

BUSINESS LAW TODAY

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A corporation's main objective, and many would agree, legal obligation, is to make money and maximize profits for its shareholders, but should more be asked or required of today's successful businesses? For an ever increasing segment of society, the answer without a doubt is "yes." This article will examine environmental sustainability and why it matters for business.
- **Sustainability Reporting: The Lawyer's Response**

With ever-increasing frequency, clients are seeking advice about reporting and communication on sustainability issues. "What are we legally required to communicate?" "What are we permitted to communicate?" "What can or should we say to stay competitive, and protect business relationships, profitability, and our social license to operate?" This article will help lawyers understand and advise clients on their sustainability communications pressures and needs.
- **Investor Interest in Nonfinancial Information: What Lawyers Need to Know**

More than ever before, investors want nonfinancial information from companies in making investment decisions, such as: what environmental, social, and governance risks does the company face? How is the company managing these risks? How is the company performing on corporate social responsibility and sustainability factors relative to its industry peers? This article addresses the growing interest of investors in nonfinancial information and implications for lawyers in advising their clients.

Departments

- **KEEPING CURRENT: Second Circuit Overturns Insider Trading Convictions of Two Portfolio Managers**

In a blow to the Southern District of New York's impressive run of insider trading convictions, the U.S. Court of Appeals for the Second Circuit has held that insider trading convictions require the government to prove that the tippee knew that the corporate insider received a personal benefit in exchange for disclosing confidential company information.

- **KEEPING CURRENT: Delaware Supreme Court Holds Secured Party Accountable for Filing of UCC Forms**

A recent decision from the Delaware Supreme Court found that a filed UCC-3 termination statement was effective, notwithstanding the fact that the secured party drafted the UCC-3 by mistake and did not intend to terminate the underlying security interest. This case provides a cautionary lesson to secured lenders to prepare UCC forms with care and to document UCC filing authorizations more thoroughly.

- **DELAWARE INSIDER: Softening the Revlon Reasonableness Standard**

The Delaware Supreme Court recently reversed a Court of Chancery ruling holding that a board's actions may have violated Revlon. That decision portends well for directors selling a company, particularly when no competing bid has emerged.

- **MEMBER SPOTLIGHT: An Interview with Caroline D. Pham**

Caroline D. Pham spent time in the nation's capital gaining experience at financial regulators, including the U.S. Securities and Exchange Commission and the Office of the Comptroller of the Currency. Pham was also a Visiting Fellow at GW Law's Center for Law, Economics and Finance, focusing on Dodd-Frank Act implementation and financial regulatory reform. She has lectured on Dodd-Frank Title VII reforms of the swaps market and causes of the financial crisis. Currently, Pham is a Director, Markets Regulatory Implementation at Citigroup Global Markets Inc.

- **INSIDE BUSINESS LAW**

This month's Inside Business Law highlights the Business Law Section's latest book release, discusses the 2014 M&A Deal Points Studies, and reports on a Section member who has received one of Canada's highest civilian honors. We also cover the latest edition of The Business Lawyer, which has articles on the Supreme Court's controversial Hobby Lobby decision, the rights and duties of blockholder directors, common qualifications to a remedies opinion in U.S. commercial loan transactions, and more. We close with a view of the latest survey by the Committee on Cyberspace Law in The Business Lawyer.

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BUSINESS LAW TODAY

Corporate Social Responsibility is Now Legal

Headlines are rife with firms that are “going green” and otherwise incorporating corporate social responsibility (CSR) into their business practices. Businesses are increasingly recognizing not only the tactical advantages of CSR, but are also treating it as a strategic priority critical to the future success of their enterprises. For example, KPMG has found that 83 percent of people surveyed trust a firm more if it is socially responsible. Investors are also responding to the changing marketplace, with one dollar out of every nine dollars under professional management in the United States now involving an element of “socially responsible investment.” In response, the *Economist Intelligence Unit* has found that CSR has risen sharply in global executives’ priorities. Yet until relatively recently, although many firms took advantage of tax-related and other marketplace incentives for greening their operations and supply chains, regulatory compliance was not high on the list of forces shaping the CSR movement. That is now changing.

Although a growing number of firms have been adopting CSR programs and policies over the course of the last decade as voluntary measures with reference to various rationales, we are now witnessing a transition from voluntary CSR measures to hard law by means of the codification of CSR-related societal norms and the advent of CSR-relat-

ed law and regulations in the United States and around the globe. From the SEC’s conflict minerals rules, to California’s Transparency in Supply Chains Act, to the recently adopted European Union directive requiring nearly 7,000 companies in the EU to report on non-financial sustainability matters – it is impossible to ignore the fact that CSR is now inherently legal.

Business Law Today, in conjunction with the ABA’s [Corporate Social Responsibility Law Task Force](#), is pleased to introduce the emerging and increasing important practice area of corporate social responsibility law by publishing five articles covering five different fields within this practice area: CSR stakeholder engagement; CSR disclosure and reporting; cleantech, energy, and environmental sustainability; labor and workers’ rights; startup CSR and social entrepreneurship; and CSR law for the corporate counsel. These fields correspond to recently established committees within the CSR Law Task Force, with each committee contributing an article to this special publication. Topics include investor interest in nonfinancial information, the business case for environmental sustainability, the evolving legal requirements policing human trafficking and child labor in supply chains, recent developments in sustainability reporting, and the benefits of CSR stakeholder engagement.

This special issue serves as the launch vehicle for these new substantive committees of the CSR Law Task Force, the creation of which represents the next crucial step in the ABA Business Section’s ongoing commitment to be a clearinghouse, thought leader, and primary source of education and training in the field of CSR Law. We encourage readers with any interest in this practice area to take the step of joining the CSR Law Task Force, as there is much important work to be done. The committee chairs will be introducing the work of their committees at the 2015 Business Law Section Spring Meeting in San Francisco, so we hope to see you there. You may also contact Ashley Walter at awalter@fenwick.com or 206-389-4556 if you have any questions regarding membership in the CSR Law Task Force.

Ashley C. Walter
Chair, Corporate Social Responsibility Law Task Force; Chair, Fenwick & West Corporate Social Responsibility Practice Group

Scott J. Shackelford
Assistant Professor of Business Law and Ethics, Indiana University; W. Glenn Campbell and Rita Ricardo-Campbell National Fellow, Stanford University Hoover Institution

BUSINESS LAW TODAY

Corporate Social Responsibility Stakeholder Engagement: Opportunity for Business to Thrive?

By [Keith T. Vernon](#)

It's Friday afternoon and you find yourself in a group lunch with business and attorney colleagues when a colleague shares with the group his work in preparing for an upcoming "CSR stakeholder engagement." Unaware of what exactly a CSR stakeholder engagement is, you excuse yourself, Google "CSR," and quickly find information on corporate social responsibility. You learn that CSR comprises many aspects of intentional corporate work designed to help a corporation operate at its highest ethical and legal level including engaging on specific social issues that impact its business. It is here that a corporation may engage on high impact issues affecting its business including human rights, water stewardship, and human trafficking.

Comforted with your CSR Google research, you then Google "stakeholder engagement." You learn that stakeholder engagement is a way for a corporation to reach out and meet with parties interested in the corporation's business impacts on social issues – for example, how a corporation manages its water use in water-stressed parts of the world – ensuring its impact on the community is managed carefully and its need for water to operate its facilities is preserved. The engagement is designed to provide a formal process for communication between committed stakeholders and corporate representatives allowing stakeholders to detail

business concerns and engage with the corporation on ways to impact the issues.

Both terms seem to make sense and even sound a bit familiar. Armed with your Google knowledge, you confidently rejoin lunch, where you listen and nod as the conversation progresses. After lunch you find yourself asking yourself the question – what really is CSR stakeholder engagement? And more importantly, do I need to know more about what this area of business entails? The answer may very well be "yes." If your practice includes advising businesses on internal policies and procedures, external policies and procedures, supplier contracts, governance, compliance, public relations, or even more generally issues related to corporate responsibility and contractual obligations including requirements within the supply chain, then you may someday find yourself providing counsel related to the issues in a CSR stakeholder engagement. You may someday be asked to join a stakeholder engagement to provide initial guidance on the impact that a new human rights policy would have on the corporation's operations around the world. The issues could be many, including understanding the laws that would apply both in the United States and other countries in which the corporation operates. You may be asked to consider the compliance and transparency obligations that would come

from the adoption of a corporate-wide water stewardship policy. You may be asked to advise on the effects that arise from the information reporting that may come from the adoption of the policy. More practically, you may be asked to provide advice on the practical growing contractual effects such a policy could have or require of your client's current and future contracts within the supply chain.

Some CSR Stakeholder Engagement Fundamentals

Stakeholder engagement, when done at its best, is an opportunity for a corporation to carefully listen to issues raised in the engagement, work to fully understand the viewpoints presented around the issues, and then engage in dialogue, response, and action where warranted. There are many styles and practices designed to create an environment for a successful dialogue. A few practices are critical. The party seeking the engagement must be well-informed with facts and supporting information in raising the issues which it seeks to engage on. The party seeking engagement should invest the time to understand the business operations and business environment in which the business it seeks to engage operates: without fully understanding the business operations, meaningful dialogue can be challenging. The party seeking the engagement must work to

establish trust within the engagement, ensuring that parties at the table seek to understand one another's positions and concerns in good faith. At the core of the engagement, the party seeking the engagement must work to make the business case for why the concern being raised is one which, once addressed thoughtfully, will create business value for the corporation. The corporation, if it hopes to benefit from the engagement, will have its best opportunity to do so if it enters the engagement with a true willingness to hear and understand the concerns being raised – committed to carefully listening to the positions being advocated and determining throughout the length of the engagement the opportunity for growth that may come from implementing responsive action to the concerns being raised. Stakeholder engagement is done best when the critical process of “trust and respect” is established – simple, yet essential to the process: true trust and respect. Once the information and facts supporting the concerns are fully evaluated and understood, a process for good faith engagement can move forward. The components of a CSR stakeholder engagement can vary from engagement to engagement, but the fundamental purpose of a stakeholder engagement is to provide a framework for a dialogue (conversation) in which committed stakeholders bring concerns forward to a corporation with the intention of discussing and hopefully coming to consensus in the form of a policy, a practice, or perhaps training designed to address a particular issue. Stakeholder engagements often involve teams including corporate executives ranging from public relations professionals, sustainability professionals, attorneys, and subject matter expert executives matching the dialogue topics. For example, in a dialogue focused on a corporation's human rights policies and actions, you will likely have a corporate representative most familiar with human rights policies and practices within the corporation. Often, for the dialogue team initiating the engagement, teams will include stakeholder representatives and professionals with subject matter expertise committed to having a robust conversation around the concerns being raised.

The Rev. David Schilling, senior program director of the Interfaith Center on Corporate Responsibility, a coalition of 300 faith-based and socially responsible investors founded in 1971, has been working within the stakeholder engagement model for two decades. He has seen the fruit of engagements done well through the efforts of committed stakeholders and corporations set on making the corporation better through well-crafted stakeholder engagements. Rev. Schilling has also witnessed the rising tide of engagements and the breadth of topics being engaged. He adds:

Ten years ago stakeholder engagement for most companies meant episodic, one-off meetings with a few selected stakeholders designed to put out fires. Today, there is an emerging global norm where companies now see ongoing engagement with non-governmental organizations, investors, consumers, and local community groups as essential to assessing and addressing their social and environmental impact on communities. Leading companies incorporate strategic stakeholder engagement into their business plan and see the value in entering equal partnerships with affected communities, whether it's a beverage company in India on water scarcity, an apparel company in Bangladesh on wages, fire, and building safety, or a food retailer sourcing seafood from Thailand confronted with slave labor.

Just How Relevant is CSR Shareholder Engagement?

To begin to shed light on whether CSR engagement is “opportunity for business to thrive,” we move beyond the quick Google research and see what CSR means to professionals operating in the CSR world. Bart Alexander, principal at Alexander & Associates LLC, has been operating in the corporate responsibility world for decades, including serving as the chief corporate responsibility officer for Molson Coors. Bart accepts the evolving nature of CSR and the fact that the term means different things to different folks, but believes that CSR at its

core is fundamental to the long-term success of a corporation, adding:

CSR simply means making money the ‘right way,’ which requires simultaneously building shareholder value, providing social benefits, and enhancing our physical environment. Of course, there are many puts and takes to be weighed, which will vary in relative importance depending on what time frame is used. Typically, there are a number of CSR strategies, such as improving eco-efficiency, that make good financial sense in the short run. However, some of the transformational changes that will produce the greatest financial, social and environmental impacts will require a longer time horizon to demonstrate ROI.

Alexander acknowledges that making the case for strong CSR initiatives within the context of all the other business concerns a corporation may be dealing with can be a challenge, and that the business case for CSR – the “why” is CSR-relevant – is essential and must be made well, adding:

Across the world, societies are recognizing both the limitations on government capacity and the significant role of the private sector in influencing, if not determining, social and environmental outcomes that go beyond typical measures of shareholder return. Companies that understand these changes will seize the opportunity to be the competitive winners in generating economic, social, and environmental capital. Those that do not may find themselves subject to negative reactions from their customers in terms of market performance and the public in terms of regulation and taxation.

Well, that sounds good, right? Corporations certainly aspire to be ethical in their practices and very often engage in rigorous analysis to develop strong, consistent, and fair policies. For example, most companies have in place procedures to ensure fair employment practices for their employees. And most companies set forth specific policies to ensure compliance with all applicable laws. You may even have clients

who have called upon you for help in constructing a policy to ensure guidelines for responsible water use and runoff within its manufacturing plants throughout the world. And, some of these policies and procedures may have been driven by stakeholder engagement. So perhaps, as you reflect a bit, you already are involved in some aspects of business decisions within CSR policy and actions. As many forces push to create growing levels of corporate compliance and transparency (including within supply chains), corporations are moving to meet these demands through many mediums, including through actively engaging in stakeholder engagements.

But is CSR stakeholder engagement really that relevant, and are business leaders interested in CSR? If you ask Father Nicky Santos, SJ, he would work to convince you they are! Father Santos brings a particularly unique perspective to CSR stakeholder engagement as he has served on stakeholder engagement teams and teaches business marketing ethics – standing at the intersection in which business seeks to grow while recognizing the growing number of issues that can impact a business – and the value a well-crafted CSR and stakeholder engagement plan can bring to the corporation. Father Santos, a Jesuit priest and professor at Marquette University's School of Business, believes CSR and stakeholder engagements have moved up the business chain within a corporation to now stand as a highly critical piece for corporations (intentional with their operations and actions impacting business both today and into the future) that have a long-term horizon. Father Santos is encouraged to see corporations standing up and engaging in good faith dialogues with the purpose of understanding concerns that are being raised and seeking to find solutions that will add shareholder and societal value. Father Santos believes CSR stakeholder engagement is business opportunity and opines that some of this is driven by a deep belief within today's business leaders wanting to impact the world in a positive way as they seek to fulfill the business operation goals they set out to achieve. Father Santos notes a growing shift in just how important the

idea of doing well in business while ensuring your impacts on the world are managed responsibly, and adds:

I see a big shift in student attitudes towards CSR, from when I did my MBA some years ago at Marquette, to the students I now have in my class. When I did my MBA, there were just a few students who would subscribe to the stakeholder model and to CSR concerns. Today, it is just the reverse. Most MBA students expect companies to be good corporate citizens and to care about social and environmental issues. This perspective is even more pronounced in the undergraduate classes. It is almost like a given.

CSR Stakeholder Engagement is an Opportunity to Thrive

Given the increasing presence of committed and well-informed stakeholders raising issues impacting corporations' immediate and long term success, engagement with committed and well-informed stakeholders is indeed an opportunity. With the increasing compliance and transparency demands on corporations, a committed CSR program with careful attention to stakeholder engagement should prove to provide short-term and long-term advantages for a corporation. Alexander thinks that stakeholder engagement opens opportunities for corporations committed to innovation and growth. He adds:

Engagement with diverse stakeholders exposes the company to new information that may inform previously unknown risks and opportunities. I encourage companies to focus their stakeholder engagement, first, on those key stakeholder groups who materially impact the business, and second, on the issues that really matter to those key stakeholders. The people and the issues are very different for different companies, depending on their products and services as well as geographical footprint. While the initial focus will be on what the companies can do themselves, over time, the greater value lies in forging partnerships with other companies, governments, and civil soci-

ety organizations to effect meaningful and sustainable change. Companies that don't intend to adapt to a changing environment should probably eschew stakeholder engagement, which might expose risks and concerns that need attention, and which if left unaddressed, create liabilities. Similarly, addressing new opportunities would require business changes, so these prospects are probably best left to more flexible and adaptive competitors.

Father Santos believes the business case for a careful and well informed stakeholder dialogue is solid. With the benefit of seeing the fruits of a multi-year engagement around complex and significant human rights issues with a large corporation resulting in the adoption of a world-wide human rights policy, Father Santos has seen the benefits that can come to a corporation engaged in a trusted and committed dialogue. He adds: "what the corporation did as a result of adopting this policy was to intentionally require their executives, employees, suppliers, and contractors to adhere to the tenets of this policy, thereby reducing possible human rights violations."

When done well, stakeholder engagement should be a win for all sides. A growing number of business leaders are coming to view CSR work as essential as the very quality of the product they provide and service they offer. These leaders view CSR engagement as an avenue to engage pressing societal concerns that also impact their businesses. By engaging in meaningful dialogue and working toward ways their companies can mitigate down their risks and impacts on the concerns raised, these leaders contribute to answering the call to very real problems that will likely impact their companies either today or in the future. Businesses that invest in CSR and listen carefully to the concerns raised by committed stakeholders will be poised to benefit from the engagement and thrive well into the future.

Keith T. Vernon is principal of the Vernon Law Firm, practicing in Washington, D.C.

BUSINESS LAW TODAY

The Important Role for Socially Responsible Businesses in the Fight Against Human Trafficking and Child Labor in Supply Chains

By [E. Christopher Johnson, Jr.](#)

The general view of human trafficking is that it is something only occurring “over there,” in places such as Africa and India. However, this perception is wrong. Trafficking is a problem not just “over there,” but right here, right now. Indeed, trafficking and child labor abuses are part of our lives right here, right now.

For example, slavery may taint the computer, smartphone, or tablet that you are using right now. A recent NGO study by [Verité](#) shows that one in three Malaysian electronics workers toil at forced labor. Slavery may have tainted the shrimp that you enjoyed last week. A recent investigation by *The Guardian* cited evidence that threats of extreme violence may have forced slaves to toil without pay for years harvesting shrimp in Thailand for sale abroad. The bad news is that these and other similar situations exist. The good news is that as businesspeople, there is something that we can do about it. As an example, *The Guardian* reports on efforts by businesses to form a task force to address the shrimp issue.

You might be wondering, is this really an article in *Business Law Today*? Did I click the wrong link? You’ve got the right link. This article addresses two significant initiatives of the Business Law Section: its [Corporate](#)

[Social Responsibility Law Task Force](#) and its [Working Group on Model Business and Supplier Policies on Labor Trafficking and Child Labor](#). These supply chain and corporate social responsibility initiatives work together. While basic social decency demands elimination of labor trafficking from supply chains, corporate social responsibility supplies the business case for doing so.

The Supply Chain Issue

The International Labor Organization (ILO) estimates that 20.9 million individuals worldwide are victims of human trafficking. Of that number, 14.2 million are victims of forced labor or labor trafficking, and 4.5 million in sex trafficking or forced prostitution. As illustrated above, many of these slaves support the supply chains of products that we all use. As further confirmation, one only need look at the December 2014 version of the [U.S. Department of Labor List of Goods Produced by Child Labor or Forced Labor](#) to identify 136 goods in 74 countries produced in this manner (child labor is estimated by the ILO at 168 million).

Human trafficking and child labor are against the law everywhere. Yet the reality is that in the countries “over there” where trafficking is most prevalent, the rule of law

isn’t what it is in this country. The problem is that slaves produce goods that enter the supply chains of goods made here, used here, worn here, and eaten here. True, the Supreme Court took the teeth out of the Alien Tort Claims Act with its *Kiobel* ruling. Yet Congress still knows how to write laws (like Dodd-Frank’s conflict-minerals provision) having extraterritorial reach. As I counseled students in my LL.M. course on Corporate Professional Responsibility, basing risk management on nonenforcement of existing laws is unduly risky business.

Responsible businesses already know about the supply chain problem and are trying to do something about it. They include a group that belongs to the [Global Business Coalition Against Trafficking](#) (gBCAT). Members include Carlson, Cison, Coca Cola, Delta Airlines, Hilton Worldwide, LexisNexis, Ford Motor Company, Manpower, NXP, and Travelport. The coalition has several worthwhile initiatives that dovetail nicely with the ABA Model Principles (Model Principles) and Policies (Model Policies) discussed below.

Trafficking’s and child labor’s tainting of supply chains starts here in the United States and in other mature economies with consumer demand for cheap goods and services.

Demand drives corporations to exact lower prices from supply bases. Price pressure, exacerbated by globalization, outsourcing, and use of labor brokers lead to exploitation of workers. Foreign workers are easily exploited because so many are extremely poor. Among the laborers my wife and I encountered in India, 20 percent live on one dollar a day, 50 percent are malnourished, 67 percent can't read, and 33 percent don't have access to safe drinking water. Consider that the present value of a single slave working in early nineteenth century America would be \$40,000, while today, a slave sells in the sex or labor-trafficking market for just \$90. Noted slavery expert Kevin Bales understandably titles his book citing these statistics *Disposable People*.

Certainly, supply chain exploitation and other forms of trafficking like forced prostitution, which goes on both in the United States and abroad (*see* U.S. State Department Trafficking in Person Reports) conflict with the concept of human dignity that all major religions and atheists alike recognize. The Declaration of Independence provides "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Similarly, the UN's Universal Declaration of Human Rights states, "All human beings are born free and equal in dignity and rights. . . . Everyone has the right to life, liberty and security of person. . . . No one shall be held in slavery or servitude."

The business question is whether moral considerations like those in the ABA Model Principles are enough to motivate a corporation to act. Maybe so, but maybe not. My experience is that in certain situations the personal moral standards of a CEO or board will lead a corporation to address social issues. Yet a surer way to ensure that responsible action survives leadership change or insensitivity is to base that action on a business case.

The Case for Corporate Social Responsibility

Corporations address social issues under the banner of corporate social responsibility

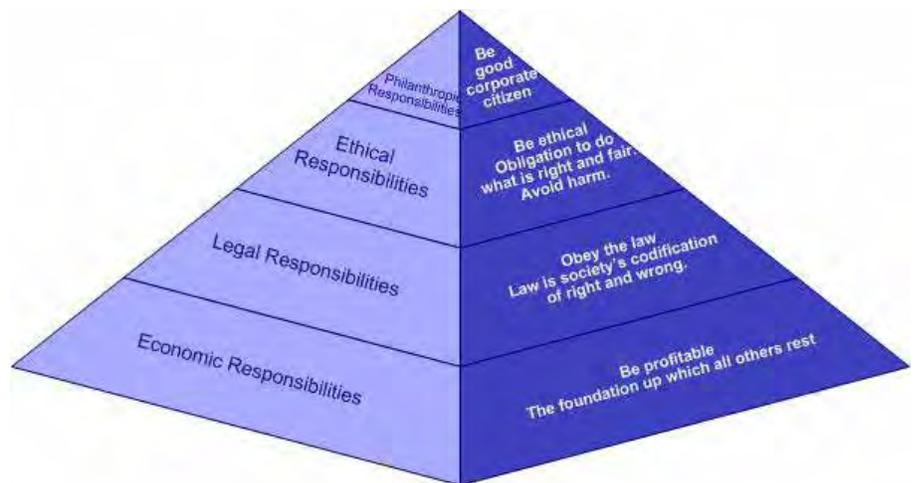
(CSR), also known as corporate citizenship, corporate responsibility, sustainability, social enterprise, triple bottom line, or corporate ethics. A member of the Business Law Section's CSR Task Force, Stanford Law School Professor Chip Pitts, coauthored the premier law school text on the subject, *Corporate Social Responsibility: A Legal Analysis*, urging that we view CSR as a set of assessment, strategic-development, and commitment practices.

The widely recognized Carroll Model defines CSR as "the economic, legal, ethical and philanthropic expectations placed on organizations by society at a given point and time." The Carroll Model depicts a pyramid with the economic imperative to generate a profit at the base, on top of which lie legal obligations to obey the law, ethical

obligations to do what is right and fair, and philanthropic obligations to be a good corporate citizen.

An alternative also puts economic obligations at the base, but then represents legal, ethical, and philanthropic obligations as concentric circles sitting on the base. This representation illustrates that while some CSR obligations fall squarely within one category, others overlap two.

Supply chain efforts to address trafficking primarily fall into the ethical area, because guides like the ABA Model Principles and Policies and UN Guiding Principles are voluntary. Yet California's Transparency in Supply Chain Act is one state supply chain law already on the books. This law, like the proposed federal law H.R. 4842 discussed below, requires corporations to disclose actions



Carroll's CSR Pyramid



to clean up the supply chain rather than actually undertaking actions to do so, as Dodd-Frank's conflict minerals law requires.

Significant potential criminal penalties and civil liability already attend labor trafficking. Congress enacted the Trafficking Victims Protection Act in 2000. Offenders also violate Title VII, the Fair Labor Standards Act and state equivalents, and the Thirteenth Amendment. Corporations could also consider the social and ethical implications. They already do in the environmental arena, where although laws like the Clean Air Act, Superfund, Resource Conservation and Recovery Act, and Clean Water Act certainly provide heavy regulation, voluntary green initiatives in some instances nonetheless predominate.

Extensive discussion on the Business Law Section Model Policies Working Group website make more of the moral and social case for addressing trafficking in the supply chain.

The Business Case

We have yet to consider the business reasons why corporations would voluntarily model their supply chain policies after the ABA Model Principles and take appropriate action. The business risks include unstable supply chains. Worker unrest over trafficking or trafficking-related issues can lead to work stoppages, consumer boycotts, product quality issues, and product recalls. Even without direct economic impact, media reports that a company has slaves in its supply chain can cause huge reputational damage, loss of investor confidence, and enormous stock-value loss.

You should now clearly see the value to a proactive policy to eliminate trafficking and child labor from the supply chain. One sure way to address the issue is to adopt and implement the ABA Model Principles. By doing so, corporations can increase the supply chain stability and sustainability while increasing reputation for responsibility. Appealing to the growing number of socially conscious consumers can increase sales. Institutional investors are also becoming more socially conscious. Due in large part to the 2012 collapse of Bangladesh's Rana Plaza, in which 1,100 workers lost their lives, insti-

tutional investors controlling \$4.2 trillion in investments continue to advocate for worker safety while urging companies to commit to a trust fund established to provide victim and family assistance.

Legal Consequences Affecting the Business Case

Potential financial impacts from legal exposure are also growing. Beyond the Trafficking Victims Protection Act, the House of Representatives' Business Transparency on Trafficking and Slavery Act bill (H.R. 4842) would, if enacted, require disclosure similar to California's Transparency Act, although federal disclosure would be to the SEC. Ahem: *the SEC*. The administration also backs proposed regulations to implement President Obama's Executive Order on Trafficking in Federal Contracts, which would in some cases require mapping the supply chain. Potential Foreign Corrupt Practices Act liability also exists when a company uses a labor broker.

State laws are also becoming tougher in this area. With the assistance of University of Michigan Law trafficking expert Bridgette Carr and others, Michigan's Attorney General Bill Schuette led a group of legislators including State Senator Judy Emmons in securing the adoption of 22 provisions toughening existing laws fighting sex trafficking and protecting its victims. The National Association of Attorneys General remains engaged in fighting trafficking. While the present focus is on sex trafficking, labor trafficking could easily become more of a focus.

Internationally, law-reform advocates in 2013 approved the Uniform Law Commission Model Human Trafficking Law. Advocates also propose UN treaty negotiations to increase the responsibility of businesses to remedy of human rights violations. The European Union and India are each instituting corporate reporting on CSR issues.

Litigation on behalf of trafficking victims also increases as the movement identifies more trafficking victims. An EEOC lawsuit involving Henry's Turkey Service of Texas led to \$242 million in damages based on findings involving alleged abuse of 32 men-

tally disabled turkey plant workers whom employers for decades paid hourly rates as low as 41 cents. A recent class action lawsuit involving 350 Filipino teachers whom corrupt labor recruiters charging exorbitant fees allegedly lured to teach in Louisiana public schools returned \$4.5 million in damages for the teachers. A prominent plaintiff's lawyer noted at a recent conference that damages could easily exceed \$150 million even in cases involving as few as 100 employees. The array of potential civil causes of actions includes a private right of action under the Trafficking Victims Protection Act, Thirteenth Amendment, Ku Klux Klan Act, Civil Rights Act of 1866, Alien Tort Claims Act, RICO, Fair Labor Standards Act, Title VII, and state labor codes, plus common law claims for intentional torts, negligence, and breach of contract claims.

Professional Responses

During the 2012 tenure of Laurel Bellows as ABA president, the American Bar Association formed a Human Trafficking Task Force to attack human trafficking from a professional standpoint. Efforts include training for lawyers and law enforcement officials who are often the first to respond to trafficking reports, strengthening pro bono networks to ensure that all civil legal needs of trafficking victims are addressed, and a media campaign including a video explaining how the legal community can help. See Laurel Bellows, "[Breaking the Shackles: More Must Be Done to End Human Trafficking and Help Victims](#)," *ABA Journal*, Sept. 1, 2012.

President Bellows asked the ABA's Business Law Section to develop business practices for corporations encountering and addressing human trafficking. While certain businesses have adopted and implemented codes of business conduct to address labor trafficking including child labor in their operations, other businesses have not done so. U.S. corporations have not yet widely adopted standard business conduct codes. Even corporations that do have codes in place can benefit from periodic policy review to reflect evolving best practices particularly around trafficking.

The Business Law Section responded to this request by creating a Working Group made up of over 50 leading business law experts who prepared the ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor. The Model Policies consist of six parts: Part I Introduction, Part II Model Principles, Part III Model Business Policy, Part IV Model Supplier Policy, Part V Model Glossary, and Part VI Endnotes.

The Model Policies assist both corporations and their suppliers currently having labor trafficking and child labor policies in place, but wishing to update those policies, and also corporations and suppliers lacking any current policy. The Model Policies can stand alone or be adapted for particular industries and be incorporated into existing business codes of conduct.

The Model Principles form the centerpiece of the Model Policies. The ABA House of Delegates formally adopted the Model Principles as ABA policy, apart from the balance of the Model Policies. In addition to adopting the Model Principles as ABA Policy, the ABA House of Delegates in a second resolution urged businesses to adopt policies consistent with the Model Principles. Four Model Principles address both businesses and suppliers:

- Principle 1 – The Business/Supplier will Prohibit Labor Trafficking and Child Labor in its Operations.
- Principle 2 – The Business/Supplier will Conduct a Risk Assessment of the Risk of Labor Trafficking and Child Labor and Continually Monitor Implementation of this Policy.
- Principle 3 – The Business/Supplier should: (i) Train Relevant Employees, (ii) Engage in Continuous Improvement, and (iii) Maintain Effective Communications Mechanisms with its Suppliers.
- Principle 4 – The Business/Supplier will Devise a Remediation Policy and Plan that Addresses Remediation for Labor Trafficking or Child Labor in its Operation.

The Model Principles are consistent with the UN Guiding Principles on Business

and Human Rights, which are the globally recognized guidelines on the roles of states and business enterprises in addressing human rights issues. The Guiding Principles recognize that: (1) states have existing obligations to respect, protect, and fulfill human rights and fundamental freedoms; (2) business enterprises including suppliers must comply with all applicable laws and respect human rights; and (3) rights and obligations should carry appropriate and effective remedies when breached.

The Model Policies' Parts III and IV consist of two main parts. Four Model Business and Supplier Policies each relate to one of the Model Principles. Each Model Policy starts with a statement of the applicable Model Principle. A commentary and guidance section recommends provisions to use in a business enterprise's policy or code of conduct. These Model Policies are not ABA policy in the same manner as the Model Principles, hence a business enterprise can modify any or all of the provisions to suit its environment.

The Model Policies' Parts V Definitions and VI Endnotes are also part of the Model Policies and as such were not adopted by the ABA as policy.

Companies are undertaking more ethical activities related to trafficking, beyond those related to the ABA Model Policies. The Working Group plans a database of resources to permit companies to post their policies and other relevant materials for sharing with others. For example, Apple's code of conduct requires suppliers to refund to workers any excessive recruitment fees. Since 2008, this initiative has resulted in \$17 million going back to workers, \$3.9 million during the last year.

Philanthropic Consequences

Corporations have demonstrated good corporate citizenship in this area. These efforts include the corporations mentioned earlier that formed the Global Business Coalition Against Trafficking. This initiative can become much more than philanthropic as this coalition develops additional tools. Some of those same corporations are signatories

to the Luxor Implementation Guidelines to the Athens Ethical Principles, including the Gap, the Body Shop, Microsoft, and Manpower. Microsoft and Manpower are members of End Human Trafficking Now. Google had donated \$11.5 million to Polaris and International Justice Mission to Fight Human Trafficking. Hilton Worldwide, Carlson/Radisson, and Delta Airlines have signed the ECPAT Code.

Conclusion

Lawyers discern the legal, financial, ethical, and moral risks of noncompliance with local, state, and federal laws, and international norms and rules, or the "rule of law." We do not substitute the public good for shareholder return. CSR starts with a corporation's economic interests and then moves through the legal, ethical, and philanthropic opportunities and concerns. Lawyers help corporate boards and CEOs recognize the risks of violating laws and the long-term reward of acting within those laws, even when others might pursue short-term rewards carrying unacceptable risks. Model Rule 2.1 permits lawyers to consider social and moral concerns relevant to its client's situation in rendering legal advice. Yet lawyers should go beyond advocating correction of social or moral wrongs to also articulating a cogent business case. Lawyers can help corporate leaders communicate to shareholders broad and lasting value from eradicating trafficking from the supply chain. Doing so can build and protect equity while appealing to the growing number of customers, shareholders, and investors who care about human rights. Conversely, making a profit off of slavery presents unacceptable social, legal, litigation, and reputational risks that no corporation should accept as it could lead to significant erosion of a company's business

E. Christopher Johnson, Jr. is CEO and Co-Founder of the Center for Justice, Rights & Dignity and the retired General Motors North America Vice President and General Counsel.

BUSINESS LAW TODAY

The Business Case for Environmental Sustainability

By [E. Lynn Grayson](#) and [Gary P. Kjelleren](#)

A corporation's main objective, and many would agree, legal obligation, is to make money and maximize profits for its shareholders, but should more be asked or required of today's successful businesses? For an ever increasing segment of society, the answer without a doubt is "yes." The concept, commonly referred to as corporate social responsibility (CSR), extends beyond compliance with legal mandates or even charitable donations and good deeds. CSR advocates believe a company has a clear duty of care to all stakeholders connected to or impacted by a company's operation.

A number of green issues are emerging as key components in a more global initiative to hold corporations socially, and if possible, financially responsible for their actions and inactions. Sustainable development, as a critical component of CSR, takes into account social, economic, environmental, and natural resource issues potentially affected by business. With growing awareness worldwide of environmental concerns, the CSR component of sustainability is focused on environmental sustainability. Environmental sustainability generally addresses how the needs of the present can be met without compromising the ability of future generations to meet their own needs

with emphasis on protection of natural resources and the environment.

CSR and environmental sustainability at first blush appear newer, more trendy philosophies, but in reality are deeply rooted in the kinds of challenges companies have confronted over the last century such as pollution, corruption, child labor, and poor worker conditions. Similar challenges exist today as companies seek new international markets and expand globally into areas that present not only business opportunities but also more operational risk. This is particularly evident in the environmental arena where critical business needs for water, energy, and raw products must coincide and be balanced with care for stakeholders and the environment. How companies manage these modern-day challenges does matter, as evidenced in a new study by Nielsen. This year's Nielsen Global Survey on Corporate Social Responsibility polled 30,000 consumers in 60 countries to understand how passionate consumers are about sustainable practices when it comes to purchase considerations; which consumer segments are most supportive of ecological or other socially responsible efforts; and, which social issues/causes are attracting the most concern. One key finding is that

55 percent of global online customers are willing to pay more for products and services provided by companies that are committed to positive social and environmental impact.

This article will examine environmental sustainability and why it matters for business. The authors will detail key environmental sustainability focus areas and outline a roadmap of essential considerations companies should incorporate into any environmental stewardship initiatives. Lastly, we conclude that there is a business case for environmental sustainability that will improve financial performance.

What is Environmental Sustainability?

The terms "environmental sustainability" or "sustainable development" are widely used, but the United Nations World Commission on the Environment and Development is credited with developing these concepts in its 1987 report titled *Our Common Future*. In that report, the World Commission defined "sustainable development" as development which "meets the needs of the present without compromising the ability of future generations to meet their own needs." The greening of the U.S. economy has focused increased scrutiny on environ-

mental issues, laws, and policies and focused much more attention and emphasis on environmental sustainability initiatives. In a recent report titled *Taking Flight: Environmental Sustainability Proposals Gain More Attention*, it is interesting to note that Ernst & Young found the three largest sustainability topics were all environmental issues including climate change/sustainability, energy efficiency/recycling, and energy extraction risks.

While environmental sustainability appears a new concept, it really has roots in conservation, land management, and protection of natural resources which are age-old mandates in the United States. In 1966, Lyndon B. Johnson commented on environmental conditions and even on the sustainability of the environment: “. . . To sustain an environment suitable for man, we must fight one-thousand battlefields. Despite all of our wealth and knowledge, we cannot create a redwood forest, a wild river or a gleaming seashore. But we can keep these we have.”

Understanding what environmental sustainability means, its priorities, and how the same are measured remain an ongoing challenge. The Global Reporting Initiative (GRI), a well-known leader in developing a sustainability reporting framework, incorporates key environmental performance indicators into its sustainability guidelines:

Materials

- Materials used by weight or volume.
- Percentage of materials used that are recycled input materials.

Energy

- Direct energy consumption by primary energy source.
- Indirect energy consumption by primary source.
- Energy saved due to conservation and efficiency improvements.
- Initiatives to provide energy efficient or renewable energy-based products and services, and reductions in energy requirements as a result of these initiatives.
- Initiatives to reduce indirect energy consumption and reductions achieved.

Water

- Total water withdrawal by source.
- Water sources significantly affected by withdrawal of water.
- Percentage and total volume of water recycled and reused.
- Total weight of waste by type and disposal method.
- Total number and volume of significant spills.
- Weight of transported, imported, exported, or treated waste deemed hazardous under the terms of the Basel Convention Annex I, II, III, and VIII, and percentage of transported waste shipped internationally.
- Identify size, protected status, and biodiversity value of water bodies and related habitats significantly affected by the reporting organization’s discharges of water and runoff.

Biodiversity

- Location and size of land owned, leased, managed in, or adjacent to, protected areas and areas of high biodiversity value outside protected areas.
- Description of significant impacts of activities, products, and services on biodiversity in protected areas and areas of high biodiversity value outside protected areas.
- Habitats protected or restored.
- Strategies current actions and future plans for managing impacts on biodiversity.
- Number of IUCN Red List species and national conservation list species with habitats in areas affected by operations, by level of extinction risk.

Emissions, Effluents, and Waste

- Total direct and indirect greenhouse gas emissions by weight.
- Other relevant indirect greenhouse gas emissions by weight.
- Initiatives to reduce greenhouse gas emissions and reductions achieved.
- Emissions of ozone-depleting substances by weight.
- NO, SO, and other significant air emissions by type and weight.
- Total water discharge by quality and destination.

Products and Services

- Initiatives to mitigate environmental impact of products and services, and extent of impact mitigation.
- Percentage of products sold and their packaging materials that are reclaimed by category.

Transport

- Significant environmental impacts of transporting products and other goods and materials used for the organization’s operations, and transporting members of the workforce.

Compliance

- Monetary value of significant fines and total number of nonmonetary sanctions for noncompliance with environmental laws and regulations.

Overall

- Total environmental protection expenditures and investments by type.

These environmental performance indicators serve as an important reference for an interpretation and understanding of environmental sustainability concepts.

The Importance of Environmental Sustainability

For businesses, being a good corporate citizen certainly is part of the CSR philosophy encouraging companies to give back in the communities where they live and work. CSR and environmental sustainability go beyond the “good corporate citizen” approach, however, and motivate companies to develop environmental and community outreach initiatives and to establish related policies applicable not only to company personnel but downstream suppliers and other vendors.

Almost three-quarters of the U.S. companies on the S&P 500 publish corporate sustainability reports according to research from the Governance & Accountability Institute. Despite growing pressure from green investor groups and organizations like the GRI, sustainability reporting in any meaningful way remains a largely volun-

tary effort on the part of American companies. New European Union requirements for sustainability reporting going into effect in 2017 will convert these voluntary efforts into legally mandated ones. These new reporting requirements will apply to 6,000 companies in the EU and will impact a number of U.S. businesses. The GRI sustainability reporting framework has been recommended as a possible platform for the EU reporting obligations. Similar to GRI reporting requirements, the EU directive will seek disclosure on policies, risks, and impacts regarding human rights, diversity, environmental matters, and other social considerations.

Increased or legally mandated sustainability reporting may actually help promote and enhance performance measures for companies that have made environmental sustainability a core element of their business strategies. A recent GreenBiz blog by Daniel Esty highlights the common disconnect between sustainability-related competitive strengths versus improved shareholder value – a concern that better sustainability reporting might improve. In his blog, Mr. Esty identifies several problems that need to be addressed regarding environmental, social, and governance (ESG) data currently available.

1. “Value” investors in the past wanted to exclude polluting companies and other bad actors from their portfolios. A wider range of investors today are interested in sustainability-driven growth, productivity gains, and risk reduction. The new “value” investors need a different set of sustainability metrics, including indicators tightly focused on financial results.
2. The sprawling nature of data available lacks clarity on what is important or possibly material. Mr. Esty notes “. . . What is critical to engaging the broad investor community are metrics that are meaningful from an investor perspective rather than from an environmentalist point of view. Thus, we argue for a ‘value driven model’ that centers on a core set of sustainability

metrics cast in language familiar to the Wall Street world.”

3. Existing ESG data is not action or results oriented in a manner useful to investors.
4. Concern exists over the quality of data often self-reported by companies.

Significant research exists supporting the competitive advantage benefits of environmental sustainability. Commonly cited improvements include enhanced corporate reputation, better employee retention and engagement, cost effectiveness, risk avoidance and mitigation, innovation, market expansion and greater access to capital. While these benefits appear impressive, a new language must be developed to translate these impacts into positive financial results if environmental sustainability efforts are to gain marketplace traction.

Key Environmental Sustainability Areas – What Matters?

The environmental sustainability journey is not one-size-fits-all. Each business needs to be clear on why it is making the effort, what it hopes to accomplish, and the scale of its commitment. Having said that, there are a number of typical focus areas. Comparable to most business initiatives, what we measure gets managed. Key performance indicators (KPIs) should be customized to the business needs. Common environmental sustainability concerns include the following.

Energy/Greenhouse Gases/Climate Change

Many businesses have chosen energy use as their first “toe in the water” on the environmental sustainability journey. Energy reduction is usually a “win-win” due to the positive impact on overhead, cost, return on investment (ROI), and commensurate reduction of greenhouse gas emissions. Utility, local, and state incentives are often available and can make the ROI even more attractive.

Energy use is frequently considered in terms of direct and indirect energy or energy used or generated on site and energy used or generated offsite.

Successful energy reduction programs are best started with an energy audit. This can be performed by competent internal facilities personnel, but is more commonly performed by outside consultants or utility representatives. The resulting report should document information on each identified issue including potential cost savings, incentives available, and cost to implement.

Greenhouse gas reductions go hand-in-hand with most energy-reduction strategies. For many manufacturing operations, releases of greenhouse gases from the manufacturing processes are a significant proportion of the overall footprint. As such, a reduction in the amount of energy used has a direct effect on the amount of greenhouse gases resulting from operations.

When deciding on how to approach identification, tracking, and goal setting on greenhouse gases, decisions will need to be made on what to count. Some businesses choose to only count those greenhouse gases arising from operations within their four walls. Others look at issues as far reaching as employee travel, fleet emissions, and life cycle product impacts. Numerous vendors provide greenhouse gas tracking software, which assists in the conversions of different types of energy uses into carbon dioxide equivalents.

Water Use

Water use is an environmental sustainability concern that has recently taken on increased relevance. Drought conditions and the prospects for increased weather severity has caused communities, industry, and regulators to place additional efforts into conservation strategies. Water resources have become increasingly stressed by population growth, contamination of resources, and depletion of groundwater supplies.

Conservation strategies have included closed-loop water cooling, low-flow fixtures, onsite treatment and reuse, gray water collection for irrigation, and xeriscaping.

Water use KPIs include total water used, water used per production unit, water used as a percentage of sales, and percent water reduction.

Waste Reduction/Product Inputs Reduction/Recycling

Products and processes require resource inputs. Furthermore, processes are never 100 percent efficient, so there is waste. Some excess can be reused in product, some can be profitably sold to other businesses, some can be given away or sold at a loss, and some will have to be disposed.

The company on the sustainability journey will seek to improve their resource use to product conversion ratio. A hierarchy of environmental preference can be established to guide the process. It is generally easiest to start with reuse and recycling of materials. Large gains can also be made by working with the supply chain on the reduction of packaging materials being received. Additionally, the types of packaging materials can be specified in order to reduce the volume, improve recyclability, and support reuse for outgoing shipments.

Common measurements may include percent waste recycled, waste per production unit, and total waste disposed to landfill.

Toxics Use Reduction or Elimination

Toxic materials are used to make and are found in many products. There are a host of reasons for reducing the toxicity or minimizing toxic materials, including workers exposure, emissions from our factories, and, ultimately, the health of our customers. This is an area that continues to see traction and has resulted in such things as the organic foods movement and calls for regulating plasticizers in children's toys. Eliminating toxins can be an admirable goal, may be essential to compete, and may also be challenging. Companies can choose to substitute less toxic materials in both the process and the product. This has also become an area of regulatory exposure as the European Union has implemented regulations such as REACH.

Emissions and Effluents

Toxic air emissions and contaminated wastewater are common byproducts of manufacturing. While they may be legal and released under a permit, they still have impact and are increasing the level of pollutants in the environment. Industry is re-

quired to do an annual assessment of these releases and submit reports to their environmental regulators. These reports are public information and are often scrutinized by stakeholders as one indication of a company's environmental performance. Many companies have made a significant effort to reduce emissions to be below reporting thresholds, or at least to be able to show progress on protecting the environment.

Common KPIs are tons released, tons per dollars of sales, and pounds per production unit.

Reduction strategies include substitution or elimination of toxic materials in process and product and process efficiency improvements.

Normalizing KPIs

It is key when selecting normalizing factors that they enhance understanding of performance, not obfuscate it. The clearer the correlation with processes or products, the better. An example from the automotive industry would be KPI per auto produced. Other common normalizing factors are employee hours, sales, or earnings.

Getting Goals Right

Goals drive performance. Properly designed goals have a positive impact on an organization in that they inform the employees that management has selected priorities, provide a frequent reminder of progress, and flow down in a way that identifies the role of each individual in meeting the objective. Where goals often fail is the lack of a plan to achieve them. The plan needs to define actions, individual responsibilities, and timeframes.

KPIs also need to be well defined so that results across the organization are based on the same data inputs. For example, a water use KPI could include water embedded in the product, used for cooling machinery, sanitary facilities, or growing crops.

It is important to make sure that goals are contextually meaningful. KPIs and goals for some facility locations may not have the same relevance and importance as another. Back to the water example again: facilities in the arid regions of the Ameri-

can Southwest and facilities on the shore of a large lake may not warrant the same use reduction objectives.

A Simplified Road Map to Implementation

Start with a shared vision: Each enterprise needs to start with the development of their environmental sustainability vision. As stated earlier, this requires that top management identify their level of commitment to the sustainability journey. This will be influenced by the business culture (or the culture they are trying to achieve), stakeholder interest, the potential to strengthen brand, personal values of leadership, and considerations of moral or ethical positions.

Communicate the vision: Leadership is responsible for the culture in any business and it is no exception for implementing a sustainability program. A successful sustainability program launch requires commitment to communication.

Develop an implementation strategy: It's a project, so manage it with the same rigor you would manage any other important initiative. Identify personnel, resources, objectives, targets, schedule and milestones.

Decide what is important: Once there is a vision, a materiality inventory will help direct the implementation strategy. A company may find that it has very low reportable air emissions, but produce large amounts of toxic waste. The air emissions may not be material and the toxic waste is likely material. There is no requirement that a company work on all material impacts concurrently. A strategy of focusing on the most material issues can be an effective approach.

Determine what to measure and how to measure performance: What are your key performance indicators? How will you normalize? What is your reporting frequency and how will you share this information? Data will need to be collected on each of the target areas. This can get challenging for some aspects, but is commonly available for energy, water, wastewater, hazardous waste, and recyclables. Also be aware that this data should be of a quality that could be audited if you will be communicating it externally.

Develop strategies for each KPI: Affecting the KPIs requires actions. Appropriate teams for each KPI can develop and implement plans to achieve the desired results.

Spend the money but spend it consistent with your values: Nothing can put the brakes on a sustainability program faster than a lack of appropriate resources. Having said that, many businesses look at ROI for various projects. Hurdle rates are sometimes relaxed for projects that have significant brand, employee morale, or stakeholder importance.

Start winning: Early success breeds enthusiasm. As one sustainability director at a large corporation said, “Simple wins are gateway drugs.”

Communicate: There is a theme here – it is pretty hard to overcommunicate when engaged in change. Of course, there is ineffective communication. Do not expect high levels of readership for sustainability e-mails and newsletters. Internal communications are best done at all appropriate levels of management by management.

Continually improve: Turn your implementation into an annual cycle with a goal of improving each year.

Communicate: Will you share your environmental sustainability progress outside your organization? Most companies publish

a sustainability report or a CSR report. Get familiar with organizations which are involved in reporting on environmental performance. As discussed earlier, the GRI, the Carbon Disclosure Project, and the Dow Jones Sustainability Index are examples from a growing list of organizations that have sustainability reporting standards.

Conclusion

According to the United Nations Principles for Responsible Investment (UNPRI), over \$34 trillion (approximately 15 percent) of the world’s investment assets are managed by signatories to the UNPRI who have committed to adopting policies and procedures that factor ESG issues into investment decisions. While not all investors and financial market analysts are convinced that environmental sustainability delivers shareholder value, there is growing belief that companies that are successful in avoiding environmental risks while taking advantage of ESG opportunities will outperform over the long term. The UNPRI economic marketplace statistics support this investment trend.

Moving toward environmental sustainability should work for even the most prudent or conservative business leaders, as implementing environmental sustain-

ability practices present few if any risks to business operations. Moreover, early start-up initiatives easily can be managed in house including identification of key environmental sustainability areas important to your business, assessing sustainability reporting opportunities and other means of communicating environmental sustainability efforts to stakeholders, and development of KPIs and financial performance impacts.

It appears a virtual certainty that environmental sustainability will increasingly move from voluntary to legally mandated initiatives, including sustainability reporting requirements. The critical inquiry for business is no longer if, but how and when to launch a meaningful environmental sustainability program. There is a growing business case for environmental sustainability. It is an added bonus that addressing these business challenges not only will enhance financial performance over time, but is simply the right thing to do as well.

E. Lynn Grayson is a partner and co-chair of Jenner & Block’s Environmental and Workplace Health and Safety Practice. Gary P. Kjelleren is a senior manager with Environ International.

BUSINESS LAW TODAY

Sustainability Reporting: The Lawyer's Response

By [Nancy S. Cleveland](#), [David M. Lynn](#), and [Stephen A. Pike](#)

With ever-increasing frequency, clients are seeking advice about reporting and communication on sustainability issues. “What are we legally required to communicate?” “What are we permitted to communicate?” “What can or should we say to stay competitive and protect business relationships, profitability, and our social license to operate?” “What standards should we use?” This article will help lawyers understand and advise clients on their sustainability communications pressures and needs.

Corporate sustainability is a business management practice. When used strategically, it enhances business value. As a practice, it involves assessing and managing risks and opportunities that arise from environmental, social, and economic impacts of the company and its industry. Assessment is done for short-, medium-, and long-term horizons. This broader and longer-term perspective is essential to realizing value from sustainability management.

As a practical matter, the concept of sustainability management may conflict with some aspects of current corporate law and behavior. These conflicts can be generalized by the reality that most of corporate America focuses on a market-imposed, short-term, single bottom line. But the marketplace is in flux. Perspectives are changing in response

to climate change, population growth, constrained resources, globalization of supply chains, and more transparent and ubiquitous communications. The upshot is growing pressure on businesses to evolve toward a triple bottom line approach: considering social, environmental, and economic impacts over a longer term, and their implications for governance. As lawyers, we will be called upon to help navigate these shifting influences on business management and success.

What's Going On?

Macro Drivers for Sustainability Reporting Pressure

The drivers that are creating pressure on companies to address and communicate more and more about sustainability issues arise from a number of factors, including from a variety of external and internal stakeholders. There are four primary macro drivers that have had, and will continue to have, wide-ranging social, environmental, and economic impacts with the potential to affect businesses everywhere. Being attuned to, and mitigating the risks of, or adapting to those impacts is a key attribute of a sustainable company.

Concern about climate change and greenhouse gas emissions: Rising levels of green-

house gasses in our atmosphere are driving increases in average temperature on the planet. This warming leads to changes in our climate and natural systems, resulting in sea level rise, droughts, floods, severe weather, wildfires, and ocean acidification. Even 2°C of warming will have a significant adverse impact on human health and well-being.

Population growth and resource constraints: World population is on track to reach 9 billion by 2050 and 10 billion by 2100. The global middle class is expected to triple by 2030. At today's pace, global energy demand will increase by 57 percent over the next 25 years. Water use is expected to increase by 50 percent in developing countries and 18 percent in developed countries by 2025. Our current level of consumption utilizes 1.5 Earths to provide resources to meet current demand and absorb waste. These factors will drive prices of all commodities up and lead to serious problems without corrective actions and creative solutions. Businesses have significant risks and opportunities in this respect. See, [World Business Council on Sustainable Development](#); [Energy Information Agency](#); [Geo-4 – Global Economic Outlook](#); [Global Footprint Network](#).

Organizational and global interdependence: Large companies used to have sev-

eral hundred partners and suppliers; today they have thousands, and they are spread across the globe. Companies of all sizes are outsourcing noncore functions, partnering for some core functions, and building larger business networks in general. The greater the number of outside suppliers and service providers upon which a company relies, the more difficult it is to manage the associated risks across multiple geographies. This is true from both a supply chain and reputation management perspective.

Social license and accountability to stakeholders: Public demand for transparency and accountability has increased markedly. An instant information society has emerged from widespread access to social media, the Internet, and cable news. A single individual now has the ability to communicate instantaneously and globally to influence public opinion on a topic or a business. Multiplicities of stakeholders are affected by and interested in how a company manages sustainability issues. Consumers and investors are increasingly factoring a company's ethics, sustainability, and social responsibility into their buying and investment decisions.

Stakeholder Perspectives

Sustainability reporting serves the needs and interests of a wide and growing variety of stakeholders, ranging from investors, employees, customers, and suppliers, to governments, regulators, local community groups, and nongovernmental organizations. Stakeholder reasons for seeking information on sustainability issues, the information they seek, and the lens through which they view the reported information varies. The number and variety of information requests about environmental, social, and governance (ESG) activities is a significant burden for many companies. Accordingly, companies must balance how and to whom they respond.

Investors and customers are the two stakeholder groups that garner the most attention. Companies are influenced by their own investors to pursue sustainability into their supply chains. As a result, understanding what is driving the investment community

to care about sustainability activities and reporting is key.

In many cases, institutional investors care about medium- and long-term value and whether the companies in which they invest are contributing to systemic problems or are conducting their business in a way that helps solve those problems. This is not to say that short-term financial returns are unimportant to institutional investors, but rather, that more and more institutional investors are taking into account a broader range of factors in their investment decisions. Company performance on ESG factors are being included because they are outperformance indicators. Robert G. Eccles, Ioannis Ioannou, and George Serafeim, *The Impact of Corporate Sustainability on Organizational Processes and Performance*, first published November 01, 2011 (dated 11/23/11). In the words of Thomas P. DiNapoli, New York State Comptroller and Sole Trustee of the New York State Common Retirement Fund: "Our goal is simple: we want long-term sustainable economic growth. And we have found from experience that comprehensively integrating environmental, social and governance considerations into the investment process is essential to achieving that goal." Peter Ellsworth and Kirsten Snow Spalding, *The 21st Century Investor: Ceres Blueprint for Sustainable Investing*, 2013, Forward, www.ceres.org.

Pressures to Report; Understanding the Reporting Landscape

Clients are measuring their reporting against that of their peers and competitors. They are gauging social pressure to demonstrate responsible corporate behavior. There have been significant reporting developments, both in terms of the growth in reporting and the number and quality of reporting requirements, standards, or frameworks.

The arguments for not reporting are shrinking day after day for companies that have yet begun to report on their sustainability progress. Now that 53% of the S&P 500 and 57% of the Fortune 500 are reporting on their Environmental, Social, and Govern-

nance impacts, the non-reporters are now in the minority. We believe this minority will continue to shrink as it has in the past few years. The benefits of sustainability reporting will become increasingly obvious as more time passes and the long term benefits are easier to measure.

Governance & Accountability Institute, Inc., *2012 Corporate ESG/Sustainability/Responsibility Reporting, Does It Matter?* (Dec. 15, 2012).

Making Reporting Decisions

Once a company decides to report to stakeholders about its sustainability activities, risks, and opportunities, legal questions arise. Public-facing information about sustainability often starts as a marketing initiative in response to customer interest or as a means of demonstrating social responsibility and philanthropy. This type of information can then become the basis of requests to "verify" information gathered by a rating systems that will report with or without company input or corrections. Other reporting systems, like the CDP (formerly the Carbon Disclosure Project), will request formal reporting and publicize a failure to respond or report. As soon as investors or rating systems get involved, or customer pressure takes the form of supply chain requests, the focus rapidly shifts from a marketing effort. Management begins to ask what the company is legally required to report and what the company should report to support reputation, stakeholder relationships, and business development.

Mandatory Reporting Requirements

1. SEC Filings.

Companies subject to the Securities and Exchange Commission (SEC) filing requirements must disclose material information in their SEC filings, such as the Form 10-K. Various rules and regulations, including Regulation S-K, may require the disclosure of material sustainability information in the Form 10-K and other periodic SEC filings, depending on the circumstances. Securities Act Rule 408 and Exchange Act Rule 12b-20 require a registrant to disclose, in addition to the information expressly required

by line-item requirements, “such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading.”

Over the past several years, the SEC has struggled with how best to address evolving concerns with climate change and sustainability in the agency’s disclosure requirements. The SEC attempted to address the issue of climate change by publishing an interpretive release providing specific guidance as to how existing rules may require disclosure of information relevant to climate change. Release No. 33-9106, *Commission Guidance Regarding Disclosure Related to Climate Change* (February 2, 2010). The interpretive release identifies how climate change disclosures may be required under particular disclosure items in Regulation S-K, depending upon a company’s circumstances. These disclosure items include Description of Business (Item 101 of Regulation S-K), Legal Proceedings (Item 103 of Regulation S-K), Risk Factors (Item 503(c) of Regulation S-K), and Management’s Discussion and Analysis of Financial Condition and Results of Operations (Item 303 of Regulation S-K). The principles that the SEC articulated in the climate change interpretive release can be applied in other contexts related to sustainability in determining if a public company has any disclosure obligations with respect to such matters.

The SEC’s interpretive release addresses four topics that companies should consider when evaluating the need for, and appropriate level of, disclosure related to climate change matters:

- The impact of legislation and regulation regarding climate change, including the potential impact of pending legislation.
- When material, the impact on their business of treaties or international accords relating to climate change.
- Whether legal, technological, political, and scientific developments regarding climate change will create new opportunities or risks, including reputational risks.
- The actual and potential material impacts of the physical effects of climate change on their business, such as the effects of se-

vere weather, sea levels, availability of farmland, and water availability and quality.

In other sustainability areas, Congress has recently amended the federal securities laws to impose disclosure obligations regarding certain types of human rights and other issues of interest to specific groups. Recent examples include disclosure regarding the sourcing of certain “conflict minerals” (Section 13(p) of the Securities Exchange Act of 1934 (“Exchange Act”), which was implemented by the SEC by rule), payments to governments by resource extraction issuers (Section 13(q) of the Exchange Act, which is in the process of being implemented by SEC rule), and business with certain governments, persons, and entities subject to specific U.S. trade sanctions (Section 13(r) of the Exchange Act, which was effective upon enactment).

2. State and Local Requirements.

Other requirements for reporting on sustainability issues may arise at the state or even local level, or come into play by virtue of the geographic scope of a company’s business. For example, the California Transparency in Supply Chains Act requires every retail seller and manufacturer doing business in the State of California and having worldwide annual revenues of \$100 million or more to disclose their specific actions to eradicate slavery and human trafficking in their direct supply chains for tangible goods offered for sale.

For a regulatory example, the insurance commissions in six states (California, Connecticut, Illinois, Minnesota, New York, and Washington) require insurance companies with direct written premiums of \$100 million or more in their state to complete an annual climate risk disclosure survey.

3. International Requirements.

In spring 2014, the European Parliament passed a law requiring publicly traded companies with more than 500 employees to report on nonfinancial sustainability factors. The law will go into effect in 2017, and will require nearly 7,000 companies to include this new information in their annual

financial reports – 4,500 more than are doing so today. The new law requires affected companies to report on ESG factors, including human rights impacts, diversity, and anticorruption policies. Companies will be expected to describe their business model and the outcomes and risks of their policies. Companies will also be required to include their supply chain in reporting. This will likely have a trickle-down impact, forcing smaller and medium-sized private companies and multinational companies upstream in the value chain to report even though the law does not apply them.

Under Canadian securities laws, public companies must disclose all material information, including material information about environmental and social issues, and there are additional disclosure obligations under the TSX and TSX Venture Exchange timely disclosure policies.

In October 2010, the Canadian Securities Administrator published Staff Notice 51-333, *Environmental Reporting Guidance* to provide guidance on continuous disclosure requirements relating to environmental matters under applicable Canadian securities laws and to assist issuers in determining what information about environmental matters needs to be disclosed and about enhancing or supplementing their environmental disclosures. The staff notice was motivated by the impact of environmental matters on reporting issuers, the changing regulatory landscape, and increasing investor interest in environmental matters.

Quasi-Voluntary and Voluntary Reporting

There are many stakeholder and other organizations that pressure companies for ESG information. Among the many means used to gather this information are a myriad of investment screening tools, rating organizations, and reporting frameworks that aggregate public information or provide vehicles for sustainability reporting. Below is a brief overview of the most prominent among these organizations, tools, and reporting frameworks.

Investors use ESG screening to measure or assess how a company manages social and environmental impacts. This screening

focuses on whether a company identifies and either mitigates risks or seizes opportunities with respect to ESG indicators.

Investment screening tools are flourishing:

- The Bloomberg ESG Valuation Tool and its ESG Score has experienced significant interest. This tool “enables users to apply a financially-based methodology to assess and value the impact of ESG factors on a company’s Earnings Before Interest and Taxes (EBIT) performance and share price.” PWC, *Do Investors care About Sustainability? Seven Trends Provide Clues* (March 2012).
- MSCI has several screening tools/indices, including its ESG Impact Monitor.
- FTSE4Good revamped and expanded its screening process. Companies are required to publicly disclose a broad array of sustainability information to gain and maintain listing on the index.
- GS SUSTAIN is another index that incorporates ESG into its analysis. Like MSCI and FTSE4Good, GS SUSTAIN submits information it has gathered from the public realm for company review, correction, and supplementation.

The CDP, a global not-for-profit organization, operates a reporting framework and rating system. The CDP holds the largest and most comprehensive collection of primary climate change, water, and forest-risk information. Investors representing more than a third of the world’s capital request corporate accountability on climate change through the CDP reporting framework.

Global Reporting Initiative (GRI) is the globally-recognized “gold standard” for sustainability reporting. The framework includes reporting guidelines and sector/industry guidance. It requires a high degree of organizational transparency and accountability. The uniform indexed reporting structure provides stakeholders a capacity for year-over-year analysis and easy comparison of reports from different companies. When investors pressure companies to report, they most often request reporting using the GRI framework.

On the leading edge of the reporting in-

dustry, and in support of an emerging interest in integrating financial and non-financial reporting, the International Integrated Reporting Council (IIRC) has developed the Integrated Reporting Framework. This includes guidance for how publicly traded companies can integrate sustainability into their annual reports so that the public can understand the value of sustainability initiatives and can effectively compare one company to the another. The stated purpose of integrated reporting is to show how a company creates value of the short, medium, and long term. <http://www.theiirc.org/resources-2/faqs/>.

Voluntary Standards to Support Mandatory Reporting

The Sustainability Accounting Standards Board (SASB) is developing voluntary standards, which identify industry-specific, sustainability-related issues that may give rise to material information for companies to disclose. The intent is for companies to reference the standards as a guide when making sustainability disclosure decisions for mandatory filings to the SEC. The complete set of guidelines is scheduled for release in early 2016. See www.sasb.org. The SEC has not acted on incorporating the SASB standards into any disclosure requirements.

The Lawyer’s Response

The manner in which sustainability issues are reported or communicated to stakeholders and others must align with the type and purpose of the report or communication. Mandatory reporting should follow SEC or other governing requirements. Voluntary reporting should, on its face, be readily distinguishable from such mandatory reporting. Lawyers should recommend that language be used that reflects the standard and the audience for the reporting venue. Counsel will need to weigh litigation risks that voluntary reporting may carry for reported information that is significant, but not material, and therefore not included in mandatory reporting.

This is of primary significance because of the ways in which differing concepts of materiality are incorporated into mandatory and voluntary reporting requirements:

- Under the GRI reporting framework, information is considered material and should be included in a report if it “may reasonably be considered important for reflecting the organization’s economic, environmental and social impacts, or influencing the decisions of stakeholders.”
- The IIRC deems information to be material if “it is of such relevance and importance that it could substantively influence the assessments of providers of financial capital with regard to the organization’s ability to create value over the short, medium and long term.”
- For SEC reporting purposes and under the voluntary SASB standards, information is deemed to be material if there is “a substantial likelihood” that a “reasonable investor” would view the information as “significantly alter[ing] the ‘total mix’ of information made available.” *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

Disclosures under the U.S. federal securities laws are a mixed question of law and fact. The SEC has noted that the issuer is in the best position to know what is likely to be material to investors. “[A] corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact.” *Richman v. Goldman Sachs Group, Inc., et al.*, 10 Civ 3461 (June 21, 2012, United States District Court for the Southern District of New York).

Companies are required to disclose material information only where the federal securities laws or other applicable legislation specifically impose such a duty to disclose. The analysis should focus on whether or not the information is material by securities law standards and whether there is a prima facie duty to disclose the information.

Because a number of recognized standards for sustainability reporting outside of the SEC’s disclosure requirements reference different concepts of “materiality,” counsel must be cognizant of those varying definitions while remaining focused on the specific duties and obligations that are currently contemplated by the U.S. federal securities laws. Understanding these nuances enables

lawyers to help clients clearly identify the importance ascribed to information by reference to the standard and audience. For example, a company could use the concept of materiality for investor-related information that is included in required reporting to the SEC. Other information should be identified using words like “significant,” “important,” or “key,” or as being relevant to stakeholders other than investors. The company could add disclaimers or cautions where appropriate.

All reporting standards require that a company’s sustainability disclosures – even where there is no duty to disclose under the U.S. federal securities laws – be both accurate and complete. To effectively manage sustainability reporting and communication,

companies must build appropriate reporting capacity (including disclosure controls and procedures) to identify and vet sustainability issues. The development and implementation of sustainability management systems will serve to provide a company with a process for measuring, monitoring, and improving sustainability reporting and performance. These systems should encompass an internal educational component to ensure awareness of sustainability activities and reporting needs.

Companies ask their lawyers to review mandatory reporting disclosures as a matter of course. Given the complexity of sustainability issues, there is also a role for lawyers in reviewing and advising on voluntary reporting. Counsel should help clients weigh

liability risks against reputational, relational, and other benefits of voluntary reporting. Understanding the drivers for that reporting noted above should guide that review and inform giving advice that protects client interests, while enabling them to respond to real and significant social and business pressures.

[Nancy S. Cleveland](#) is a principal at [Sustrana LLC](#) in Devon, Pennsylvania. [David M. Lynn](#) is a partner at the Washington, D.C., office of [Morrison & Foerster LLP](#). [Stephen A. Pike](#) is a partner at [Gowling Lafleur Henderson LLP](#) in Toronto.

BUSINESS LAW TODAY

Investor Interest in Nonfinancial Information: What Lawyers Need to Know

By [Douglas Y. Park](#)

More than ever before, investors want nonfinancial information from companies in making investment decisions. Examples of nonfinancial information (also referred to as environmental, social, and governance or sustainability information) include climate change, water quality and quantity, ethical business practices, cybersecurity, and supply chain management. What environmental, social, and governance (ESG) risks does the company face? How is the company managing these risks? How is the company performing on corporate social responsibility (CSR) and sustainability factors relative to its industry peers? This article addresses the growing interest of investors in nonfinancial information and implications for lawyers in advising their clients.

Nonfinancial information has legal and business dimensions. On the legal side, a company may, as appropriate, be required to disclose nonfinancial information regarding climate change, cybersecurity, environmental impacts, and social impacts under state and federal regulations. How the company responds to these requirements can create liability consequences. On the business side, how a company implements and represents its CSR and sustainability practices may affect its operations, financial performance,

corporate governance, and reputation. These business aspects of nonfinancial information can also raise questions for lawyers.

With this context, this article proceeds as follows. First, the article examines the rise of fiduciary capitalism and investor interest in nonfinancial information. Second, the article discusses the implications for lawyers. Finally, the article provides thoughts on the future of nonfinancial information.

Institutional Investors and Nonfinancial Information

The Rise of Fiduciary Capitalism

In the early 1930s, Adolf Berle and Gardiner Means described the modern corporation as one of dispersed ownership by small shareholders who had little power relative to managers. Before the passage of the Securities Act of 1933 and the Securities Exchange Act of 1934, investors had little information about the companies they invested in, or thought about investing in, because companies had to report little about themselves to investors. The Exchange Act gave investors a window into the financial condition and operations of a company by mandating that registered companies periodically report in-

formation to the Securities and Exchange Commission.

Since the passage of the Securities Acts, the capital markets have experienced eras of industrial or managerial capitalism and, more recently, finance capitalism, which was dominated by financial intermediaries such as banks, asset managers, and brokers. Some observers see the financial crisis of 2008 as the beginning of a new age – the age of fiduciary capitalism. Fiduciary capitalism differs from the other ages of capitalism in that long-term focused institutional investors dominate the capital markets. The primary actors in fiduciary capitalism are pension funds, university endowments, foundations, and sovereign wealth funds. John Rogers, “[A New Era of Fiduciary Capitalism? Let’s Hope So.](#)” *Financial Analysts Journal* (May/June 2014), Volume 70, Issue 3.

In the United States, these asset owners have common law fiduciary duties of care and loyalty. The duty of care, or prudence, requires the fiduciary to invest and manage the investments, diversification, and risks of the fund as a prudent investor would, considering the purposes, terms, and distribution requirements of the fund.

The duty of loyalty binds the investor to remain impartial between beneficiaries, for

example, different generations. This duty may influence how the fiduciary incorporates nonfinancial information into its investment calculus:

Given the potential for shifting of wealth, environmental remediation costs and climate risks between young and older generations, failures of fiduciaries to adopt a sustainable development investment approach has fiduciary duty implications and raises questions about the ability of fiduciaries to efficiently allocate investment capital to growth opportunities and manage risks to economic growth and future portfolio returns.

Keith Johnson, "[Introduction to Institutional Investor Duties](#)," *Institute for Sustainable Development Report*, pg. 8 (February 2014).

The Employees' Retirement Income Security Act's (ERISA) fiduciary standard applies to private pension funds. ERISA fiduciaries may not subordinate the economic interests of the plan to unrelated goals, and may not choose investments on factors other than the economic interests of the plan. Nonfinancial factors can be considered if they do not negatively affect risk and returns and if they are integrated into the financial and risk analysis to help choose an investment portfolio that meets the long-term investment objectives of the beneficiaries.

Although large, public pension funds are not subject to ERISA, they often follow the fiduciary standards of ERISA. The California Public Employees Retirement System (CalPERS), the largest public pension fund in the United States, explains how its sustainable investment approach supports its fiduciary duties:

CalPERS' fiduciary duty is paramount to achieving our mission, which is to provide pension and health benefits to more than 1.6 million CalPERS members and their families. We clearly state that our focus is on the long term—which is both a responsibility and an advantage for a fund our size. . . . The Beliefs also elevate our framework

for sustainable investment, recognizing that long-term value creation requires the effective management of three forms of capital: financial, physical, and human. This process has evolved our thinking on ESG issues into a core theme across our portfolio. The Beliefs flag important issues such as the multi-faceted nature of risk including climate change and resource availability, and the importance of managing costs.

CalPERS, *Towards Sustainable Investment & Operations: Making Progress, 2014 Report*, pg. 7 (2014).

The California State Teachers Retirement System (CalSTRS) requires its investment managers to assess ESG risks in making investments. CalSTRS explains why this approach is in its best interest:

Since CalSTRS is a long-term investor and may hold an investment in a corporation or entity for decade after decade, short-term gains at the expense of long-term gains are not in the best interest of the Fund. Sustainable returns over long period are in the economic interest of the Fund.

CalSTRS, *Teachers' Retirement Board Policy Manual*, pg. A-18 (2013).

Materiality and Investor Interest in Nonfinancial Information: The NRDC Cases

Materiality is intrinsically tied to the reasonable investor. After all, what is material depends on what the reasonable investor would find important in his or her investment decisions. Yet, courts have not explicitly or clearly defined the reasonable investor. Instead, courts have attributed a number of traits to the reasonable investor, including rationality in investment decision making. (Tom C.W. Lin, "The New Investor," 60 *UCLA L. Rev.* 678, 694–695 (2013)). Although the definition of the reasonable investor is not settled, the definition is intended to be objective. (Stephen Padfield, "Is Puffery Material to Investors? Maybe We Should Ask Them," 10 *U. Ap. J. Bus. & Emp. L.* 339, 346, 365 (2008)). The SEC ex-

plains that the reasonable investor has been viewed as a long-term investor going back to the Exchange Act. Regulation NMS, 70 Fed. Reg. 37,496, 37,500 (June 29, 2005).

Through a series of cases brought by the National Resources Defense Council (NRDC) against the SEC during the 1970s, the SEC provided insight how it thinks about the reasonable investor. The late 1960s and early 1970s saw shareholders and organizations ask companies to disclose more social, environmental, and civil rights information. For example, Campaign GM was a proxy proposal that involved General Motors shareholders asking the company to provide more information on its environmental and civil rights performance and on safety and design issues. In 1971, the NRDC brought a rule-making petition before the SEC, asking the commission to expand civil rights and environmental disclosure under the federal securities laws. *NRDC v. SEC*, 389 F. Supp. 689, 693–694 (D.D.C. 1974). After a number of investigations and public hearings spanning almost a decade, the SEC decided in administrative proceedings that the requested disclosures were not needed because only a small fraction of investors considered social and environmental information important. Two federal courts upheld the SEC's rule-making authority and actions.

The district court ordered the SEC to work on two critical factual issues regarding materiality: first, the prevalence of ethical investor interest in greater environmental and civil rights disclosure, and second, what other avenues ethical investors can use to combat corporate actions that negatively affect the environment or the practice of equal employment. Regarding expanded social disclosure, the SEC found that about 0.0005 percent of the total value of stocks and bonds in the United States in 1974 was invested using ethical investing principles. Likewise, shareholder proposals on environmental and social received, on average, between 2 percent to 3 percent approval during the 1970s. These findings led the SEC to conclude that ethical investing was not an important or significant type of investing. Commission Conclusions and

Rule Making Proposals, Securities Act Release No. 5627, Exchange Act Release No. 11773, [1965–1976 Transfer Binder] Fed. Sec. L. Rep (CCH) ¶ 80, 820 at 85,719-720 (Oct. 14, 1975).

The SEC's decision turned on a level of interest insufficient to conclude that the reasonable investor was interested in social and environmental information. The commission's analysis of what is material to the reasonable investor depended, to a large extent, on the portion of investors and assets under management interested in nonfinancial information. This suggests that when a sufficiently large percentage of investors and/or assets under management consider sustainability information to be material, sustainability disclosure would be justified because the reasonable investor views that information as decision-useful.

Because investors presumably invest primarily for economic gain, the commission decided to adhere to an economic understanding of materiality. Further, the SEC stated that it could not require disclosure solely for the purposes of changing corporate behavior, although it recognized that disclosure might have an indirect effect on such behavior. To require disclosure solely for the goal of changing corporate behavior would go beyond the commission's authority to require disclosure that is "necessary or appropriate for the protection of investors or the furtherance of fair, orderly and efficient markets or for fair opportunity of corporate suffrage." (Commission Conclusions, Securities Act Release No. 5627, at 85,713.) This reasoning, however, contradicts the legislative intent of the Securities Acts. Moreover, expanded social and environmental disclosure can provide useful information to investors that directly relates to the goals of investor protection and informed voting. Cynthia A. Williams, "The Securities and Exchange Commission and Corporate Social Transparency," 112 *Harvard L. Rev.* 1197, 1272-1273 (1999).

Increased Investor Interest in Nonfinancial Information Today

The level of investor interest in nonfinancial information has dramatically increased

since the SEC's market study of the 1970s. One reason is the growth of sustainable, responsible, and impact investing. According to US SIF (The Forum for Sustainable and Responsible Investment), at the beginning of 2014 approximately \$6.57 trillion in assets under management was engaged in sustainable, responsible, and impact investing. This amount represents about 18 percent of the \$36.8 trillion in total assets under management in the United States. The amount invested in sustainable investing practices increased 76 percent from \$3.74 trillion in 2012. Since 1995, when US SIF first began tracking sustainable, responsible, and impact investing, the amount of assets engaged in this investment approach has increased over 900 percent from about \$600 billion. *Report on US Sustainable, Responsible and Impact Investing Trends 2014*, US SIF, pg. 12–16 (2014).

In response to a 2013 survey conducted by Ernst & Young of more than 160 investors, analysts, and portfolio managers around the globe, nine out of 10 respondents stated that nonfinancial performance had played a pivotal role in their investment decision-making in the past 12 months. The report concluded: "This demonstrates that the analysis of nonfinancial issues can no longer be dismissed as a niche approach to investment." EY, *Tomorrow's Investment Rules: Global Survey of Institutional Investors on Non-Financial Performance* (2014).

How do investors benefit from nonfinancial information? In response to PwC's survey in 2014 of institutional investors with \$7.6 trillion in assets under management, 73 percent said that risk mitigation is the primary reason they consider sustainability information. Fifty-five percent said that avoiding unethical companies is a reason for their interest, and 52 percent said that financial performance is why they factor sustainability information into their investment decisions.

Despite investor interest in nonfinancial information, companies are not providing the information that investors want. Sixty-one percent of investors stated that they are dissatisfied with corporate disclosures of social and environmental information by

U.S. companies. With respect to sustainability issues, investors expressed broad dissatisfaction with how U.S.-listed companies are disclosing information:

- 79 percent are dissatisfied with comparability of sustainability reporting between companies in the same industry.
- 74 percent are dissatisfied with relevance and implications of sustainability risks.
- 68 percent are dissatisfied with sustainability strategy that is linked to business strategy.
- 62 percent are dissatisfied with internal governance of sustainability issues.
- 57 percent are dissatisfied with process used to identify material sustainability issues.

PwC, *Sustainability Goes Mainstream: Insights Into Investor Views* (May 2014).

Another reason for the increased interest in nonfinancial information is the greater presence of long-term oriented institutional investors today. Institutional investors own 70 percent of the largest 1,000 U.S. companies, and pension funds own almost 40 percent of this amount. Institutional investors incorporate sustainable, responsible, and impact principles into investment analysis and portfolio selection of \$4.04 trillion, or about 60 percent of the total amount of assets under management investing using these principles.

At the same time, a growing number of investors has committed to the United Nations Principles for Responsible Investment (PRI). The PRI is a global framework for investors to include ESG information into investment analysis and decisions with the purpose of increasing returns and reducing risk. In 2009, 560 institutional investors with \$18 trillion in assets under management had committed to the principles, while in 2014 over 1,200 investors with \$34 trillion in assets under management had done so. The principles are based on the idea that ESG issues can affect investment performance and that consideration of these issues can help to produce superior risk-adjusted returns. For these reasons, nonfinancial information can fall squarely

within investors' fiduciary duties. The principles explicitly state they are to be applied only in a manner that is consistent with those duties.

In incorporating ESG information into fundamental equity analysis, investors use the information in several ways:

- **Economic analysis:** To understand industry trends and externalities likely to affect the economic outlook and, therefore, value creation and capital formation.
- **Industry analysis:** To understand factors driving competitiveness and the potential for sustained value creation in an industry, as well as externalities from an industry likely to affect other industries (and therefore portfolio risks).
- **Company strategy:** To understand management quality and corporate strategy, and evaluate a company's ability to respond to emerging trends.
- **Valuation:** To adjust traditional valuation parameters and assumptions, including cash flow and weighted average cost of capital, to reflect performance on material sustainability issues.

Robert C. Eccles and Jean Rogers, *The SEC and Capital Markets in the 21st Century: Evolving Accounting Infrastructure for Today's World*, Governance Studies at Brookings, pg. 5 (Sept. 2014).

Implications for Lawyers

The trend of increasing investor interest in nonfinancial information has many implications for how lawyers might advise their clients. With respect to disclosing nonfinancial information to investors, lawyers will need to consider how to advise com-

panies on what kind of information to provide, in what level of detail, and in what format. Should the company provide information only on ESG issues that investors specifically ask about? Should the company provide information on the commonly sought types of information (e.g., climate change) for companies in its industry? How much information and at what level of detail (general initiatives or measurable performance) is enough to satisfy investors? Should the information be provided in voluntary sustainability reports or in SEC filings? A company may, under appropriate circumstances, need to disclose information on these issues in a company's SEC filings under Regulation S-K. In other situations, a company may decide to report the information in voluntary reports, such as its corporate social responsibility, Global Reporting Initiative, or sustainability reports.

Since nonfinancial information is related to risk mitigation and value creation, the lawyer should consider reviewing the board's role in overseeing the information. What kind of nonfinancial information, and how much, should management report to the board? Should an existing or dedicated committee be responsible for the oversight of nonfinancial information? Or should the entire board be responsible? Should the compensation of executives be tied to performance on nonfinancial matters? If so, over how long of a time period?

Finally, lawyers can help clients understand the liability implications of nonfinancial information. Companies that fail to disclose material sustainability information may face a higher risk of shareholder suits alleging that the company made materially misleading or false statements. Companies

who consider disclosing nonfinancial information in SEC filings should examine the requirements and potential liabilities associated with signing Section 302 and 906 Sarbanes-Oxley certifications concerning the company's disclosure controls and procedures. Lawyers can help companies assess the materiality of sustainability information and evaluate the risks of disclosing, or not disclosing, sustainability information.

Conclusion

With the growing prominence of fiduciary capitalism, nonfinancial information assumes greater significance for companies and investors. Investors want nonfinancial information that will help them reduce risk, improve returns, and make better informed investment decisions. How can they obtain the information in an effective, efficient manner that allows them to compare companies within industries? Companies need to find a way to address investor demand for nonfinancial information. How can companies collect, organize, and report information to investors in a cost-effective manner?

So long as fiduciary investors manage a substantial portion of assets under management, nonfinancial information is likely to remain important to the efficient operation of the capital markets and the formation of capital. Lawyers can play a critical role in advising companies and investors about the legal and business implications of nonfinancial information.

Douglas Y. Park is Director of Legal Policy and Outreach at the Sustainability Accounting Standards Board (SASB) in San Francisco, California.

BUSINESS LAW TODAY

Keeping Current:

Second Circuit Overturns Insider Trading Convictions of Two Portfolio Managers

By [Philip J. Bezanson](#), [Kedar S. Bhatia](#), [Glen A. Kopp](#), [Shamoil T. Shipchandler](#), and [Craig S. Warkol](#)

In a blow to the Southern District of New York's impressive run of insider trading convictions, the United States Court of Appeals for the Second Circuit held recently that insider trading convictions require the government to prove that the tippee knew that the corporate insider received a personal benefit in exchange for disclosing confidential company information. That was the holding in *United States v. Newman*, where a three-judge panel vacated the convictions of two portfolio managers and remanded the case to the district judge with instructions to dismiss the indictment.

The Second Circuit's ruling clarifies a murky area of insider trading law and puts a limit on the liability of financial analysts, portfolio managers, and others who occasionally trade on information that is not widely available to the public. The Second Circuit summarized the requirements of an insider trading conviction for a tippee as follows:

[T]he Government must prove each of the following elements beyond a reasonable doubt: that (1) the corporate insider was entrusted with a fiduciary duty; (2) the corporate insider breached his fiduciary duty by (a) disclosing confidential information to a tippee (b) in exchange for a personal benefit; (3) the tippee knew of the tipper's breach, that is, he knew the information was confidential and *divulged for personal benefit [of the tipper]*; and (4) the tippee

still used that information to trade in a security or tip another individual for personal benefit.

United States v. Newman, Nos. 13-1837-cr, 13-1917-cr, slip op. at 18 (2d Cir. Dec. 10, 2014) (emphasis added).

The decision sets the groundwork for defendant-favorable rulings in ongoing criminal cases that were put on hold pending the ruling in this case. In addition, the ruling is likely to chill future prosecutions of remote tippees because of the added evidentiary burden for the government.

Moving forward from this decision, the government has three primary options. It can ask the Second Circuit to reconsider the case en banc, which could either have the effect of overturning this unfavorable ruling or memorializing it in an en banc decision. The government could also file a petition for a writ of certiorari before the Supreme Court, which has produced both prosecutor- and defendant-friendly rulings in recent criminal cases. Finally, the government could simply accept the Second Circuit's decision in *Newman* and look to curtail the ruling in future cases that present facts more favorable for federal prosecutors.

Case Background

United States v. Newman arose out of a push by prosecutors in the Southern District of New York in the wake of the recent

financial crisis to stamp out insider trading at hedge funds. The government alleged that portfolio managers Todd Newman and his codefendant Anthony Chiasson made \$4 million and \$68 million for their funds, respectively, in 2008, based on inside information about earnings for Dell and NVIDIA. Both defendants obtained their nonpublic information through a string of different tippees. For example, Newman received information about NVIDIA from another analyst at his firm, who received the information from a friend, who received the information from another individual, who received the information from the original tipper, an analyst in NVIDIA's finance unit. As a result, Newman and Chiasson were both several steps removed from the corporate insiders who leaked the earnings information: for the Dell earnings numbers, Newman was three levels removed from the original tipper and Chiasson was four levels removed; both were four levels removed from the source of the NVIDIA earnings data. Moreover, neither defendant knew of the original source of the inside information.

A jury ultimately found Newman and Chiasson guilty of violating Section 10(b) and 32 of the Securities Exchange Act of 1934 (codified at 15 U.S.C. §§ 18j(b), 78ff), Securities and Exchange Commission Rules 10b-5 and 10b5-2 (codified at 17 C.F.R. §§ 240.10b-5, 240.10b5-2), and conspiracy to commit securities fraud. Sec-

tion 10(b) itself does not expressly outlaw insider trading, but instead it bars the use of, “in connection with the purchase or sale of any security[,] . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe” Courts have interpreted insider trading to be one type of “deceptive device” to violate the securities laws. See *United States v. O’Hagan*, 521 U.S. 642 (1997). Corporate insiders who possess and act on non-public information may be liable for insider trading where they personally benefit from their knowledge. The use of non-public information for personal gain is considered a breach of fiduciary duty.

On appeal, the Second Circuit relied on two key principles in reaching its decision in favor of Newman and Chiasson. First is the principle that liability for those who receive tips from insiders flows from the initial breach of fiduciary duty by the insider – not from any independent wrongdoing in acting on otherwise nonpublic information. See *Chiarella v. United States*, 445 U.S. 222, 230 n. 12 (1980) (“The tippee’s obligation has been viewed as arising from his role as a participant after the fact in the insider’s breach of a fiduciary duty.”). Second, liability under Section 10(b) and Rule 10b-5 requires scienter, which has been defined as “a mental state embracing intent to deceive, manipulate or defraud.” (*Newman* quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n. 12 (1976)). More specifically, for a criminal conviction, the government must demonstrate that a defendant acted “willfully,” which demands

that prosecutors show “a realization on the defendant’s part that he was doing a wrongful act under the securities laws.” (*Newman* quoting *United States v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005)); see also 15 U.S.C. 78ff(a).

Relying on those two tenets of insider trading law, the Second Circuit held that a tippee can only be convicted for insider trading where the evidence demonstrates that he knew the original source of that information – the corporate insider – breached a fiduciary duty by “divulg[ing] the information for personal benefit.” As a result, the Second Circuit found that the district judge’s jury instructions were erroneous because he failed to instruct the jury that they had to find proof beyond a reasonable doubt that the defendants knew that the corporate insider received a personal benefit for disclosing the inside information. Furthermore, the Circuit determined that the judge’s instructional error was not harmless because there was insufficient evidence from which the jury could have found that Newman and Chiasson “inferred from circumstances that some benefit was provided” to the corporate insiders who were the sources of the original tip. Finally, the Second Circuit concluded that even when viewing the evidence in the light most favorable to the government, the prosecution’s evidence of any personal benefit flowing to the corporate insiders was severely lacking.

Takeaway

The case is significant for the way it limits the ripple effect of insider information dis-

closures. In many information leaks, like the one in *Newman*, insider data is repeatedly passed along to different groups of analysts and portfolio managers. While a contrary ruling would have allowed prosecutors to convict anyone who simply knew that the information was confidential and non-public, the Second Circuit rejected this view and reinforced the requirement that a tippee defendant know that the original corporate insider disclosed the information for his or her own personal benefit; i.e., in breach of a fiduciary duty.

This requirement may not be an easy one for prosecutors to satisfy. In *Newman*, the government could not demonstrate that Newman and Chiasson were aware the sources of the inside information, let alone the benefits received by those corporate insiders. Moving forward, defendants investigated for acting on tips with insider information will surely latch onto this decision to argue that they did not know the motivations behind those who supplied the tips; that is to say, defendants will argue that they were not aware of any personal benefit that accrued to the insider who was a distant link in the information chain. In certain situations, federal prosecutors could even have trouble demonstrating that the direct recipient of a tip knew that any personal benefit accrued to the corporate insider.

Philip J. Bezanson, Glen A. Kopp, Shamoil T. Shipchandler, and Craig S. Warkol are partners, and Kedar S. Bhatia is an associate at Bracewell & Giuliani LLP.

BUSINESS LAW TODAY

Keeping Current:

Delaware Supreme Court Holds Secured Party Accountable for Filing of UCC Forms

By [Christopher L. Messa](#)

Article 9 of the Uniform Commercial Code (UCC) is notoriously unforgiving. It is well-known, even among nonspecialists, that completing UCC forms requires attention to the minutest details. A recent opinion authored by Chief Justice Strine on behalf of the Delaware Supreme Court is a quintessential example of how minor mistakes can result in harsh consequences under the UCC. In *Official Committee of Unsecured Creditors of Motors Liquidation Company v. JPMorgan Chase Bank, N.A.* (*In re: Motors Liquidation Company*), (No. 325, 2014, 2014 WL 5305937 (Del. Oct. 17, 2014)), the Delaware Supreme Court held that a UCC-3 termination statement was authorized and effective notwithstanding the undisputed facts that the secured party prepared the UCC-3 termination statement by mistake and did not intend to terminate the underlying perfected security interest. The Supreme Court ruled that, based on the plain meaning of the statute, a filed UCC-3 termination statement is effective if the secured party of record authorizes the filing, and under the UCC, authorization to file a UCC-3 termination statement does not depend on the secured party's subjective intent or its understanding of the effect of such filing. Although the Court's holding may not be substantively remarkable, this case stands as a cautionary lesson to secured lenders to make certain that their UCC filings are accurate because courts are unwilling to save them from their own mis-

takes, even when those mistakes could have harsh consequences. This case should also encourage practitioners to document UCC filing authorizations more consistently and thoroughly as a preventative measure against inadvertent and potentially severe results.

Factual and Procedural Background

The dispute underlying this case began with UCC-1 financing statements filed pursuant to two entirely separate and unrelated credit facilities in favor of General Motors Corporation. Under each credit facility, JPMorgan Chase Bank, N.A., acted as administrative agent for a different syndicate of lenders. The first credit facility involved a \$300 million synthetic lease financing. In connection with that transaction, two UCC-1 financing statements identifying JPMorgan as administrative agent were filed with the Secretary of State of the State of Delaware. The second credit facility was a \$1.5 billion term loan in favor of General Motors. As a part of that transaction, a UCC-1 financing statement was filed with the Delaware Secretary of State which also identified JPMorgan as administrative agent.

When the time came to unwind the synthetic lease facility, General Motors' attorneys prepared the necessary documentation, which properly included UCC-3 terminations statements to terminate the perfected nature of the security interests in the collateral securing the synthetic lease

facility. However, in addition to preparing UCC-3 termination statements related to the synthetic lease, General Motors' attorneys mistakenly prepared a UCC-3 termination statement that would terminate the term loan UCC-1. The erroneous UCC-3 was reviewed by General Motors' attorneys and JPMorgan's attorneys and the error was not discovered. As a result, the erroneous UCC-3 was filed and became a part of the public record.

When General Motors later filed for bankruptcy, the erroneous UCC-3 termination statement was discovered. The committee for unsecured creditors (the "Creditors Committee") brought an action in the Bankruptcy Court for the Southern District of New York seeking a determination that the term loan UCC-1 had been effectively terminated by the erroneously filed UCC-3 and that the security interest in the collateral underlying the term loan facility was unperfected. If correct, the Creditors Committee's assertion would mean that the erroneous UCC-3 had caused the term loan to become unsecured and the term loan lenders' \$1.5 billion claim against General Motors would have lost priority over General Motors' unsecured creditors. The bankruptcy court, however, disagreed with the Creditors Committee and determined that the UCC-3 did not effectively terminate the term loan UCC-1 because the UCC-3 was not properly authorized. The Creditors Committee appealed the bankruptcy

court's holding to the Second Circuit Court of Appeals.

On appeal, the Second Circuit ruled that resolution of the case involved a two-step analysis. First, a determination of what constitutes "authorization" under the UCC and second, whether JPMorgan provided the requisite authorization. The first issue was a matter of statutory interpretation and an issue of first impression, and for those reasons, the Second Circuit certified the question to the Delaware Supreme Court. The Second Circuit's ruling on the second issue will follow the determination of the first issue.

The Delaware Supreme Court narrowly construed the issue presented to it, and endeavored to determine whether "authorization" under the UCC requires the secured party only to approve the filing of the UCC-3 termination or must it also intend the consequences that flow from the filing of the UCC-3. The Supreme Court sided with the Creditors Committee and held that the erroneous UCC-3 was effective to terminate the term loan UCC-1. The Supreme Court reasoned that under the UCC, "it is enough that the secured party authorizes the filing to be made" because the UCC "contains no requirement that a secured party that authorizes a filing subjectively intends or otherwise understands the effect of the plain terms of its own filing."

Supreme Court's Reasoning

The Supreme Court set forth two lines of reasoning that led to its holding. The first "and most important consideration" was the statutory language governing the effectiveness of a UCC-3 termination statement. The Supreme Court found that the statutory language was unambiguous and supported the Creditors Committee's position that the UCC-3 termination was effective. Second, the Supreme Court asserted that its holding was consistent with the policy underlying

the UCC. The UCC, it noted, is a system of notice filing, and for the sake of efficiency and consistency, lenders should be able "to rely in good faith on the plain terms of authorized public filings."

Plain Meaning of UCC

The Supreme Court's statutory analysis focused on sections 9-513(d), 9-510(a), and 9-509(d)(1) of the UCC. When read together, these sections state that upon the filing of a UCC-3 termination that is authorized by the secured party, the UCC-1 financing statement to which the UCC-3 termination relates ceases to be effective. The Supreme Court determined that these three sections are unambiguous and do not require a secured party to intend the consequences of a UCC-3 termination in order to properly authorize such a filing. The Creditor's Committee persuasively argued that the Delaware General Assembly could have, but did not, include a statutory "safety valve" for secured parties who do not intend the effect of their filings.

UCC Public Policy

The Supreme Court's second line of reasoning was that its holding is supported by the policy underlying the UCC, namely the promotion of certainty and efficiency in commercial transactions. The Court wrote that:

[t]o hold that parties cannot rely upon authorized filings unless the secured party subjectively understood the effect of its own action would disrupt and undermine the secured lending markets. It is not clear to us how an inquiring party would find out whether a secured party understood and intended the consequences of its own filing.

Interestingly, the Court recognized a certain level of inefficiency under the UCC when it noted that the UCC filing system

"contemplates that later lenders may need to conduct diligence to determine that a filing was authorized by the secured party of record."

Conclusion and Practice Points

The Supreme Court's holding in this case provides a practical resolution to this issue of first impression. The lesson for secured parties is that great care must be taken in the preparation of UCC forms. In transactions involving sophisticated parties, it is reasonable for those parties to bear the burden of ensuring the accuracy of their filings. The Supreme Court's holding properly holds a secured party accountable for filings that it makes, even if those filings have results which are unintended and harsh.

In light of the Delaware Supreme Court's holding, the Second Circuit next will determine whether JPMorgan provided the requisite authorization for the erroneous UCC-3. While we await that decision, it is worth considering whether and how UCC filing authorizations are documented. In many financing transactions, there are no stand-alone UCC authorization documents, and when UCC filing authorizations are separately documented, they are often general statements authorizing the lender to file the "appropriate" UCC forms. With the benefit of hindsight, it is fair to say that JPMorgan should have drafted UCC filings authorizations which would have authorized only UCC-3 terminations related to the synthetic lease transaction. Perhaps the diligence required by this extra layer of documentation would have the added benefit of making it more likely that practitioners would avoid drafting an erroneous UCC-3 termination in the first place.

Christopher L. Messa is a partner at Berger Harris LLP in Wilmington, Delaware.

BUSINESS LAW TODAY

Delaware Insider:

Softening the *Revlon* Reasonableness Standard

By [Peter J. Walsh, Jr.](#) and [Andrew H. Sauder](#)

“Although the record before us reveals a board process that sometimes fell short of ideal, *Revlon* requires us to examine whether a board’s overall course of action was reasonable under the circumstances as a good faith attempt to secure the highest value reasonably attainable.” These are the words of the Supreme Court of Delaware, and they portend good news for directors selling a company, particularly when no competing bid has emerged. In *C&J Energy Servs., Inc. v. City of Miami Gen. Employees’ and Sanitation Employees’ Ret. Trust*, No. 655/657, 2014 (Del. Dec. 19, 2014), the Supreme Court of Delaware recently reversed a Court of Chancery ruling, striking down a preliminary injunction that: (1) enjoined a pending merger for 30 days, (2) required a committee of the selling corporation’s board to actively solicit alternative bids for the corporation during that time, and (3) declared (contrary to the merger agreement) that the counterparty in the transaction could not consider the required solicitation to be a breach of contract. Along the way, the Supreme Court explained that the board’s actions did not violate any duties it may have owed under the often-invoked *Revlon* standard of review.

The Transaction

C&J Energy Services, Inc. (C&J) is an oilfield services provider and a publicly-

traded Delaware corporation with a market capitalization of about \$730 million. C&J’s board has seven directors, five of whom are independent. Nabors is a Bermuda company that also provides oilfield services. In 2013, C&J’s board explored strategic acquisitions, and authorized its CEO, a board member, to lead the search. In January 2014, an investment banker approached the CEO with the possibility of buying a division of Nabors that was engaged in oil field completions and productions services (Nabors CPS). That approach resulted in the challenged merger.

Under the terms of the merger agreement, C&J would acquire the Nabors CPS business. Significantly, to secure tax benefits with an estimated net present value of \$200 million, Nabors would acquire majority ownership of the surviving company, which would be domiciled in Bermuda. To accomplish this result, a newly-created subsidiary of Nabors Industries Ltd. (Nabors) would hold the Nabors CPS business. C&J would merge with that subsidiary to create C&J Energy Services, Ltd. (New C&J). C&J’s management team would manage the new company. C&J’s former stockholders would own 47 percent of the equity in the new entity; Nabors would own 53 percent and receive about \$938 million in cash.

To cushion the potentially harsh consequences of Nabors’ majority ownership,

C&J’s board secured protections for C&J stockholders in the merger agreement, including:

- (a) for five years, a requirement that two-thirds of New C&J’s stockholders vote in favor of any bye-law amendment (Bermuda refers to bylaws as “bye-laws”), stock issuance, or sale of the company;
- (b) a bye-law that all stockholders must receive equal consideration per share upon a sale of the company or major asset sale, and that this bye-law cannot be amended without unanimous stockholder vote;
- (c) for five years (or until Nabors owns less than 15 percent of New C&J’s shares), Nabors may not take certain actions to alter its stock ownership or enter into agreements to increase its voting power or change the board of directors;
- (d) New C&J board members would be nominated by a three-member committee, two of whom would be current C&J directors;
- (e) restrictions on Nabors’ ability to sell its stock to third parties that could affect the control of New C&J; and
- (f) any violations of standstill provisions in the merger agreement permits the termination of Nabors’ management from the post-merger management team.

Nabors also secured a “fiduciary out,” so that C&J could negotiate with third parties in certain situations and could terminate the deal if a superior proposal emerged before closing. To exercise this right, C&J would have to pay a \$65 million termination fee (2.27 percent of the deal value).

The deal was publicly announced on June 25, 2014, but was not expected to close before year-end 2014. The plaintiff, a retirement trust, brought a class action in the Court of Chancery seeking to enjoin the merger. No superior proposal ever emerged.

The Court of Chancery’s Decision

Before the Court of Chancery, the plaintiff argued that C&J’s board failed to fully appreciate that it was entering into a change of control transaction. On a motion for preliminary injunction, the Court of Chancery credited this argument, and held in a transcript ruling that plaintiff made a “plausible” showing that C&J’s board failed to satisfy *Revlon*. To remedy the alleged wrongdoing, the Court of Chancery entered an order enjoining consummation of the merger for 30 days. During that time, certain independent directors on C&J’s board were required to solicit interest in the company, and the Court further declared that such a solicitation would not violate Nabors’ contractually-secured right to have C&J refrain from actively seeking bids.

The Supreme Court Opinion

The Supreme Court of Delaware accepted an interlocutory appeal of the ruling and expedited the appeal to permit consideration of the 30-day injunction. Sitting en banc, the Court reversed the Court of Chancery’s order, ending the injunction. The Supreme Court held that the Court of Chancery failed to apply the proper standard for a preliminary injunction, misapprehended *Revlon*, and entered an impermissible form of preliminary injunction.

Revlon Allows Boards Broad Discretion to Negotiate a Deal

The Supreme Court held that C&J’s board did not violate *Revlon*, which requires a

board of directors to act reasonably to attain the highest price available when selling control of a corporation. Given the expedited nature of the appeal, the Court assumed *Revlon* applied to the transaction, but did not so decide. The Court highlighted three important features of *Revlon* jurisprudence: the principle that there is no single blueprint for a sale process, the importance of even a passive market check, and the value of an uncoerced stockholder vote. Before delving into these particular aspects of *Revlon*, the Court noted the relatively narrow circumstances from which the doctrine arose, observing that “as the years go by, people seem to forget that *Revlon* was largely about a board’s resistance to a particular bidder and its subsequent attempts to prevent market forces from surfacing the highest bid.”

As the Supreme Court explained, *Revlon* does not require a board to follow a particular model, such as conducting an auction for the corporation. Instead, courts applying *Revlon* must ask whether the directors made a reasonable decision (not a perfect one) to attain the best value. A board may choose a transaction that the board reasonably considers to be the most valuable to stockholders, so long as the chosen transaction provides an opportunity for other bidders to submit offers and permits the board the freedom to accept any such offer.

Based on these formulations, the Supreme Court disagreed with the Court of Chancery’s holding that the C&J board’s actions violated *Revlon*. Several factors animated this conclusion. First, the board possessed no improper motive to enter into a transaction with Nabors, and conducted a “passive,” post-signing market check by providing for a reasonable period of time before closing to allow serious bidders to emerge. Second, the merger agreement contained a broad “fiduciary out,” coupled with a reasonable termination fee. Finally, the Court emphasized that the stockholders would have a “fair chance to evaluate the board’s decision for themselves,” by way of a fully informed stockholder vote. In these circumstances, the Court observed, the Court of Chancery “should be reluctant to take the decisions out

of [the stockholders’] hands.” Accordingly, the Court concluded that the Court of Chancery had erred in its application of *Revlon*.

Preliminary Injunction Standard

Another aspect of this opinion – perhaps of more interest to the litigator than the deal lawyer – dealt with the showing necessary to justify the injunction entered by the Court of Chancery.

A party seeking a preliminary injunction must demonstrate that it would suffer irreparable harm in the absence of the requested injunction, that the balancing of the equities justifies the requested relief, and that it has a reasonable likelihood of success on the merits of the claim. It is this final requirement that principally distinguishes the preliminary injunction standard from that governing temporary restraining orders, which requires only a colorable claim. A preliminary injunction, typically sought after a plaintiff obtains some discovery, requires a higher showing on the merits. Here, the Court of Chancery entered an injunction having found only that the plaintiff made a “plausible showing” of a likelihood of success on its duty of care claim.

The Supreme Court of Delaware was critical of this procedural shortcoming. The Court explained that a reasonable probability of success exists if the plaintiff demonstrates “that it will prove that it is more likely than not entitled to relief.” A plaintiff who merely makes a “plausible showing” has not met the likelihood of success prong for preliminary injunctive relief. To its credit, the Court of Chancery noted that its preliminary finding was a “very close call.”

The Permissible Nature of Preliminary Injunctive Relief

Finally, the Supreme Court reiterated the correct procedural standard required for the issuance of mandatory injunctive relief. A typical injunction prohibits a person from taking some form of action. When a court enters “mandatory” injunctive relief, however, it is requiring a person or entity to undertake some *affirmative* act or conduct. Under Delaware case law, it is frequently observed that a court may not typically exercise its

equitable powers to impose mandatory injunctive relief in the absence of undisputed facts, or until after trial. The Supreme Court held that the Court of Chancery overstepped its equitable powers by requiring the C&J directors to actively “solicit interest” during the 30-day injunction period.

The Supreme Court was similarly critical of the form of injunction to the extent it stripped Nabors, a third party, of its contractual rights. Nabors had secured C&J’s agreement that its board would not actively shop the company. The Court of Chancery ruled that compliance with its order would not constitute breach of contract. But, as the Supreme Court instructed, an order “holding a party to its contractual obliga-

tions while stripping it of bargained-for benefits” should only be undertaken after trial and if the party participated in the alleged wrongdoing, for instance by aiding and abetting a breach of fiduciary duty.

Conclusion

The Court struck down the injunction, observing: “To rely on this insufficient premise [of only a plausible showing of success on the merits] to issue a powerful mandatory injunction, when no rival transaction was available, and when the stockholders can reject the deal for themselves if they do not find its terms to be value-maximizing, was an error.”

C&J Energy is an important read for

all transactional lawyers advising clients whose deals may be subject to the *Revlon* standard of review. *Revlon* does not require boards to take any particular course of action in selling a company. A board need not conduct an auction, although circumstances may warrant this approach. And, even a “passive” market check may now suffice. Above all, one cannot over-emphasize the need for a fully informed vote of the stockholders, particularly when other aspects of the transaction are less than ideal.

Peter J. Walsh, Jr. is a partner and Andrew H. Sauder is an associate at Potter Anderson & Corroon LLP in Wilmington, Delaware.

BUSINESS LAW TODAY

Member Spotlight:

An Interview with Caroline D. Pham



In response to the global financial crisis, the United States Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which granted the Commodity Fu-

tures Trading Commission (CFTC) sweeping new powers and oversight of the \$700 trillion derivatives markets. To meet this mandate, the CFTC issued over 60 new rules in just four years. Caroline D. Pham served as Special Counsel and Policy Advisor to CFTC Commissioner Scott D. O'Malia, placing her right in the center of the action.

Pham spent her time in the nation's capital gaining experience at financial regulators, including the U.S. Securities and Exchange Commission (SEC) and the Office of the Comptroller of the Currency (OCC). Pham was also a Visiting Fellow at GW's Center for Law, Economics and Finance, focusing on Dodd-Frank Act implementation and financial regulatory reform. She has lectured on Dodd-Frank Title VII reforms of the swaps market and causes of the financial crisis. Currently, Pham is a Director, Markets Regulatory Implementation at Citigroup Global Markets Inc.

Pham is a 2014–2016 Business Law Section Ambassador. She also serves on the Section's Publications Board, as Content Director for the Banking Law Committee, and as Vice Chair of Membership for the Business and Corporate Litigation Commit-

tee. Her involvement in the Section began as a former ABA Law Student Division Liaison. Pham is also a member of the ABA Board of Governors Legal Opportunity Scholarship Committee. She is a graduate of the George Washington University Law School and a past recipient of the Manatt-Phelps Scholarship, awarded to an outstanding student in the field of banking law. Pham received her bachelor's degree from UCLA.

* * *

I saw that you studied political science and international relations at UCLA as an undergraduate. Was your early ambition to do something in one of these areas?

It was. I was very fortunate that the summer after my junior year in high school, I had the opportunity to study abroad in Paris in an accelerated high school program. That experience – to be 16 in Paris and exposed to different cultures, to have that degree of independence – made me very passionate about international relations. I even considered pursuing a career as a Foreign Service officer at one time.

At UCLA you participated in the U.S. Army Reserve Officers' Training Corps. What did you learn from this experience?

There is so much. Although I decided not to seek a commission as an officer in the Army, the time that I spent in ROTC was invaluable for the leadership training that I received. I remember in particular one meeting that I had with an Army major,

who was part of the cadre for our cadet corps. He asked me what I wanted to do and I wasn't quite sure, though I had a couple of different ideas. He explained that there's something they do in the Army, which is called backwards planning. You envision your ultimate goal and then you work backward from the goal to the step just below the goal, then the next step below that, all the way back to where you are right now. That method of planning and goal setting has been invaluable to me in my career. I also learned how to shine my boots to a mirror finish, so now I can shine shoes.

That's a nice segue, not to boots, but planning. What set your sight on the goal of becoming a lawyer?

Well, I worked at various law offices to help put myself through college. I was a legal assistant at a plaintiffs' class-action law firm and a paralegal for an attorney in real estate development and mortgage brokerage. Then, after I graduated, I still wasn't sure what I wanted to do. I had done internships in fashion and entertainment and didn't really want to pursue that as a career. But, I knew I needed health insurance, and I wanted to think about law school and see what it was like being at a big law firm. So, I got a job at a large New York law firm and that was an eye-opening experience. It was exciting to be a part of the firm's work on complex issues for big-name clients that would be reported on the front page of the newspaper. The deals had a big impact on the economy or on people's lives. It was

very inspiring to me. I've always enjoyed problem-solving, identifying issues, and figuring out what's the best way to find a solution and follow through on it. That's what I saw at the firm, and that's why I ended up making the decision to become a lawyer.

Now that you are based in New York, do you ever wish that you did pursue a career in fashion or entertainment?

No, no. Some may disagree with me, but I think it's much more fun to wear fashion than to work in fashion, especially once you're out of your 20s. I can't resist a good sale though.

In law school, you were awarded the Manatt-Phelps Scholarship for outstanding student in the field of banking law. How did you become interested in this area of law?

This was sort of an accidental occurrence for me. I had landed a judicial externship after my first year of law school at the U.S. Court of Federal Claims with former Chief Judge Loren Smith. He had been the trial judge for a case called *Winstar*, which went all the way up to the U.S. Supreme Court. The case is a seminal holding on the bank failures in the 1980s and the 1990s that arose out of the savings and loan crisis.

On the first day of my summer internship, which was a Friday, I sat through a pretrial conference. The following Monday we were in a full-blown trial that went on for a month. It was all about a failed bank and what damages they had sustained from the government breach of contract that caused the bank failure. I learned so much about the business of banking, banking law, and the interaction between a regulated industry and the regulator, as well as the history of our banking and financial system. It was 2009, and we were in the midst of this great financial crisis. There were certain parallels that stood out to me. I found it interesting, intriguing – I just got hooked. It still remains one of my academic interests.

You worked at the Commodity Futures Trading Commission. Can you describe

what the CFTC does and why you were interested in working there?

The CFTC is a market regulator for the derivatives markets, which includes the futures, options, and swaps markets. It's responsible for preventing fraud, manipulation and abuse in the markets, as well as ensuring market integrity. Two important functions of the derivatives markets are hedging and price discovery. The futures market has been around for over a hundred years and started as a way for farmers to hedge their risk when they're bringing crops to market.

One way that people might be familiar with the markets that the CFTC regulates is through the movie *Trading Places*, with Eddie Murphy and Dan Aykroyd. It was about the futures market, and it was what got me interested in the CFTC. I used that in my interview for an internship and it worked, by the way. I love that movie.

I see that you grew up in Modesto, California, which is in the central valley of California, called "the food basket of the world." Did that play a part at all?

Oh, yes. Both the CFTC and I have agricultural roots. When I was a kid, I did 4-H and showed horses at the county fair. My dad is a doctor, but my parents also owned 10 acres of almond orchards and eight acres of peach orchards. The mission of the CFTC resonated with me.

What did you do at the CFTC? What did you enjoy the most about your job?

I served as a counsel to a commissioner. The commissioners are appointed by the President and confirmed by the Senate. They serve the public interest and have a great responsibility. What I enjoyed most is being able to work at the intersection of the law, policy, and the industry. We met with anyone who had something to say, from a regional utility cooperative to growers and merchants to exchanges and other stakeholders. I learned so much about the impact that the CFTC has on people's lives. You feel the weight and the significance of the work that you do, and you take your job very seriously. It truly gave meaning to getting up and going to work every day.

Being counsel to a commissioner is also a very dynamic position and keeps you on your toes. The work changes from moment-to-moment, depending on what's going on in the world. I did everything from analyzing rules to reviewing cases – traditional legal work – to writing speeches or Congressional testimony, or handling media inquiries, which was very different than drafting a memo. I had to develop an entirely different skill set, but it was very fun and fast-paced. I also enjoyed gaining this unique expertise in a brand-new area of law that is complex and still growing.

I read that the CFTC issued over 60 new rules in the four years after the Dodd-Frank Act was passed. What was that like?

It was an incredibly intense time at the agency. You have this previously unregulated market that is now under the CFTC's jurisdiction, but there's no rules. The agency has to write them. Title VII – that's the part of the Dodd-Frank Act that deals with the swaps market – laid out the vision that Congress had. Then the CFTC went and built a house on that foundation, using that framework. It was a tremendous effort. I was so impressed by the dedication and determination of everyone at the CFTC to get the job done within tight timeframes. People worked around the clock to make it happen, including all-nighters. It was tough, but exhilarating too.

How did you stay on top of the many changes in this area of law? Are there publications you subscribe to?

I read a lot. I read papers, the news clips that we had internally at the agency. I subscribe to newsletters from law firms and industry associations, as well as all the major financial market publications. I find Twitter is a pretty effective way to keep immediately up-to-date on things like breaking developments. I participate in a lot of industry conferences, seminars, and continuing legal education programs, where I'm constantly dialoguing with and listening to the best and the brightest – the experts in the field – and what are the current developments and trends in the law.

How did your past experience help prepare you to be counsel to a commissioner?

It was actually very helpful. I had a variety of experiences, including at other financial regulators and from an academic or policy background. First, I had seen at the law firm that I had worked at that being trained as a generalist was advantageous – you saw the big picture and could understand issues in context, rather than in isolation. So by gaining experience in bank regulatory law, securities regulation, and consumer financial services, besides derivatives, that helped me understand how each fit into the overall financial system. It also allowed me to do comparative analysis and see the pros and cons of different regulatory approaches and goals. That's also the focus of an academic or policy perspective. Second, my background in litigation and enforcement was very helpful. That trains you to examine the facts and understand how the law applies in different circumstances. In a commissioner's office, you do a lot of issue-spotting at a high level, but then you also have to be able to go into the weeds and understand the subtleties of the rules as applied in a particular situation. Finally, being in a judge's chambers is a once-in-a-lifetime experience. That's where I really learned how to be a good writer – to be clear, concise, and logical in both my analysis and writing. Everything you write tells a story. I can't emphasize enough how important that is.

You're very active in the ABA Business Law Section, serving on the Publications Board and as Content Director for the Banking Law Committee. How did you first become involved in the Section?

As a law student, I was on the executive board of the Student Bar Association. GW Law sent us to represent the school at the ABA Annual Meeting, which was very generous. I saw firsthand what the ABA was all about, and what it did, and all its members and their work and the programs that they put on. Then, I had breakfast with a Section leader that I used to work with, and he encouraged me to come to the Banking Law Committee meeting even though I was only

a law student. The Committee was so warm and welcoming, that I decided to attend the Banking Law Committee Fall Meeting and the Section Fall Meeting in D.C. As part of the Committee meeting, I went to the dinner and made contacts that helped lead to a summer position and job offer after graduation. It was very clear to me what the benefits of being involved in the ABA were. I applied to be the ABA Law Student Division Liaison to the Business Law Section and I've stayed here ever since.

You're also Vice Chair of Membership for the Business and Corporate Litigation Committee.

Yes. The Business and Corporate Litigation Committee has been like another home to me. I've found so many mentors here. Becoming involved in the Section the way I did, early on as a law student, created so many opportunities for me. I attended meetings all over the country, I met so many people that I am friends with today, and I learned so much about the different areas of law that I was interested in. I think it's the least I can do, to spread the word and let everyone know how really great being a member of the Section is, and especially to encourage law students to get involved as I did. So, I feel like it's an area where I can speak from my own experience and meaningfully contribute. I've also held similar positions in alumni efforts at UCLA and GW Law.

What are some of the most effective ways you've found to increase membership?

In this day and age, it's all about what is a value proposition of being a member of the Business Law Section. What does it provide to lawyers? What's going to make it worthwhile for them to pay their dues? We find people tend to renew their memberships and stay engaged when they actually have real connections with the Section.

Whether it's by attending meetings or by joining a committee and contributing to the work of that committee, it's very important that people feel a connection to the Section, and this is what ultimately drives the membership. It's also important for current

members to mentor new members.

As law becomes increasingly decentralized and more and more people who practice law are solo practitioners and in small practices, there is so much more to be gained from the resources that the ABA can provide. The practice of law is moving away from an apprenticeship model towards one that is more entrepreneurial.

You are a Business Law Section Ambassador. Tell me about that.

I have been very privileged to be selected as an Ambassador for the 2014–2016 class. It's a leadership development and mentoring program, so it's really an investment by the Section in what they see as the future. It is truly an honor, and it's given me opportunities to participate in the activities of the Section that I wouldn't otherwise have. I'm very grateful.

How is mentoring important to you?

I have been so lucky throughout my life to have had wonderful mentors. There have been so many people who have been incredibly kind and generous with their time, especially in the Section, but also my past professors and colleagues. I wouldn't be where I am today without them. That's why it's so important for me to return the favor and spend the time mentoring and being a resource to others, especially for career advice or guidance. I think I've mentored over half-a-dozen law students so far, and they are all doing so well. Some of them I remain very close with. It's so great to see them succeed in their careers.

I read that you like to scuba dive. For your last dive, where did you go?

I'm working on my certification. Last summer, I did an open dive in Jamaica, which was amazing. We went 60 feet down. I saw lion fish and sea turtles. It was very calming, almost a Zen-like experience because you can't panic – you have to control your breathing. And for a lawyer who can be in a sometimes high-stress role, it's liberating to be forced to relax.

Thank you so much.

BUSINESS LAW TODAY

Inside Business Law

The ABCs of the UCC Article 3

The ABC's of UCC Article 3: Negotiable Instruments and Article 4: Bank Deposits and Collections and Other Modern Payment Systems, Third Edition, was published in December by the Business Law Section. The publication was authored by Stephan C. Veltri.

Become acquainted with the background, terminology, and general outline of the law of negotiable instruments, check collections, credit cards, consumer electronic funds transfers, prepaid value cards, and other emerging payment systems. The book covers recent developments such as the mortgage crisis, the transition of check collections from paper to digital images, the growth in the use of debit cards and stored value cards as payment devices, payments made over the Internet through non-bank intermediaries, and mobile payments.

The Third Edition covers all significant developments in the twenty-first century relating to Articles 3 and 4 of the UCC. It's a valuable resource that will benefit both lawyers and law students. The price to Section members is only \$34.95 and can be ordered [here](#).

The Mergers and Acquisition Committee's Deal Points Studies

It's a new year and with it comes some exciting news from the Business Law Section Mergers and Acquisitions Committee. The 2014 M&A *Deal Points Studies* have

been released, and we wanted to give you a chance to check them out. As you may know, the *Deal Points Studies* contain analyses of frequently-used contract clauses, and are available exclusively to Mergers and Acquisitions Committee members. Included in these documents are recently-published 2013 studies on private targets, strategic buyer/public targets, Canadian public-company targets, and European private targets. Access the *Deal Points Studies* by joining the Mergers and Acquisitions Committee for free. You can join at the Committee page, located [here](#).

Business Law Section Member Receives One of Canada's Highest Civilian Honors

Richard Pound was named a Companion of the Order of Canada when Governor General David Johnson announced 95 Canadians as companions, officers, or members of the Order on December 26.

The Order of Canada is considered one of Canada's highest civilian honors which recognizes outstanding achievement, dedication to the community, and service to the country. Mr. Pound was made an Officer of the Order of Canada in 1992 and has now been promoted to the highest tier of Companion "for his contributions as a champion of fairness in sport and of the Olympic spirit, as well as for his engagement in civic, legal and educational causes."

Richard Pound is a Counsel in the Mon-

tréal office of Stikeman Elliott and member of the firm's Tax Group. His main areas of practice include tax litigation and negotiations with tax authorities on behalf of clients, in addition to general tax advisory work and commercial arbitration.

Please join us in congratulating Richard on this wonderful and well deserved honor.

The Winter Edition of The Business Lawyer is Now Available

The Winter Edition of *The Business Lawyer* is now available and can be found [here](#). Articles include:

Corporate Law After Hobby Lobby, by Lyman Johnson and David Millon. The authors evaluate the U.S. Supreme Court's controversial decision in the *Hobby Lobby* case from the perspective of state corporate law, and argue that the Court is correct in holding that corporate law does not mandate that business corporations limit themselves to pursuit of profit. Rather, state law allows incorporation for any lawful purpose. The authors elaborate on this important point and also explain what it means for a corporation to "exercise religion." In addition, the article addresses the larger implications of the Court's analysis for an accurate understanding both of state law's essentially agnostic stance on the question of corporate purpose and also of the broad scope of managerial discretion.

The Rights and Duties of Blockholder Directors, by J. Travis Laster and John

Mark Zeberkiewicz. Delaware corporate law embraces a “board-centric” model of governance contemplating that, as a general matter, all directors will participate in a collective and deliberative decision-making process. Rather than serving as a justification for a board majority to disempower directors elected or appointed by or at the direction of a particular class or series of stock or an insurgent group – which we refer to as “blockholder” directors – this system recognizes the need for a balancing of both majority and minority rights. In this article, the authors review the rights and duties of all directors and highlight cases where both board majorities and blockholder directors have overstepped their bounds. The authors caution that board majorities should deliberate carefully before taking action that limits a blockholder director’s rights or excludes the blockholder director from participation in fundamental corporate matters. At the same time, the authors caution that blockholder directors should take care when exercising their rights, given that their affiliation with investors may make them vulnerable to duty of loyalty claims. The authors urge both sides to proceed with a sense of empathy toward the other and seek to make reasonable accommodations, and we emphasize the role that experienced corporate counsel can play in mediating disputes, resolving tensions, and striking the appropriate balance in the boardroom.

The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013, by Wulf A. Kaal and Timothy A. Lacine. Non- and deferred-prosecution agreements (N/DPAs) are controversial because prosecutors, not judges or the legislature, are changing the governance of leading public corporations and entire industries. To analyze N/DPAs’ corporate governance implications and provide policy makers with guidance, the authors code all publicly available N/DPAs (N=271) from 1993 to 2013, identifying 215 governance categories and subcategories. The authors find evidence that the execution of N/DPAs is associated with significant corporate gover-

nance changes. The study categorizes mandated corporate governance changes for entities that executed an N/DPA as follows: (1) Business Changes, (2) Board Changes, (3) Senior Management, (4) Monitoring, (5) Cooperation, (6) Compliance Program, and (7) Waiver of Rights. The authors supplement the analysis of governance changes in these categories with a more in depth evaluation of the respective subcategories of governance changes. The authors also code and analyze preemptive remedial measures, designed by corporations to preempt the execution of an N/DPA or corporate criminal indictment. The article evaluates the implications of the empirical evidence for boards, management, and legal practitioners.

Common Qualifications to a Remedies Opinion in U.S. Commercial Loan Transactions, by Gail Merel (Reporter), A. Mark Adcock, Robert W. Barron, Willis R. Buck, Jr., Jerome A. Grossman, Louis G. Hering, Timothy G. Hoxie, Andrew M. Kaufman, Reade H. Ryan, Jr., Philip B. Schwartz, and Stephen C. Tarry. As a condition to the closing of many types of business transactions, one or more of the parties may be required to provide written opinion letters of counsel for the benefit of other parties to the transaction. These opinions are often referred to as “third-party” opinions because the opinion giver renders them to a party or parties other than the opinion giver’s own client. These opinions may cover a range of issues, including, among others, the entity status and power of, the due authorization, execution, and delivery of the transaction documents by, and the enforceability of those documents against, the opinion giver’s own client in the transaction. Oftentimes, the discussions regarding the scope of these opinions and the extent to which they will be qualified are time-consuming, and the resulting costs, borne by the client whose counsel is asked to render the opinions, increase substantially as negotiations proceed. This article, focusing on third-party opinions rendered in the context of U.S. commercial loan transactions, considers a number of qualifications that for various reasons, in

the experience of the authors, opinion givers commonly include and opinion recipients and their counsel commonly accept. The authors believe that the identification of commonly used and accepted qualifications in the U.S. commercial loan market can help to streamline the opinion process in many transactions.

Essays include **Consent in Corporate Law**, by Lawrence A. Hamermesh. Recent Delaware case law explores and extends what the author describes as the “doctrine of corporate consent,” under which a stockholder is deemed to consent to changes in the corporate relationship that are adopted pursuant to statutory authority (such as by directors adopting bylaws). This essay examines whether and to what extent there may be limits on the application of the doctrine of corporate consent and whether fee-shifting bylaws exceed those limits.

Reports include:

- **Changes in the Model Business Corporation Act**, by the Corporate Laws Committee, and
- **Sample California Third-Party Legal Opinion for Venture Capital Financing Transactions**, by Opinions Committee, Business Law Section of the State Bar of California.

A Survey by the Committee on Cyberspace Law includes:

- **Introduction to the Survey of the Law of Cyberspace – 2014**, by Jonathan T. Rubens and Kristine F. Dorrain;
- **In the Wake of Cyber Damage: Significant Decisions in Cybersecurity 2013–2014**, by Roland L. Trope and Lixian Loong Hantover;
- **Developments in Data Security Breach Liability**, by David L. Silverman;
- **Survey of Recent FTC Privacy Enforcement Actions and Developments**, by Greg Dickenson;
- **European Union Data Privacy Law Developments**, by W. Gregory Voss;
- **Are These Game Changers? Developments in the Law Affecting Virtual Currencies, Prepaid Payroll Cards,**

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- **Online Tribal Lending, and Payday Lenders**, by Sarah Jane Hughes and Stephen T. Middlebrook;
 - **Survey of Patent Law Developments Relevant to Cyberspace**, by Phong Nguyen;
 - **Trademarks in Cyberspace: 2013 in Review**, by Eran Kahana;
 - **Copyrights in Cyberspace: A Year in Review**, by Janice Rourke Hugener;
 - **2014 State of the Law Regarding Internet Intermediary Liability for User-Generated Content**, by Catherine R. Gellis;
 - **Developments in India—Website Owner and Service Provider Liability for User-Generated Content and User Misconduct**, by Garima Jhunjunwala and Prashant Kumar; and
 - **Know More About the Brazilian “Internet Legal Framework,”** by Renato Opice Blum, Rony Vainzof, and Rita P. Ferreira Blum.

Business Law Today Board Members 2014–2015

Co-Chairs:

Warren E. Agin
Swiggart & Agin, LLC
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christopher.rockers@huschblackwell.com

Advisor:

Robert Boehm
Steiner Leisure Limited
bobb@steinerleisure.com

Members:

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katherine.allen@stites.com

Phillip J. Long
Branch Banking and Trust Company
pjlong@bbandt.com

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Eckert Seamans Cherin & Mellott, LLC
mbach@eckertseamans.com

Kathleen S. McLeroy
Carlton Fields
kmcleroy@carltonfields.com

Michael St. Patrick Baxter
Covington & Burling LLP
mbaxter@cov.com

Bradford K. Newman
Paul Hastings LLP
bradfordnewman@paulhastings.com

Lawrence A. Goldman
Gibbons P.C.
lgoldman@gibbonslaw.com

Michael K. Reilly
Potter Anderson & Corroon LLP
mreilly@potteranderson.com

Kristin A. Gore
Carlton Fields Jordan Burt
kgore@cfjblaw.com

Jeffrey W. Rubin
Financial Accounting Foundation
jwrubin@f-a-f.org

Nicole Harris
Pacific Gas and Electric Company
ndh1@pge.com

John H. Stout
Fredrikson & Byron, P.A.
jstout@fredlaw.com

Kathleen J. Hopkins
Real Property Law Group, PLLC
khopkins@rp-lawgroup.com

Thomas W. White
Wilmer Cutler Pickering Hale and Dorr
thomas.white@wilmerhale.com

Lisa R. Lifshitz
Torkin Manes LLP
llifshitz@torkinmanes.com

Editor:

John Palmer
ABA Publishing Periodicals
john.palmer@americanbar.org