CORPORATE GOVERNANCE, COMPLIANCE, SOCIAL RESPONSIBILITY, AND ENTERPRISE RISK MANAGEMENT IN THE TRUMP/PENCE ERA

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[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception and fraud. - Milton Friedman, 1970[1]

INTRODUCTION

With Republicans controlling Congress, a Republican CEO as President, a "czar" appointed to oversee deregulation,[2] and billionaires leading key Cabinet posts, corporate America had reason for optimism following President Trump's unexpected election in 2016. However, the first year of the Trump Administration has not yielded the kinds of results that many business people had originally anticipated. Candidate Trump promised an aggressive agenda of, among other things, disman-

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[1] Milton Friedman, *A Friedman doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32, 126.

[2] Carl Icahn, the President's advisor on deregulation, stepped down from his appointment in August 2017. *See* Tom DiChristopher & Everett Rosenfield, *Carl Ichan Resigned from Trump Advisor Role Ahead of Article Alleging Conflict of Interest*, CNBC (Aug. 20, 2017), www.cnbc.com/2017/08/20/carl-icahn-resigned-from-trump-advisor-role-ahead-of-article-alleging-conflict-of-interest.html; *see also* Joe Mont, *Ichan Bids Adieu as Trump's Unofficial Deregulation Guru*, COMPLIANCE WEEK (Aug. 23, 2017), https://www.complianceweek.com/blogs/the-filing-cabinet/icahn-bids-adieu-as-trump%E2%80%99s-unofficial-deregulation-guru#.WbB-CJOGPFQ.

tling Dodd-Frank,[3] repealing and replacing the Affordable Care Act,[4] improving the nation's infrastructure, revamping trade deals, solving the decades-old immigration dilemma, eliminating onerous laws, and lowering the tax burden.[5]

Unfortunately, not only has this pro-business agenda stalled in Congress, but the President has, in some instances, issued executive orders[6] and proposed legislation[7] that completely contravenes much of

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[3] *See* Emily Flitter & Steve Holland, *Trump Preparing Plan to Dismantle Obama's Wall Street Reform Law*, REUTERS (May 17, 2017, 8:14 PM), https://www.reuters.com/article/us-usa-election-trump-banks/trump-preparing-plan-to-dismantle-obamas-wall-street-reform-law-idUSKCN0Y900J; *see generally* Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173,111th Cong. (2010).

[4] *See* Caroline Humer, *Trump Promised to Repeal Obamacare. Now What?*, REUTERS (Nov. 10, 2016, 6:09 AM), https://www.reuters.com/article/us-usa-election-obamacare-analysis/trump-promised-to-repeal-obamacare-now-what-idUSKBN135171; *see generally* H.R. DOC. NO. 111-1, 111th Cong. (2010).

[5] *See* Pamela Engel, *Trump's First 100 Days Were Unlike Any We've Ever Seen – Here Are All the Promises He's Kept and Broken*, BUSINESS INSIDER (Apr. 29, 2017), http:// www.businessinsider.com/ trump-first-100-days-promises-2017-4.

[6] *See* David Streitfeld et al., *Silicon Valley's Ambivalence Toward Trump Turns to Anger*, N.Y. TIMES (Jan. 29, 2017), https://www.nytimes.com/2017/01/29/technology/silicon-valleys-ambivalence-toward-trump-turns-to-anger.html?mcubz=1&_r=0 (observing reactions to an executive order temporarily barring immigrants from predominantly Muslim countries). After repeated failures of the Republican-led Congress to repeal and replace the Affordable Care Act, President Trump issued an Executive Order on October 12, 2017 asking federal agencies to determine ways to expand the use of association health plans and to broaden the definition of short-term insurance, which is currently exempt from the Affordable Care Act. *See* OFFICE OF THE PRESS SEC'Y, PRESIDENTIAL EXECUTIVE ORDER PROMOTING HEALTHCARE CHOICE AND COMPETITION ACROSS THE UNITED STATES (2017), https://www.whitehouse.gov/the-press-office/2017/10/12/presidential-executive-order-promoting-healthcare-choice-and-competition. Many in the business community voiced concerns about the stability of the insurance market after this Order and the President's statements that he may end health care subsidies. *See also* Dan Mangan, *Obamacare Defenders Blast Trump's New Executive Order on Health Care as More 'Sabotage'*, CNBC (Oct. 12, 2017), https://www.cnbc.com/2017/10/12/obamacare-defenders-blast-trumps-new-executive-order-on-health-care-as-more-sabotage.html (the American Academy of Actuaries observed, the order "could present significant risks and have unintended consequences for consumers and health insurance markets."). The Administration's new tax plan, which eliminates the individual mandate, has also raised concerns. Robert Pear, *Without the Insurance Mandate, Health Care's Future*

