pricing model, and (3) projections by Dell's management and financial advisors of valuations ranging from...\$14-\$27 per share, prior to the transaction at a time when Dell's stock was...trading at \$9-\$10 per share. Because the Court found it impossible to quantify the exact degree of the sale process mispricing, it gave no weight to the final merger consideration. Instead, it relied exclusively on a DCF methodology to generate a fair value of \$17.62 per share for the Company.

The Chancery Court opinion provides a sharp reminder of the limits of merger price as an indicator of fair value when the transaction involves a leveraged management buy-out, even one resulting from a careful sales effort free of any fiduciary breaches.

--Brett M. McCartney

## SECURITIES EXCHANGES

### NASDAQ Rule Change Mandating “Golden Leash” Disclosure Approved

*July 2016*

The [SEC has approved changes](#) to NASDAQ Rule 5250(b)(3) to require listed companies to publicly disclose the material terms of all third-party compensation or other payments to directors and nominees for director in connection with their candidacy to serve on the board of directors of the listed company, or so-called “golden leash” arrangements. The NASDAQ proposal, originally proposed in January 2016 and resubmitted on March 15, 2016, was effective July 31, 2016. NASDAQ listed companies will be required to disclose the information not later than the date on which the company files or furnishes a definitive proxy or information statement relating to the company's next shareholders' meeting at which directors are elected (or, if the company does not file proxy or information statements, not later than when the company files its next Annual Report on Form 10-K). The rules, as modified, also will permit listed companies to disclose the information on the company's website. Notably, disclosure is not required at the time the initial compensatory arrangements are made. Disclosure must be made at least annually until the earlier of the director's resignation or one year following the termination of the compensatory arrangements. The term “compensation” includes non-cash payments, such as indemnification arrangements, but does not include reimbursement of expenses in connection with a director's nomination (customary in connection with proxy contests), arrangements that existed before a nominee's nomination (such as employment relationships) for a relationship that has been publicly disclosed in a proxy or information statement, or arrangements that have already been disclosed in a Current Report on Form 8-K or a Schedule 14A.

--Ellen Grady



## INVESTOR DEVELOPMENTS

### Activist Investors Launch Lobbying Effort

*May 2016*

A group of activist investors, reported to include Pershing Square, Carl Icahn, Third Point, Elliott Associates and JANA Partners, has formed a trade association to advocate for activist investors in Washington. The Council for Investor Rights and [Corporate Accountability](#), or Circa, announced its formation in May with a statement that it is “committed to promoting the actions of shareholder activists, and their positive impact on corporate governance and business policies at publicly traded companies.” In recent years, there has been much debate about the impact that activist investors are having on the public markets, including whether corporate strategies employed by some activists value short-term shareholder returns over the long-term health of targeted corporations. Circa’s lobbying efforts may be aimed in part at recent Congressional attention to disclosure obligations of activist investors, including the introduction in March of the Brokaw Act, legislation designed to update and tighten the Section 13(d) beneficial ownership reporting requirements.

--Anne Meyer

### Investor Denied Proxy Contest After Board Determines It Failed To Comply With Advance Notice Bylaws

*May 2016*

The U.S. District Court in the Northern District of Texas granted a [preliminary injunction](#) to Ashford Hospitality Prime when director candidates proposed by its shareholder Sessa Capital refused to complete a questionnaire that to indicate whether they were aware of “any plans or proposals” by Sessa that would result in a sale or transfer of material assets, any extraordinary corporate transactions, any other material change to the corporate structure or any similar actions. Ashford’s bylaws contained an advance notice provision governing contested elections that required director nominees to provide all information related to the nominee that must be disclosed under SEC rules, including disclosure of extraordinary transactions.

The Court, reviewing the board’s actions under the business judgment rule, found that Ashford’s board reasonably exercised its business judgment in concluding that the Sessa candidates actually had a plan that they refused to disclose and that this refusal to complete the required questionnaire rendered them ineligible to stand for election under the company’s bylaws. Correspondence among Sessa and its candidates indicated that they discussed a plan for selling the company after election and having a “real and fair sale process” in order to maximize value and to garner support from ISS.

--Anne Meyer

## **AFL-CIO Submits Shareholder Proposals Seeking to Exclude Stock Buyback Data From Executive Compensation Metrics**

*June 2016*

The AFL-CIO [announced that one of its funds has](#) submitted shareholder proposals to IBM, Illinois Tool Works, 3M and Xerox, asking shareholders of these companies to approve a resolution to “exclude the impact of stock buybacks from the compensation formulas” used to compensate their senior executives. IBM was on the announced list of companies to which proposals were submitted, but did not conduct a proxy vote on this proposal. IBM did, however, [announce](#) that performance metrics for executive compensation would exclude the impact of “unplanned” or “unbudgeted” share repurchases.

