

University of Cincinnati
College of Law
Spring 2008

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Room 430
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 (as of February 2008) 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* (9th ed. Unabridged). The other materials are available online; please let me know if you have any problems in retrieving them. All securities statutes and regulations are at the Securities Lawyer's Deskbook at <http://www.law.uc.edu/CCL/>.

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. You will be expected to make brief oral reports about your corporation throughout the semester, make an oral presentation during the final weeks of the semester and write a report that will be due at the end of the semester. (Additional information about these reports will be available later.) **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.

Grading

There will be a final examination that will be graded anonymously. In addition, your corporate reports and your class participation will count for one-third of your course grade.

Office Hours

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

Reading Assignments

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

The Nature of the Public Corporation

Background

Note on Shareholdership in Publicly Held Corporation, pp. 154-162

Note on the Structure of the Corporation, pp. 198-200

Overview of Stock Markets, the SEC, and the Proxy Rules, pp. 270- 281

Conflicts of Interest in the Proxy Voting System, pp. 322-324

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 the Introduction to its Corporate Governance Policies at

<http://www.cii.org/policies/Current%20CII%20Corporate%20Governance%20Policies%2009-18-07.pdf>, and

(2) the CalPERS homepage at <http://www.calpers-governance.org/forumhome.asp>, and read Global Principles of Accountable Corporate Governance at <http://www.calpers-governance.org/principles/international/global/page02.asp>.

The Influence of Proxy Advisory Firms

Review: (1) the ISS Governance Services(part of the RiskMetrics Group) homepage at <http://www.issproxy.com/issgovernance.html>, and read Recommendation-Based Proxy Advisory Services at

<http://www.issproxy.com/issgovernance/research/recommendation.html>; and

(2) the Glass Lewis homepage at <http://www.glasslewis.com>, and read Proxy Analysis and Voting Services at <http://www.glasslewis.com/solutions/proxyanalysis.php>.

The Academic Debate: Bebchuk vs. Bainbridge

Lucian A. Bebchuk, Letting Shareholders Set the Rules, 119 Harv. L. Rev. 1784 (2006)
Stephen M. Bainbridge, Director Primacy and Shareholder Disempowerment, 119 Harv. L. Rev. 1735 (2006).

This class discussion on Bebchuk/Bainbridge will focus on the following questions:

1. Generally speaking, what are the competing models of corporate governance advocated by Professors Bebchuk and Bainbridge?
2. What specific changes in corporate law does Professor Bebchuk propose?
3. What's wrong with these proposals, according to Professor Bainbridge?
4. How, according to Professor Bainbridge, do market forces provide the optimal governance rules? Do you agree or disagree with him?
5. Can we reasonably expect that shareholders will make better decisions on behalf of the corporation? Why or why not? Does it matter who the shareholders are (e.g., Warren Buffet, pension funds, hedge funds)?

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.law.uc.edu/CCL/p205/index.html>.

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>.

You are an associate in a large law firm that represents a publicly traded corporation that is planning a public offering. You are the junior member on the "due diligence" team, assigned to review the company's minutes of meetings of the board of directors. You find included in the file notes, in what you recognize as the handwriting of the company's General Counsel (who acts as Secretary at all board meetings), of a board resolution authorizing payment of a \$12 million bonus to the CFO. This surprises you because you do not recall any previous mention of this bonus. You double-check the management compensation section in the company's proxy statement and confirm that the bonus is not disclosed. (1) What should you do? (2) Would your responsibilities be any different if you are a junior attorney in the corporation's inhouse legal department? (3) What are your responsibilities if you are the senior partner at the large firm working on the matter?

Corporate Social Responsibility

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Review: (1) the Business for Social Responsibility website at <http://www.bsr.org/>, and read Working with Business to Build a More Just and Sustainable World at <http://www.bsr.org/about/index.cfm>, and

(2) the Global Reporting Initiative website at <http://www.globalreporting.org/home>, and read About GRI at <http://www.globalreporting.org/About GRI/>
Kasky v. Nike, 27 Cal.4th 939 (2002)
FY00-06 Corporate Responsibility Report, available at
<http://nikeresponsibility.com/#crreport/main> -- Read Letter from CEO Mark Parker and Letter from RRC.

Corporate Governance

All references below to NYSE refer to the New York Stock Exchange, Listed Company Manual, Section 3, Corporate Responsibility, available at http://www.nyse.com/Frameset.html?nyseref=http%3A//www.nyse.com/regulation/listed/1182508124422.html&displayPage=/lcm/lcm_section.html.
All of the Chiquita Brands Int'l Inc. materials listed below are available at <http://www.chiquita.com> (go to "Investors," then to "Governance").

Board of Directors: Composition and Functions

NYSE 303A.01-303A.03, 303A.09, 303A.14, 304.00
Chiquita Brands Int'l, Inc., Governance Standards and Policies of Board of Directors Note on Independence, pp. 978-982

The Nominating/Corporate Governance Committee

NYSE 303A.04
Chiquita Brands Int'l, Inc., Charter of the Nominating and Governance Committee Del. Code tit. 8, §§ 141(b) (note the 6th sentence), 216 (note the last sentence), available at <http://www.delcode.delaware.gov/>.
NYSE Adopts Proxy Working Group Recommendation to Eliminate Broker Voting In 2008, available at <http://www.nyse.com/press/1161166307645.html> (The SEC has not, to date, approved this rule change.)
SEC Release Adopting Final Rule, Shareholder Proposals Relating to Elections, available at <http://www.sec.gov/rules/final/2007/34-56914.pdf> (skim pp. 1-16; read Part III, pp. 16-20).

