Trends in Corporate Governance and Reading the Tea Leaves for Enforcement and Corporate Compliance in a Trump Administration

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2025 ACC NCR: CORPORATE GOVERNANCE CONFERENCE

ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

Outline

- General Principles of Corporate Governance
- Corporate Transparency Act Whiplash and Narrowing
- Considerations for Public Company Disclosures
- 2025 Amendments to DGCL
- Executive Orders Issued by Trump Administration
- Questions

General Principles of Corporate Governance

Principles	For Profit Companies	Nonprofits
Fiduciary Duties for Directors – Care: Care of ordinarily prudent person under similar circumstances Loyalty: Act in good faith in best interests of organization	☑	☑
Thoughtful Board Composition and Independence – Appropriate Mix of Skills, Experiences and Perspectives Address actual, potential or perceived conflicts of interest	☑	☑
Clear Roles and Responsibilities – Strategic (adapt to new technology and political environment) vs Operating Specialized Committees (Audit, Compensation and Governance)	☑	☑
Monitoring and Measuring Performance – Regular and Productive Meetings Talented and Properly Incented Management Team	☑	☑
Internal Policies and Controls – Management of financial, operational, compliance and reputational risks Financial controls Compliance and ethics policies	☑	☑

General Principles of Corporate Governance

Corporate Governance Disclosure Reporting Requirements	For Profit (Public)	For Profit (Private)	Nonprofits
Publicly Available Reports with Securities & Exchange Commission (SEC) 10-K and 10-Q (risk factors) 8-K (reportable events) Proxy Statements (election of directors; other proposals)	☑		
Private Placement Materials; Confidential Offering Memoranda; Private Contractual Requirements		☑	
IRS Form 990 for 501(c)(3) organizations			☑
State law (e.g., DGCL, state nonprofit statutes)	☑	☑	☑

Corporate Transparency Act and Rules (Original Requirements)

- Any (i) U.S. entity created by filing with the state's secretary of state or similar office, or (ii) non-U.S. entity qualified to do business in the United States would be subject to reporting requirements under the federal Corporate Transparency Act ("CTA").
- All entities, regardless of when created, must file a report with the Financial Crimes Enforcement Network ("FinCEN") disclosing information regarding their beneficial owners.
- Beneficial owners are individuals who own or control at least 25% of the ownership interests of the Reporting Company, or exercise substantial control over the reporting entity.
- Most reporting companies were required to comply by filing their beneficial ownership information reports ("BOI Reports") by January 1, 2025.
- The reportable information regarding beneficial owners includes:
  - Name
  - Date of birth
  - Residential address
  - Identification document (e.g., passport or driver's license)
- Exemptions:
  - The original CTA rules provide 23 exemptions, most of which involve entities already subject to regulation by government agencies (e.g., public companies and nonprofit corporations)

Corporate Transparency Act and Rules (Developments)

- The CTA has been the subject of extensive legal challenges and, beginning in December 2024, the subject of conflicting federal court decisions enjoining—and then reinstating—the CTA's enforcement.
- In response to these decisions, the Treasury Department provided a series of updates:
  - **February 19, 2025**: FinCEN announced that enforcement of the CTA would resume under a new, extended reporting deadline of March 21, 2025 for most reporting companies.
  - **February 27, 2025**: FinCEN announced that it (1) would not issue any penalties or take any other enforcement actions against any companies that failed to report by March 21 and (2) intended to issue an interim final rule further extending the CTA's reporting deadline.
  - **March 2, 2025**: the Treasury Department announced that it planned to issue a proposed rulemaking that would narrow the scope of the CTA to foreign reporting companies only.

Corporate Transparency Act and Rules (Developments)

- **March 21, 2025**: FINCEN issued an interim final rule that:
  - Exempts domestic reporting companies, and their beneficial owners, from the requirement to file initial be reports, or to update or correct previously filed BOI Reports.
  - Exempts foreign reporting companies, and their U.S. person beneficial owners, from the requirement to provide the beneficial ownership information of any U.S. persons who are beneficial owners of the foreign reporting company.
  - Retains the requirement for foreign reporting companies, and their beneficial owners (excluding U.S. persons), to report their beneficial ownership information to FinCEN.
  - Extends the deadline for those foreign reporting companies to file initial beneficial ownership information reports, or update or correct previously filed reports, until 30 days after the publication of the March 21 rule in the Federal Register or 30 days after their registration to do business in the United States, whichever comes later.
- **Takeaway - subject to further developments, the March 21 rule eliminates reporting requirements for most entities that previously qualified as in-scope reporting companies under the CTA. In addition, the March 21 rule narrows the scope of information that will need to be reported for (the relatively limited universe of) foreign reporting companies.**

Board Diversity and Environmental, Social and Governance ("ESG") Disclosures

Board Diversity

- **December 2024**: U.S. Court of Appeals for the Fifth Circuit struck down Nasdaq rules which required a matrix-style disclosure of sex, race and sexual preference characteristics and that imposed a quota of diverse directors on Nasdaq-listed companies.
- **Spring 2025**:
  - New Administration scrutiny of DEI policies
  - Updated proxy advisory firm guidance
  - E.g., ISS – No longer will consider gender or racial/ethnic diversity of a company's board when making voting recommendations on director elections.
- **Takeaway**: Remains to be seen this reporting season how companies disclose board diversity information and what elements of diversity are emphasized.

ESG Disclosures

- **March 2024**: SEC adopted rules (the "Climate Rules") requiring disclosure of certain climate-related information and risks in registration documents and annual reports.
- **April-Summer 2024**: SEC stayed the Climate Rules related to, pending outcome of ongoing litigation in the Eighth Circuit. SEC shuttered the Climate and ESG Task Force.
- **February 2025:** SEC Acting Chair signaled that SEC might not continue to defend the Climate Rules.
- **March 2025**: SEC voted to end its defense of the Climate Rules.
- **Takeaways**:
  - Signals a shift by the SEC, but existing regulations still require disclosure of material information, events and risks - regardless of the subject matter – e.g., production impact due to natural disasters disrupting supply chains.

Cybersecurity and Artificial Intelligence Disclosures

Cybersecurity Disclosures

- **July 2023**: SEC adopted rules that require companies to disclose information related to cybersecurity incidents, cybersecurity risk management and governance.
- **Item 1.05 to Form 8-K**: Requires issuers to disclose material cybersecurity incidents, focusing on the material impact of the incident to the company, and not incident-specific details.
- **Item 106(b)-(c) of Regulation S-K** requires disclosures for:
  - Policies and procedures to assess, identify and manage material risks from cybersecurity threats.
  - Whether any risks from cybersecurity threats have materially affected or are reasonably likely to materially affect the company, and if so, how.
  - Board oversight of risks from cybersecurity threats and, if applicable, any Board committee or subcommittee responsible for such oversight.
  - Processes by which the Board or committee is informed about such risks.
  - Management's role in assessing and managing cybersecurity threats.

AI Risk Factor Disclosures

- As the use of generative artificial intelligence (e.g., ChatGPT) blossoms, we expect more disclosures of risks to or impacts on companies' general operations and corporate governance practices, as well as disclosures addressing the extent of the use of such technology and any policies or guidelines adopted to regulate such use in their business operations.
- For example:
  - **Competitive risks**: Are other companies in our industry adopting AI faster or more efficiently than we? Is our business especially prone to, or insulated from, disruption by AI?
  - **Regulatory risks**: Would greater regulation of AI have a material adverse effect or a material positive effect on our business?
  - **General risks**: Does our exposure to AI, whether direct or indirect, subject us to potential reputational (e.g., AI-washing) or cybersecurity harm? Do we need to revisit our cybersecurity and reputational harm risk factors? What circumstances might occur that would adversely impact our business model or financial projections?

New Amendments to Delaware General Corporation Law ("DGCL")

- In February 2025, bipartisan Delaware legislators introduced a bill (SB 21) proposing amendments to the DGCL. This bill was approved **March 25, 2025**.
- In general, the amendments limit stockholders' ability to access corporate books and records and reduce Delaware courts' scrutiny of transactions with conflicted controlling stockholders.
- These amendments could be viewed as a response to a gathering movement by corporations to reincorporate in other jurisdictions (e.g., Texas / Nevada), dubbed "DExit", which threatens Delaware's mantle as the undisputed leader in state corporate law, and a material revenue source for Delaware.
- The movement seems to have at least two underlying causes.
  - (1) Perception that Delaware's judge made law periodically either swings too far in the pro-plaintiff direction, or otherwise produces controversial decisions, alienating companies incorporated in Delaware. This is followed by a course correction, sometimes judicial and sometimes legislative.
  - (2) Criticism regarding the level of judicial scrutiny applied to actions taken by controlling shareholders, with particularly pronounced criticism coming from companies with "rockstar" CEOs and founders.

New Amendments to Delaware General Corporation Law ("DGCL")

- **Section 220 of DGCL (Books and Records Demands)**
  - Section 220 of the DGCL grants stockholders the right to inspect corporate books and records and is an important tool for stockholders both in activist campaigns and in investigating wrongdoing by a board.
  - SB 21 curtails this stockholder right by amending Section 220 to, among other things: (1) impose a higher procedural standard for demands, (2) limit documents available through a demand to a specified list of formal corporate records enumerated in Section 220, (3) permit companies to condition the provision of books and records on entry into an NDA, and (4) permit a corporation to redact its books and records for relevance.
- **Section 144 of DGCL (Controller Transactions)**
  - Existing Delaware case law provides for exacting scrutiny by a court for "controller transactions," i.e., transactions in which a controller of a company receives a benefit not shared generally among all stockholders.
  - Unlike most transactions, which are subject to a deferential business judgment review, controller transactions are subject to "entire fairness" review, in which a court determines whether the transaction was objectively fair to the company, in terms of both process and price.
  - A controller may only avoid entire fairness review if the transaction follows strict procedural safe harbor requirements, including the use of an independent special committee and approval by a majority of the corporation's minority stockholders, as the Delaware Supreme Court recently re-affirmed in In re Match Group., Inc. Deriv. Litig., 315 A.3d 446 (Del. 2024)..
  - SB 21 effectively overturns Match Group, relaxes the procedural requirements that must be met for a controller transaction to avoid entire fairness review, reduces scrutiny of those transactions and will make it more challenging to bring suit and recover damages suffered by stockholders as a result of those transactions.

President Trump Executive Orders

PRESIDENT TRUMP HAS ISSUED 89 EXECUTIVE ORDERS THUS FAR ON WIDE RANGE OF TOPICS

What is an executive order?

- It is an official, legally binding order directing ***federal agencies*** on how to implement laws or policies.
- Presidents use these tools to shape national policy without waiting for Congress to act.
- ***Article II of the US Constitution*** grants the president “executive power” and says he/she must “take care that the laws be faithfully executed.” This vague language has allowed presidents to stretch their authority over time.
- However, executive actions are NOT unlimited. If they overreach, they can be challenged in court or overturned by Congress through legislation.

EO 14209:Pausing FCPA Enforcement

- Foreign Corrupt Practices Act (FCPA) is a U.S. federal law that prohibits U.S. citizens and entities from ***bribing*** foreign government officials to benefit their business interests.

<u>The five elements include:</u>

- Paying or promising to pay money, gifts, or something of value.
- The involvement of a foreign government official.
- A corrupt motive.
- To influence, induce, or secure an improper advantage.
- Helping to obtain or retain business.

EO 14209:Pausing FCPA Enforcement

- FCPA has been systematically, and to a steadily increasing degree, stretched beyond proper bounds and abused in a manner that harms the interests of the United States."
- For a period of 180 days following the date of this order (2-10-25), the Attorney General shall review guidelines and policies governing investigations and enforcement actions under the FCPA. During the review period, the Attorney General shall:
  - cease initiation of any new FCPA investigations or enforcement actions
  - review in detail all existing FCPA investigations or enforcement actions and take appropriate action with respect to such matters to restore proper bounds on FCPA enforcement and preserve Presidential foreign policy prerogatives
- issue updated guidelines or policies to prioritize American interests, American economic competitiveness

EO 14209:Pausing FCPA Enforcement

- U.S. Attorney General Pam Bondi issued some guidance on February 5, 2025.
  - It instructs prosecutors that the FCPA Unit should shift focus away from investigations and cases that do not involve a cartel or transnational criminal organization (TCO) connection.
  - Moreover, AG Bondi’s guidance removes prior Main Justice approval to investigate or prosecute FCPA cases with such a connection.
  - The guidance provides that United States Attorney's Offices can pursue such investigations on their own and bring charges with 24 hours' advance notice to the FCPA Unit at Main Justice.
  - The Attorney General similarly instructed the Money Laundering and Asset Recovery Section ("MLARS"), including a team of prosecutors that focuses on using criminal prosecution and civil asset forfeiture to combat foreign corruption, to prioritize investigations, prosecutions and asset-forfeiture actions targeting cartels and TCOs.