what his former business peers have advocated for over the years. In addition, dozens of CEOs have resigned from various presidential advisory boards that would have provided the executives with the opportunity for significant influence over policies that could positively affect their shareholders, employees, and customers.[8] These resignations may raise corporate governance concerns because, in some cases, they had nothing to do with purely commercial interests but more to do with public perception, corporate social responsibility ("CSR"),[9] or the CEO's stated personal ideologies.

May be in Doubt, N.Y. TIMES (Dec. 18, 2017), https://www.nytimes.com/2017/12/18 /us/politics/tax-cut-obamacare-individual-mandate-repeal.html?_r=0

[7] *See* Catherine Rampell, *Our Business President Looks Pretty Anti-Business*, WASHINGTON POST (Apr. 10, 2017), https://www.washingtonpost.com/ opinions/our-businessman-president-looks-pretty-anti-business/2017/04/10/7452639c-1e28-11e7-be2a3a1fb24 d4671_story.html?utm_term=.4122a1078081.

[8] *See* Jessica Estepa, *Hispanic Chamber CEO Resigns from Trump's Diversity Council over DACA Decision*, USA TODAY (Sept. 5, 2017), https://www.usatoday.com/story/ news/politics/onpolitics/2017/09/05/hispanic-chamber-commerce-ceo-resigns-diversity-council-over-daca-decision/633219001/; Jena McGregor & Damian Paletta, *Trump's Business Advisory Council Disband as CEOs Abandon President Over Charlottesville*, WASHINGTON POST (Aug. 16, 2017), https://www.washingtonpost.com/news/on-leadership/wp/2017/08/16/after-wave-of-ceo-departures-trump-ends-business-and-manufacturing-councils/?utm_term=.39ae797910fe.

[9] There is no one established definition for CSR. *See, e.g.,* Henri Servaes & Ane Tamayo, *The Impact of Corporate Social Responsibility on Firm Value: The Role of Customer Awareness*, 59 MGMT. SCI. 1045, [1046] ([May] 2013), http://faculty.london.edu/hservaes/ms2013.pdf (citing various definitions but adopting the World Business Council for Sustainable Development's 2004 definition) . . . . The United States government has explained, "[r]esponsible business conduct is intended to include a broad range of areas in which corporate conduct impacts society. It is well understood that responsible business conduct (RBC), sometimes referred to as corporate social responsibility or CSR, entails conduct consistent with applicable laws and internationally recognised standards. Based on the idea that you can do well while doing no harm, RBC is a broad concept that focuses on two aspects of the business-society relationship: 1) the positive contribution businesses can make to economic, environmental, and social progress with a view to achieving sustainable development, and 2) avoiding adverse impacts and addressing them when they do occur." [U.S. DEP'T OF STATE, USG NATIONAL ACTION PLAN ON RESPONSIBLE BUSINESS, Feb. 12, 2015,] https://www.state.gov/documents/ organization/265918.pdf/; *see also* Marcia Narine, *Disclosing Disclosure's Defects: Addressing Corporate*

Business people thrive on predictability as they manage their enterprise risks, but the Trump Administration has been anything but predictable, and as of the time of this writing, shows no signs of settling down. This Essay will thus outline how general counsel, boards, compliance officers, and institutional investors should think about risk during an increasingly volatile administration. Specifically, I will discuss key corporate governance, compliance, and social responsibility issues facing U.S. public companies, although some of the remarks will also apply to the smaller companies that serve as their vendors, suppliers, and customers. Tennessee, which has more citizens working for foreign employers than any other U.S. state,[10] several corporate headquarters, and a burgeoning startup community, serves as a microcosm of U.S. economy.

In Part I, I will discuss the importance of enterprise risk management ("ERM") in general and some of the prevailing standards that govern it. In Part II, I will focus on the changing role of counsel and compliance officers as risk managers and will discuss recent surveys on the key risk factors that companies face under any political administration, but particularly under President Trump. Part III will outline some of the substantive issues related to compliance, specifically the enforcement priorities of various regulatory agencies. Part IV will discuss an issue that may pose a dilemma for companies under Trump—environmental issues, and specifically shareholder proposals and climate change disclosures in light of the conflict between the current EPA's position regarding climate change, the U.S. withdrawal from the Paris Climate Accord, and corporate commitments to sustainability. Part V will conclude by posing questions and proposing recommendations using the ERM framework and adopting a stakeholder rather than a shareholder

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Irresponsibility for Human Rights Impacts, 47 COLUM. HUMAN RIGHTS L. REV. 84, n.25 (2015); s*ee also* Ulrike Zeigerman, *Responsible Business Conduct: From Good Intentions to Sustainable Development*, 3 COHERENCE FOR DEVELOPMENT 2 (May 2014), https://www.oecd.org/pcd/Coherence%20for%20Development_April_2014.pdf (defining CSR as entailing "conduct consistent with applicable laws and internationally recognised standards.").

10 Patricia Cohen, *When Foreign Companies Are Making, Not Killing, U.S. Jobs*, N.Y. TIMES (Aug. 6, 2017), https://www.nytimes.com/2017/08/06/business/economy/chattanooga-foreign-investment.html?mcubz=1.

maximization perspective.[11] I submit that companies that choose to pull back on CSR or sustainability programs in response to the President's purported pro-business agenda will actually hurt both shareholders and stakeholders.

I. THE CHANGING FACE OF RISK MANAGEMENT

Corporate counsel have a number of sources for risk-management related guidance including Sarbanes-Oxley, Dodd-Frank, fiduciary duties under Delaware law, and the New York Stock Exchange Listing Standards. I will discuss each of these briefly below.

The Securities and Exchange Commission ("SEC") has required companies to publicly disclose all material risks since the mid-1990s;[12] however despite these disclosures, massive corporate scandals have wiped out shareholder value and led to repeated recessions. Congress passed Sarbanes-Oxley[13] in 2002 after the public lost trust in financial

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[11] A detailed shareholder versus stakeholder maximization debate is beyond the scope of this paper. For excellent articles on the subject *see generally* William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 100 (2008) ("A continuing and longstanding debate has been waged in corporate law scholarship among those who favor shareholder primacy, those who favor management discretion, and those who believe that corporations have a social responsibility to other constituencies, such as the corporation's employees, and the wider public interest."); Stefan J. Padfield, *Corporate Social Responsibility & Concession Theory*, 6 WM. & MARY BUS. L. REV. 1 (2014) (providing a history of the debate, discussing director primacy, team production, shareholder primacy, managerialism, and concession theories and arguing, "anyone favoring mandatory corporate social responsibility should also support concession theory because it is the theory that most empowers the state to mandate socially responsible behavior on the part of corporations." *Id.* at 4).

[12] *See* Report of The Advisory Committee on the Capital Formation and Regulatory Processes, SEC (1996), http://www.sec.gov/news/studies/capform.htm. Risk factor disclosure on Forms 10-K and 10-Q have been in place since 2005. On October 11, 2017, the SEC proposed amendments to modernize and streamline disclosures, including risk factors. Press Release, SEC, SEC Proposes Rules to Implement FAST Act Mandate to Modernize and Simplify Disclosure (Oct. 11, 2017) (available at https://www.sec.gov/news/press-release/2017-192). Among other things, the SEC proposes allowing firms to focus on a principles-based approach of the risks tailored for its investors.

[13] *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

institutions and corporate America, but notwithstanding the additional due diligence requirements and risk mitigation measures, the financial markets collapsed again in 2008 in part due to excessive risk taking. Following the 2008 financial crisis, the New York Stock Exchange Commission on Governance performed a thorough review of the legal landscape and outlined director duties as follows:

> In assessing shareholder concerns and demands, it is appropriate for directors to consider whether any constituencies (or their agents) have interests other than to maximize the long-term, sustainable profitability of the corporation . . . . The board should also ensure that appropriate risk management systems are in place so that excessive risk taking is avoided.[14]

Accordingly, companies listed on the NYSE must publicly disclose their guidelines and policies regarding their (1) risk assessments and risk management, (2) major financial risks, and (3) the steps taken to monitor and control the listed risks.[15]

In response to the public clamor for reform and accountability after the 2008 financial crisis, Congress passed Dodd-Frank[16] in 2010. That law establishes additional protections for shareholders and inves-

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[14] NEW YORK STOCK EXCHANGE (NYSE), REPORT OF THE NEW YORK STOCK EXCHANGE COMMISSION ON CORPORATE GOVERNANCE 26–27, (2010), http://www.ecgi.org/codes/documents/nyse_cgreport_ 23sep2010_en.pdf.

[15] *See Section 303A.07 Audit Committee Additional Requirements*, NYSE LISTED COMPANY MANUAL § 303A.07(c)(iii)(D) (approved Aug. 22, 2013), http://nysemanual.nyse.com/LCMTools/PlatformViewer.asp?selectednode=chp_1_4_3_6&manual=%2Flcm%2Fsections%2Flcm-sections%2F.

[16] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The Act includes, among other things, corporate governance and executive compensation reforms, new rules for credit rating agencies, new registration requirements for hedge fund and private equity fund advisers, heightened regulation of over-the-counter derivatives and asset-backed securities and significantly increased oversight and regulation of banks and other financial institutions. It also includes the conflict minerals provision discussed earlier in this Chapter.

tors. In 2010, the SEC also enacted new proxy disclosure requirements requiring companies to describe the board's role in overseeing risk management, and the ways in which that oversight responsibility affects the board's structure.[17] The SEC also published interpretative guidance regarding companies' obligations to disclose exposures and expenditures related to climate change risks.[18]

However, even before Dodd-Frank, boards had a clearly defined role in overseeing risk under the *Caremark* case, which establishes a board's duty to ensure that that there is a credible and functioning compliance program. In the 1996 *Caremark* litigation, a Delaware court established that corporate directors may face personal liability for failing to adequately monitor employee-wrongdoers, and that in order to receive the protection of the business judgment rule, they must "exercise a good faith judgment that the corporation's information and reporting system is in concept and design adequate to assure the board that appropriate information will come to its attention in a timely manner as a matter of ordinary operations so that it may satisfy its responsibility."[19] Although the board does not implement or manage the compliance program, the board must ensure that an effective, functioning compliance program exists. Counsel and compliance officers play a critical role in assisting the board in that task.

Boards must also focus on sustainability as a key risk because both the United States and European Union ("EU") governments[20] seek

[17] *See* 17 C.F.R. § 229.407(h) (2017). The SEC sought comments on Regulation S-K in 2016 as part of a disclosure effectiveness project. *See* Request for Comment on Subpart 400 of Regulation S-K Disclosure Requirements Relating to Management, Certain Security Holders and Corporate Governance Matters, SEC, (2016), https://www.sec.gov/rules/other/2016/33-10198.pdf.

[18] Commission Guidance Regarding Climate Change, SEC (Feb.), https://www.sec.gov/rules/interp/2010/33-9106.pdf; 17 C.F.R § 229.101(c)(1)(xii) (2017); 17 C.F.R. § 229.103 (2017).

[19] In re Caremark Int'l. Inc. Derivative Litigation, 698 A.2d 959, 970 (Del. Ch. 1996).

[20] *See* Council Directive 2014/95/EU, 2014 O.J. (L 330) 1, http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0095&from=EN (amending Directive 2013/34/EU as regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups).

such non-financial disclosures. "Sustainability" is commonly defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[21] More firms than ever now also speak and report in terms of the "triple bottom line"—people, profit and planet[22]—because the market either encourages or requires them to do so.[23] Further, researchers have proven that "firms with good ratings on material sustainability issues significantly outperform firms with poor ratings on these issues."[24]

Indeed, in 2016, the EU implemented non-financial disclosures for any firm that conducts business in its borders, employs more than 500 people, and has a balance sheet total of at least USD$25 million or a net turnover of approximately USD$50 million.[25] Starting in 2018, these companies must report annually on their policies related to: environmental protection; social responsibility and treatment of employees; respect

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[21] The definition likely comes from a seminal 1987 United Nations paper known as the Brundtland Report, which cautions that "sustainable development is not a fixed state of harmony, but rather a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs." See Gro Harlem Brundtland, *Our Common Future*, UNITED NATIONS WORLD COMM'N ON ENV'T & DEV. (WCED) ch. 2, introduction (1987), http://www.un-documents.net/our-common-future.pdf.

[22] *Triple Bottom Line: It Consists of Three Ps: Profit, People and Plant*, ECONOMIST (Nov. 17, 2009), http://www.economist.com/node/14301663.

[23] For examples, *see* Robert G. Eccles et al., *The Impact of Corporate Culture Sustainability on Organizational Processes and Performance*, (Nat'l Bureau of Econ. Research, Working Paper No. 17950, 2012), http://www.nber.org/papers/ w17950.pdf. The paper compares 90 "high sustainability" companies that were early and voluntary adopters of environmental and social policies and which use these measures as governance practices, with 90 "low sustainability companies" or traditional companies, finding that over an 18-year period, sustainable firms outperform traditional firms in terms of both stock market and accounting performance.

[24] Mozaffar Khan et al., *Corporate Sustainability: First Evidence on Materiality*, 91 THE ACCOUNTING REV. 1697, abstract, Nov. 9, 2016, https://ssrn.com/ abstract=2575912.

[25] *See* Katherine V. Smith, *Sustainability Reports Getting Attention from Investors and Regulators*, BOS. C. CTR. FOR CORP. CITIZENSHIP (Nov. 30, 2017, 10:53:41 AM), http://corporatecitizenship.bc.edu/sustainability-reports.

for human rights; anti-corruption and bribery; and diversity on company boards (in terms of age, gender, educational and professional background).[26]

Investors also increasingly seek information about sustainability thus forcing companies that do not have to comply with U.S. or EU governmental directives to report on environmental, social, and governance factors ("ESG") anyway.[27] A 2017 Ernst & Young survey of institutional investors revealed that 80% of respondents believe that companies have failed to develop adequate, long-term strategies on environmental and social issues even though such strategies are critical to sustainable growth and have quantifiable impact over the long term.[28]

Companies are hearing from these large investors and responding. As John Liu, who managed New York City's $152 billion pension fund for four years, has observed, "there are reports and studies that show that companies who pay attention to [ESG benchmarks] generally have a better track record of long-term growth."[29] Adding to the pres-

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[26] Non-Financial Reporting, EUROPEAN COMM'N, https://ec.europa.eu/info/ business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en (last visited Dec. 2, 2017).

[27] Chris Park & