

University of Cincinnati
College of Law
Spring 2013

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Room 422
556-0113

CORPORATIONS II

Special Note:

We are fortunate that Robert W. Olson, retired Senior Vice President and General Counsel of Chiquita Brands International, Inc. and of Counsel to Dinsmore & Shohl, LLP, will be co-teaching portions of this course to provide practical insights on issues relating to representation of publicly traded corporations.

Required Materials:

Page references are to Eisenberg, *Corporations and Other Business Organizations* (10th ed. unabridged). The other materials are available online; please let me know if you have any problems in retrieving them. The Delaware corporations code is available at <http://delcode.delaware.gov/title8/c001/index.shtml>. All federal securities statutes and regulations are at the SEC's website at <http://www.sec.gov/about/laws.shtml>

Note: Some of the materials may seem (and indeed may be) overly long and technical. They are assigned to provide you with an understanding of the important players and key issues in the ongoing debate over corporate governance. They will also give you a flavor of what corporate attorneys read on a regular basis. Read them with those purposes in mind.

We may make some adjustments in the syllabus as we move forward, depending on current issues relevant to the course.

Recommended Materials:

I strongly encourage students to read regularly the Wall Street Journal throughout the semester. It will provide you with real-life illustrations of the issues we are dealing with. You can read it in the library, or student subscriptions are available at the WSJ website.

Class Attendance and Course Preparation

I expect regular attendance and careful preparation from all students. A student whose attendance is irregular or who is consistently unprepared may be required to withdraw from the course or will be excluded from the examination pursuant to section 2.02 of the College of Law Rules.

Corporate Reporting Project

You are required to follow a large publicly traded corporation. Since we are focusing on the NYSE Governance Rules, it may be simpler to choose a NYSE-listed corporation, although you are free to choose a NASDAQ corporation if you prefer. A written report is due at the end of the semester. (Additional information about the written report is included at the end of the syllabus.) In addition, you are encouraged to make brief oral reports during the semester if your corporation engages in activities relevant to the course. **Please e-mail me the name of the corporation you wish to follow as soon as possible. I want every student to follow a different company, so if you have a strong preference you should act quickly. (Because we use Procter & Gamble as our illustrative corporation, you may not choose P&G.)**

Grading

There will be a final examination that will be graded anonymously. In addition, your written report and your class participation will count for 40% of your course grade.

Office Hours

I am generally available in my office (room 422) during business hours. In addition, you may e-mail or call to schedule an appointment.

Assignment for First Class

Our first class will focus on the issues addressed in Chancellor Strine's article; see below.

Reading Assignments

The Nature of the Public Corporation

Introduction

Note on the Structure of the Corporation, pp. 302-312, 335-339

Leo E. Strine, Jr., *One Fundamental Corporate Governance Question We Can Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1 (2010) (no need to read footnotes)

Class discussion will focus on the following questions:

1. What is wrong with the rhetoric used by activist shareholders advocating for corporate democracy, according to Chancellor Strine?
2. Chancellor Strine argues that most major shareholders lack a focus on long-term profitability. What is his evidence for this? What are the consequences of this?

3. What, in Chancellor Strine's view, are appropriate areas of shareholder concern? What are not?
4. "Boards have never been more sensitive to what shareholders want" (p.16). What can be wrong with this?
5. What does he assert is the conflict between investment vehicles like mutual funds and pension plans and those who invest in those vehicles?