The Compensation Committee

NYSE 303A.05
Chiquita Brands Int'l, Inc., Charter of the Compensation and Organization Development Committee
CII, Corporate Governance Policies: Executive Compensation, available at <http://www.cii.org/policies/CII%20Policies%20-%20Executive.pdf>.
Note on CEO Compensation, pp. 648-650
Note on the Effect of Federal Income Tax Rules and Accounting Principles on Executive Compensation, pp. 650-652
Note on the Compensation of Nonexecutive Directors, pp. 652-654

Correspondence relating to Verizon Communications' attempt to exclude shareholder "Say on Pay" resolution, 2007 WL 624310 (Feb. 19, 2007)

Verizon Communications Proxy Statement; see Item 6 of Shareholders' Resolutions (Read resolution, supporting statement and management's statement in opposition), available at <http://www.sec.gov/Archives/edgar/data/732712/000119312507067030/ddefr14a.htm>.

Conrad v. Blank, 2007 WL 2593540 (Del. Ch. Sept. 7, 2007) (Do not read "Part B. Standing")

In re Tyson Foods, 2007 WL 2351071 (Del. Ch. Aug. 15, 2007)

In re UnitedHealth Group Inc. Shareholders' Deriv. Litig., 2007 WL 4571127 (D. Minn. Dec. 26, 2007)

SEC Charges Former Apple General Counsel for Illegal Stock Option Backdating, available at <http://www.sec.gov/litigation/litreleases/2007/lr20086.htm>.

The Audit Committee

Sarbanes Oxley §§ 301, 404

NYSE 303A.06, 303A.07

Chiquita Brands Int'l, Inc., Charter of the Audit Committee

Corporate Compliance

SEC Regulation FD

SEC v. Siebel Systems, 389 F. Supp.2d 694 (S.D.N.Y. 2005)

Sarbanes Oxley § 302

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)

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

<http://www.USSC.gov/2005guid/CHAP8.pdf>

Structural Changes: Corporate Combinations and Tender Offers

Sale of Substantially All Assets

Del. Corp. Code § 271

pp. 1074-1075

Hollinger, Inc. v. Hollinger Int'l, Inc., pp. 1040-1048

The Appraisal Remedy

Del. Corp. Code § 262

pp.1049-1050, 1053-1055

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

Statutory Mergers

Del. Corp. Code §§ 251, 259-261
pp. 1056-1059

Triangular Mergers and Share Exchanges

Terry v. Penn Central Corp., pp. 1075-1081

Tender Offers and Directors' Responses

Securities Exchange Act §§ 13(d), 13(e), 14(d), 14(e)
pp. 1116-1124
Unocal Corp. v. Mesa Petroleum, pp. 1124-1135
Unitrin v. American General Corp., pp. 1135-1138
Blasius Industries v. Atlas Corp., pp. 167-175
Hilton Hotels Corp. v. ITT Corp., pp. 1196-1205

The Revlon Duty

Revlon v. MacAndrews & Forbes, pp. 1163-1174
Paramount Communications v. Time, Inc., 571 A.2d 1140 (Del. 1989)
Paramount Communications v. QVC Network, pp. 1176-1195
Omnicare, Inc. v. NCS Healthcare, Inc., pp. 1206-1221

Poison Pills

Moran v. Household Int'l, pp. 1138-1148
Note on Carmody v. Toll Brothers, pp. 1148-1151
Quickturn Design Systems v. Shapiro, pp. 1151-1163
Bebchuk v. CA, Inc., 902 A.2d 737 (Del. Ch. 2006)
Unisuper Ltd. v. News Corp., 2005 WL 3529317 (Del. Ch. Dec. 20, 2005)

Freezeouts; Going Private

Weinberger v. UOP, Inc., pp. 1083-1097
Note on Duty of Disclosure by Controlling Shareholders, pp. 686-688
Kahn v. Lynch Communication Systems, pp. 695-709
Glassman v. Unocal Exploration Corp., pp. 1098-1102
Solomon v. Pathe, pp. 1102-1104
Note on Pure Resources, Inc. Shareholders Litigation, pp. 1104-1110
In re Cox Communications Shareholders Litig., 879 A.2d 604 (Del. Ch. 2005)

Spring 2008

**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 it 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 2008 proxy statement available this spring in time for this report. Otherwise, you will have to use the 2007 proxy statement. If you’re not sure, check the date of the 2007 proxy statement; this year’s will be publicly available approximately a year later.) (a) Does it contain shareholder 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) Whether or not it is the subject of a shareholder proposal, does the corporation take a position on electing directors by majority voting. (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. Review and comment on the § 404 internal controls reports: (a) management’s assessment of internal controls in the 10-K Report and (b) the auditor’s report on the management’s assessment (which may be in the 10-K Report or in the Annual Report to Shareholders).
6. 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.
7. 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 April 30.