--Bruce Dravis

## **PROXY ADVISORY DEVELOPMENTS**

### **Congress Weighs Proxy Advisory Firm Legislation**

*May 2016*

Representative Sean Duffy introduced into Congress the [Proxy Advisory Firm Reform Act](#), under which proxy advisory firms would be required to make disclosures about their procedures for advising clients and any potential or actual conflicts of interest, including the amount of revenues from any consulting services as well as a list of the firm’s 20 largest clients and how the firm prevents such clients from having “undue influence” on their work. To address concerns about inaccuracies in reports, proxy advisory firms would be required to provide every company with access to their draft voting recommendations as well as an opportunity to provide comments to the person who develops the recommendation. The firms would also be required to review complaints about accuracy and resolve them in a timely fashion, before voting takes place.

The legislation, if adopted would also require the SEC to promulgate rules requiring that proxy advisory firms adopt written policies designed to address and disclose conflicts, including how the firms are compensated by clients and how they issue recommendations with respect to companies to whom they also provide consulting services. The rules would also prohibit certain alleged activities that issuers describe as coercive, such as conditioning voting recommendations on issuers purchasing services, or changing or threatening negative recommendations based on whether issuers bought subscription services. Senior representatives for both ISS and Glass Lewis criticized the proposed legislation in hearings before Congress held in May.

--Anne Meyer



## ACCOUNTING DEVELOPMENTS

### SEC Proposes Reg S-K Amendments to Reduce GAAP Overlap

*July 2016*

The [SEC has proposed amendments](#) to certain SEC disclosure requirements designed to eliminate redundant, overlapping, outdated and superseded disclosure provisions in light of subsequent changes to the SEC's disclosure requirements, U.S. Generally Accepted Accounting Principles (U.S. GAAP), International Financial Reporting Standards (IFRS), and technology. The SEC also solicited comments on whether to retain certain disclosure requirements that overlap with U.S. GAAP. The public comment period on the proposed amendments will be open for 60 days following publication of the release in the Federal Register.

--Anne Meyer

## BUSINESS ORGANIZATIONS

### Business Roundtable to Add Board Diversity Best Practice Recommendation

*April 2016*

The Business Roundtable Corporate Governance Committee announced that the forthcoming update to the Business Roundtable guidance on best practices, "[Principles of Corporate Governance](#)," will include an emphasis on diversity in corporate boards. "U.S. companies can drive more growth when they are guided by boards that are diverse in backgrounds, perspective and experience," said John Hayes, Chairman, President and Chief Executive Officer of Ball Corporation, and Chair of the BRT Corporate Governance Committee. Mr. Hayes stated that director diversity, like efforts to promote diversity in management, should "strengthen the performance of a board of directors and promote the creation of long-term shareholder value."

--Bruce Dravis

### Director Survey Highlights 2016 Issues and Status

*June 2016*

New York Stock Exchange Governance Services and Spencer Stuart reported the [results of a survey](#) [they](#) conducted among nearly 400 public company board members, to identify the concerns and attitudes of directors towards key issues.

Among survey respondents:

- Roughly one-third (38%) believed that notwithstanding efforts to protect company data, “most cybersecurity risk is really out of their hands.”
- More than half (57%) had not reviewed a crisis communications plan in the prior year.
- Approximately two-thirds (65%) regard direct engagement with shareholders as a meaningful way to identify critical issues.
- Approximately two-thirds (62%) think hedge-fund activism reinforces and rewards short-termism.
- The primary attributes sought in selection of board members were expertise in the relevant industry (83%) or finance (78%).

--Bruce Dravis

## **U.S. Chamber Group Surveys Impact of Financial Firm Capital Requirements**

*June 2016*

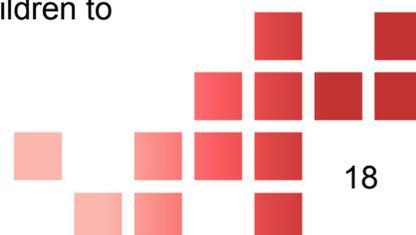
The Center for Capital Markets Competitiveness, an affiliate of the U.S. Chamber of Commerce, conducted a survey of more than 300 corporate finance professionals, including CFOs and treasurers, regarding the effect of financial services regulation on the availability and cost of financial products and services. The results are set out in [“Financing Growth: The Impact of Financial Regulation.”](#) The Report notes concerns among survey participants over the impact of capital requirements under Basel III, and questioned whether such requirements “create strong disincentives for growth.”

--Bruce Dravis

## **Business Leaders Offer “Commonsense Governance Principles”**

*July 2016*

A set of [Commonsense Principles of Corporate Governance](#) (“Principles”) has been developed by a group of business leaders, including major public company CEOs, asset managers, activists, public pension funds and mutual fund companies. In an [Open Letter announcing the Principles](#), the drafters noted that “Our future depends on [public] companies being managed effectively for long-term prosperity, which is why the governance of American companies is so important to every American,” and that “[t]he “health of America’s public corporations and financial markets - and public trust in both – is critical to economic growth and a better financial future for American workers, retirees and investors.” “[O]ur 5,000 public companies account for a third of the nation’s private sector jobs. And these same families and millions more also rely on public companies to help improve their financial future - they are heavily invested in these companies through mutual funds, 401(k) and pension plans, college savings plans and other accounts to buy a home, send their children to college and save for retirement.”



Individuals involved in developing the Principles included Mary Barra of GM, Warren Buffett of Berkshire Hathaway, and Jamie Dimon of JPMorgan, along with other leading public company CEOs, and representatives from Vanguard, Canada Pension Plan Investment, State Street Global Advisors, BlackRock, T. Rowe Price, ValueAct, and other significant investment firms and asset managers.

--Bruce Dravis

## ACCOUNTING DEVELOPMENTS

### FASB Issues New Rules for Recognizing Financial Instrument Credit Losses

*June 2016*

The Financial Accounting Standards Board (FASB) will change the requirements for recognizing credit losses on financial instruments, [Account Standards Update 2016-13- Financial Instruments – Credit Losses \(Topic 326\): Measurement of Credit Losses on Financial Instruments](#) (“Topic 326”). Topic 326 replaces the existing “loss impairment” model for financial assets and net investment in leases measured at amortized cost. A similar methodology is adopted for loan commitments and certain other off-balance sheet credit exposures. In addition, new requirements are adopted changing the accounting for available-for-sale debt securities and other financial assets measured through other comprehensive income.

Under current GAAP, credit losses on most financial assets measured at amortized cost, such as loans, are not recognized until the credit loss has been incurred – that is when the impairment has become “probable”. Topic 326 eliminates the “probable” impairment trigger and requires that an entity make an estimate of credit losses over the life of the financial statement item when the item is originated or purchased and at each relevant balance sheet date thereafter. For financial instruments classified as available-for-sale debt securities, Topic 326 specifies the use of an “impairment model” like current GAAP, but requires an assessment of expected credit losses when the fair value of the instrument is less than amortized cost. Under current GAAP, the full amount of any difference between amortized cost and fair value would be written off against current earnings.

The new requirements will apply to both public and private entities. For public business entities that are SEC filers, the guidance is effective for annual periods commencing after December 15, 2019, and interim periods therein. For other public business entities, the guidance is effective for annual periods commencing after December 15, 2020 and interim periods therein. For all others, the guidance is effective for annual periods beginning after December 15, 2021, and interim periods therein. Early adoption is permitted beginning after December 15, 2018.

--Larry Darby



## SELECTED LAW FIRM MEMOS AND ARTICLES

**Wachtell Lipton:** Director Tenure Remains a Focus of Investors and Activists

<https://corpgov.law.harvard.edu/2016/08/01/director-tenure-remains-a-focus-of-investors-and-activists/#more-73399>

**Sidley Austin:** Proxy Access Momentum in 2016

<http://www.sidley.com/~media/update-pdfs/2016/06/final-proxy-access-client-update-june-2016.pdf>

**Cooley:** Shareholder proposals to exclude the impact of buybacks from executive comp metrics — will they become a new trend?

<https://cooleypubco.com/2016/04/12/shareholder-proposals-to-exclude-the-impact-of-buybacks-from-executive-comp-metrics-will-they-become-a-new-trend>

**Wilson Sonsini:** Tenure Voting and the U.S. Public Company

<https://www.wsgr.com/publications/PDFSearch/tenure-voting.pdf>

**Baker & McKenzie:** Audit Committee And Auditor Oversight Update

[http://www.bakermckenzie.com/~media/files/insight/publications/2016/04/audit-committee-and-auditor-oversight-update/nl\\_na\\_auditupdate\\_apr16.pdf?la=en](http://www.bakermckenzie.com/~media/files/insight/publications/2016/04/audit-committee-and-auditor-oversight-update/nl_na_auditupdate_apr16.pdf?la=en)

**Squire Patton Boggs:** Shareholder Engagement: Governance Experts Share Perspectives

<http://www.squirepattonboggs.com/~media/files/insights/publications/2016/06/shareholder-engagement-governance-experts-share-perspectives/shareholderengagement.pdf>

**Gibson Dunn:** ISS Releases Survey for 2017 Policy Updates

<http://www.securitiesregulationmonitor.com/default.aspx>