The Proxy Solicitation Process

Overview of Stock Markets, the SEC, and the Proxy System, pp. 363-374
 SEC, Concept Release on the U.S. Proxy System, 75 Fed. Reg. 42982 (July 22, 2010), available at <http://www.sec.gov/rules/concept/2010/34-62495fr.pdf> -- read Parts I and II (Introduction, The Current Proxy Distribution and Voting Process)

The Role of the Institutional Shareholder

Review: (1) the Council on Institutional Investors homepage at <http://www.cii.org>, and read About The Council at <http://www.cii.org/about> and its Statement on the Value of Corporate Governance at <http://www.cii.org/UserFiles/file/Statement%20on%20the%20Value%20of%20Corporate%20Governance.pdf>, and
 (2) the CalPERS homepage at <http://www.calpers-governance.org/>, and read the Introduction and Purpose (pp.5-6) of its Global Principles of Accountable Corporate Governance at <http://www.calpers-governance.org/docs-sof/principles/2010-5-2-global-principles-of-accountable-corp-gov.pdf>

The Influence of Proxy Advisory Firms

SEC, Concept Release on the U.S. Proxy System (*supra*); read Part V.A (Proxy Advisory Firms)
 Review: (1) the ISS home page at <http://www.issgovernance.com/> and (2) ISS 2013 Corporate Governance Policy Updates and Process Executive Summary at http://www.issgovernance.com/policy/2013/policy_information

Professional Responsibilities of the Corporate Attorney

SEC Standards of Professional Conduct for Attorneys Appearing and Practicing before the Commission in the Representation of an Issuer, available at http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=c7cbe9b63d85903d1fcfc7fc748ffb17&tpl=/ecfrbrowse/Title17/17cfr205_main_02.tpl

SEC v. Isselmann, summarized in SEC Litig. Rel. 18896 (Sept. 24, 2004) at <http://www.sec.gov/litigation/litreleases/lr18896.htm>.

SEC v. Google summarized in SEC Press Rel. 2005-06 (Jan. 13, 2006) at <http://www.sec.gov/news/press/2005-6.htm>.

Joseph Collins, Principal Attorney for Former Commodities Firm Refco, Found Guilty in Manhattan Federal Court (Nov. 16, 2012) at <http://www.justice.gov/usao/nys/pressreleases/November12/CollinsVerdictPR.php>

You are an associate in a law firm that represents a publicly traded financial services firm that is planning a public offering. You are the junior member on the team assigned to work with management on the drafting of the registration statement. You have not previously done any work for this client, but are aware, from a briefing by the senior associate, that an important factor for investors is the extent of the firm's leverage, or its reliance on borrowed money. She tells you that repos, short for repurchase agreements, are short-term loans that provide financing and are a standard practice on Wall St.

In the course of your assignment, you find in the files copies of an exchange of emails between corporate employees referring to "Repo 105 transactions." One email describes Repo 105 as "basically window-dressing." In response, another asks: "I see. So it's basically do-able, but doesn't look good when we do it? Does the rest of the street do it? Does the Audit Committee know?" The first employee replies: "yes, no, and I don't know."

You don't know what these emails mean and attempt to discuss them with the senior associate, but she is harried and brushes you off. (1) What (if anything) should you do? (2) What are your responsibilities if you are the senior partner at the law firm working on the matter? (3) Would your responsibilities be any different if you are an attorney in the corporation's inhouse legal department?

See Merced & Sorkin, "Report Details How Lehman Hid Its Woes," NYTimes (Mar. 11, 2010), available at http://www.nytimes.com/2010/03/12/business/12lehman.html?_r=1&scp=14&sq=lehman%20repo%20105&st=cse

Corporate Social Responsibility

Review: (1) the Business for Social Responsibility website at <http://www.bsr.org/>, and read About BSR at <https://www.bsr.org/en/about/how-we-work> and (2) the Global Reporting Initiative website at <https://www.globalreporting.org/Pages/default.aspx> and read About GRI at <https://www.globalreporting.org/Information/about-gri/Pages/default.aspx>

Walmart Statement on Fire at Bangladesh Garment Factory (Nov. 26, 2012) at <http://news.walmart.com/news-archive/2012/11/26/walmart-statement-on-fire-at-bangladesh-garment-factory> (also follow the link to the Global Responsibility Report)

"Documents Indicate Walmart Blocked Safety Push in Bangladesh" (NYTimes Dec. 5, 2012), at <http://www.nytimes.com/2012/12/06/world/asia/3-walmart-suppliers-made-goods-in-bangladeshi-factory-where-112-died-in-fire.html>

Supplier Responsibility at Apple, at <http://www.apple.com/supplierresponsibility/>

Fair Labor Association Finds Progress at Apple Supplier Foxconn (Aug. 21, 2012) at http://www.fairlabor.org/press-release/foxconn_verification_report

“In Shift of Jobs, Apple Will Make Some Macs in the U.S.,” NYTimes (Dec. 6, 2012), at <http://www.nytimes.com/2012/12/07/technology/apple-to-resume-us-manufacturing.html?pagewanted=all>

“Hershey Co. Sued for Info on Child Labor,” Courthouse News Service (Nov. 5, 2012) at <http://www.courthousenews.com/2012/11/05/51961.htm>

SEC Adopts Rule for Disclosing Use of Conflict Minerals (2012-163), at <http://www.sec.gov/news/press/2012/2012-163.htm>

Corporate Governance

All references below to NYSE refer to the New York Stock Exchange, Listed Company Manual, Section 3, Corporate Responsibility, available at <http://nysemanual.nyse.com/LCMTTools/PlatformViewer.asp?selectednode=chp%5F1%5F4%5F3&manual=%2F1cm%2Fsections%2F1cm%2Dsections%2F>

All of the Procter & Gamble materials listed below are available at the Investor Relations section of its website, http://www.pg.com/en_US/investors/index.shtml

Board of Directors: Composition and Functions

NYSE 303A.01-303A.03, 303A.09, 304.00, 307.00

P & G Corporate Governance Policies, Independence Guidelines

Note on Independence, pp.1114-1118

HYPOTHESIS: Suppose the director is a partner in a law firm that does occasional legal work for the corporation. Can she be classified as an independent director?

The Nominating/Corporate Governance Committee

SEA § 14B (Dodd-Frank § 972) (Disclosures Regarding Chairman and CEO Structure)

NYSE 303A.04

Del. Code tit. 8, §§ 112, 113, 141(b) (note the 8th sentence), 216 (note the last sentence), available at <http://www.delcode.delaware.gov/>.

P & G Governance & Public Responsibility Committee Charter

The Compensation Committee

SEC, Corporate Governance Issues, Including Executive Compensation Disclosure and Related SRO Rules, at <http://www.sec.gov/spotlight/dodd-frank/corporategovernance.shtml>

SEC Rule 10C-1, §240.10C-1 (adopted June 20, 2012)

NYSE 303A.05

P & G Compensation & Leadership Development Committee Charter

Note on CEO Compensation, pp. 774-778

Note on the Compensation of Nonexecutive Directors, pp. 778-780

SEC, Proxy Disclosure Requirements, Rel. No. 34-9089 (Dec. 16, 2009), available at <http://www.sec.gov/rules/final/2009/33-9089fr.pdf> (read Summary and Background and Overview of Amendments only)

In re Goldman Sachs Group, Inc. Shareholder Litig., 2011 WL 4826104 (Del. Ch. Oct. 12, 2011) (Intro and Parts I; III.B and III.C)

NYTimes Dealbook, JPMorgan's Board Uses a Pay Cut as a Message (Jan. 16, 2013), <http://dealbook.nytimes.com/2013/01/16/morgans-board-uses-a-pay-cut-as-a-message/>

The Audit Committee

Sarbanes Oxley §§ 301, 404

NYSE 303A.06, 303A.07

P & G Audit Committee Charter and Audit Committee Policies

Corporate Compliance

Sarbanes Oxley § 302

SEC, Annual Report on Whistleblower Program – Fiscal Year 2012, at

<http://www.sec.gov/about/offices/owb/annual-report-2012.pdf>

SEC Rule 13a-15

Organizational Sentencing Guidelines (Nov. 1, 2005), Introductory Commentary and § 8B2.1, Effective Compliance and Ethics Program, available at

http://www.ussc.gov/Guidelines/Organizational_Guidelines/guidelines_chapter_8.htm