Reasons For Companies NOT To Relax FCPA Compliance Efforts

- Regardless of DOJ's approach to FCPA enforcement during this administration, the FCPA remains binding law, and any misconduct that occurs during the next four years would still be within the statute of limitations during the next administration, when DOJ's priorities may be different.
- The limitations period could then be tolled for up to three years under 18 U.S.C. § 3292, as often occurs in FCPA cases where the government seeks to obtain evidence from foreign jurisdictions.
- The executive order does not directly address the Securities and Exchange Commission's ("SEC") enforcement of the FCPA with respect to issuers, although the objectives of the executive order would appear to apply with equal force to both the SEC and the DOJ.

Reasons For Companies NOT To Relax FCPA Compliance Efforts

- Foreign jurisdictions and multilateral development banks have their own anti-bribery and corruption enforcement regimes, notably the World Bank's sanctions system, and many corporations subject to the FCPA also are subject to these laws and regimes.
- The pause in FCPA enforcement may result in other jurisdictions increasing enforcement of their respective anti-bribery and anti-corruption laws.

Corporate Compliance Considerations

- Commodity Futures Trading Commission (CFTC) issued Enforcement Advisory on February 25, 2025 on how to evaluate self-reporting, cooperation and mitigation credit.
- General Biden era corporate compliance guidance still in place for now.
- Chief Compliance Officer role still of great importance.
- Corporate monitorships appear to be disfavored.

CFTC Enforcement Advisory

- Enforcement Advisory cites to Executive Order to Implement the President's "Department of Government Efficiency" Deregulatory Initiative.
- "Our goal with this advisory is to obtain accountability while encouraging efficiency and conserving government resources by giving entities a clear reason to self-report and cooperate," said Division of Enforcement Director Brian Young.
- Specifically, the advisory details the framework the Division will use to assess self-reporting, cooperation, and remediation in investigations and enforcement actions.

CFTC Enforcement Advisory

- **1. Self-Reporting**
- Self-reporting is assessed on a three-tier scale:
- **Tier 1 (No Self-Report):** No timely disclosure or disclosure that lacked relevance.
- **Tier 2 (Satisfactory Self-Report):** A timely and relevant disclosure but lacking full material information.
- **Tier 3 (Exemplary Self-Report):** A voluntary, timely, and comprehensive disclosure that aids the Division's investigation.
- Voluntary self-reporting before an imminent threat of exposure can significantly improve an entity's standing, with the highest credit given to those who provide meaningful insights beyond basic disclosure.

- **2. Cooperation**
- Cooperation is evaluated on a four-tier scale:
- **Tier 1 (No Cooperation):** Only fulfilling legal obligations without added assistance.
- **Tier 2 (Satisfactory Cooperation):** Providing documents, witness interviews, and relevant data.
- **Tier 3 (Excellent Cooperation):** Conducting internal investigations, root cause analysis, and remediation planning.
- **Tier 4 (Exemplary Cooperation):** Proactively engaging with enforcement, significantly assisting the investigation, and implementing accountability measures.
- Uncooperative behavior, such as delaying compliance or obscuring key information, can negate any potential Mitigation Credit.

CFTC Enforcement Advisory

	Tier 1 No Cooperation	Tier 2 Satisfactory Cooperation	Tier 3 Excellent Cooperation	Tier 4 Exemplary Cooperation
Tier 1 **No Self-Report**	0%	10%	20%	35%
Tier 2 **Satisfactory Self-Report**	10%	20%	30%	45%
Tier 3 **Exemplary Self-Report**	20%	30%	40%	55%

Corporate Compliance Considerations

- The role of Chief Compliance Officer in a company's robust compliance program is still very important.

- Chief Compliance Officer Report can be used as mitigation credit if it's timely and accompanied by remedial steps, or remedial plan.

- Remediation is an important factor DOJ will consider in whether to enter into a Deferred Prosecution Agreement or Prosecution Declination.
  - Prosecution Declination- A matter that would have been prosecuted or criminally resolved except for the company's voluntary disclosure, full cooperation, remediation, and payment of disgorgement/forfeiture, and/or restitution/victim compensation.

Corporate Compliance Considerations

- Corporate monitorships generally appear to be on the “out” as there is a concerted effort to deregulate.
- If your company needs to self-report, now is the time to do it, while policies are in flux.
- If your company is in an industry dependent upon government funds or contracts, and you’re worried about DOGE coming after your funds:
  - Review agency Office of Inspector General Reports
    - OIG reports will often identify topical targets of enforcement
    - Non-compliance with contract or grant terms could serve as a basis to cut off or claw back funds.

Questions