Wal-Mart Stores, Inc. Current Report on Form 8-K (filed Nov. 15, 2012), item 8.01, at <http://www.sec.gov/Archives/edgar/data/104169/000119312512471604/d440140d8k.htm>

Guidance on the Use of Company Websites, Rel. 34-58288, at

<http://www.sec.gov/rules/interp/2008/34-58288.pdf> (Read Introduction and Overview only.)

SEC Regulation FD

Item 202, Form 8-K, at <http://www.sec.gov/about/forms/form8-k.pdf>

In re Black, Rel. 34-60717 (Sept. 24, 2009), available at

<http://www.sec.gov/litigation/admin/2009/34-60715.pdf>

Netflix, Inc. Current Report on Form 8-K (filed Dec. 6, 2012), at

<http://ir.netflix.com/secfiling.cfm?filingID=1065280-12-25&CIK=1065280>

Complaint in SEC v. Tenet Health Care, at

<http://www.sec.gov/litigation/complaints/2007/comp20067.pdf> (focus on the allegations against General Counsel Sulzbach, in particular, V-G and VII-C and E)

SEC Rule 10b5-1, Trading “on the basis of” material nonpublic information in insider trading cases

Council of Institutional Investors Letter to SEC Chairman Walter on Rule 10b5-1 Trading Plans (Dec. 28, 2012), at <http://www.cii.org/CouncilCorrespondence>

Risk Management

In re Goldman Sachs Group, Inc. Shareholder Litig., 2011 WL 4826104 (Del. Ch. Oct. 12, 2011) (Part III.D and IV)

Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. Corp. Law 967 (2009) – read Parts I, II, V only.

Indemnification and Advancement

Del. §§ 102(b)(7), 145

Homestore, Inc. v. Tafeen, 888 A.3d 204 (Del. 2005) (do not read p. 210 “Laches Defense Properly Rejected”)

Hermelin v. K-V Pharmaceutical Co., 54 A.3d 1093 (Del. Ch. 2012) -- stop reading at I.B (“Advancement for the Jail Records Matter”), pick up at III.C (“Indemnification Claims”).

Structural Changes: Corporate Combinations and Tender Offers

Sale of Substantially All Assets

Del. Corp. Code § 271

pp. 1207-1209

Hollinger, Inc. v. Hollinger Int’l, Inc., pp. 1169-1177

Bank of New York Mellon Trust Co., N.A. v. Liberty Media Corp., 29 A.3d 225 (2011)

HYPOTHESIS: Corporation decides to sell all its operating assets and other property, except a couple of company cars. Would shareholder approval be required?

HYPOTHESIS: A few years ago, Daimler (manufacturer of Mercedes Benz) acquired Chrysler in a merger that was billed as a “merger of equals.” DaimlerChrysler decided subsequently to sell the Chrysler assets. Assume that DaimlerChrysler is a Delaware corporation. Would shareholder approval be required under 271?

Statutory Mergers

Del. Corp. Code §§ 251, 259-261

pp. 1190-1193

Triangular Mergers and Share Exchanges

Terry v. Penn Central Corp., pp. 1209-1214

The Appraisal Remedy

Del. Corp. Code § 262

pp. 1177-1189

Louisiana Mun. Police Employees' Retirement System v. Crawford, 918 A.2d 1172 (Del. Ch. 2007) (Read Parts I, VI, and VII)

Tender Offers; Directors' Responses

Securities Exchange Act §§ 13(d), 13(e), 14(d), 14(e)
pp. 1244-1253

Unocal Corp. v. Mesa Petroleum, pp. 1253-1262

Unitrin v. American General Corp., pp. 1262-1265

Poison Pills

Moran v. Household Int'l, pp. 1266-1275

Note on Carmody v. Toll Brothers, pp. 1275-1278

Quickturn Design Systems v. Shapiro, pp. 1278-1283

Air Products and Chemicals, Inc. v. Airgas, Inc., pp. 1283-1291

Confidentiality/Standstill Agreements

Martin Marietta Materials Inc. v. Vulcan Materials Co., 2012 WL 2783101 (Del. 2012)

New York City Bar Association Model Form of Reciprocal Confidentiality Agreement,
www2.nycbar.org/.../20072130-ReciprocalConfidentialityAgreement...

The Revlon Duty

Revlon v. MacAndrews & Forbes, pp. 1291-1301

Paramount Communications v. Time Inc., pp. 1301-1315

Paramount Communications v. QVC Network, pp. 1315-1321

Note on Defensive Measures Outside Delaware, pp. 1321-1324

Omnicare, Inc. v. NCS Healthcare, Inc., pp. 1324-1339

In re Del Monte Foods Co. Shareholders Litig., 25 A.3d 813 (Del. Ch. 2011)

Transactions with Controlling Shareholders

Weinberger v. UOP, Inc., pp. 1215-1230

Note on Going Dark, pp. 1241-1243

Note on Duty of Disclosure by Controlling Shareholders, pp. 811-813

Kahn v. Lynch Communication Systems, pp. 820-831

Glassman v. Unocal Exploration Corp., pp. 1232-1234

Solomon v. Pathe, pp. 1234-1235

In re Pure Resources, Inc. Shareholders Litigation, pp. 1235-1241

In re Cox Communications Shareholders Litig., 879 A.2d 604 (Del. Ch. 2005)

Spring 2013

**CORPORATIONS II
CORPORATE REPORT**

Your report should focus on the corporate governance issues we have studied this semester as they relate to “your” corporation. The report is yours to craft as you wish, and you are free to organize your presentation as you see fit. You should address the items set forth below. How much attention to devote to each item is up to you and depends on the importance of the item to your corporation and your own particular interests. I give bonus points if you make the report interesting. I also care about grammar and spelling.

1. Provide a brief description of your corporation’s principal business(es).
2. Give your assessment of the corporation’s website and, in particular, the corporate governance section. How attractive and user-friendly is the site?
3. Review the major corporate governance documents and identify (a) items that appear to be “best practices” and go beyond what the NYSE (or Nasdaq) standards require and (b) ways in which they implement or expand upon the NYSE (Nasdaq) standards.
4. Review the corporation’s most recent proxy statement. (Many corporations have calendar fiscal years, in which case they may have the 2013 proxy statement available this spring in time for this report. Otherwise, you will have to use the 2012 proxy statement. If you’re not sure, check the date of the 2012 proxy statement; this year’s will be publicly available approximately a year later.)
 - (a) Does it contain proposals for shareholders’ vote, including “say-on-pay” and shareholders’ proposals? What is the subject matter of the proposal, who submitted it, and what was management’s response? If the annual meeting has already taken place, what was the outcome of each proposal?
 - (b) Does the corporation take a position on electing directors by majority voting? What about allowing shareholders to nominate candidates?
 - (c) Does the proxy statement set forth the company’s policy on stock option grants? If so, briefly describe it.
 - (d) Review and comment on the proxy statement’s discussion of executive compensation contained in the Compensation Discussion and Analysis.
5. Listen (preferably in real-time) to a webcast of a conference call discussing your corporation’s quarterly earnings between management and analysts. Describe briefly the content and tone of the call.
6. Has your corporation been involved in any newsworthy events recently: major litigation, a corporate scandal, an acquisition or merger, etc. Describe the matter and how it relates to the matters we have studied this semester.

Your report should be at least five, but not more than ten, pages in length (single-spaced; double-space between paragraphs). It is due by 5 p.m. on the last day of class.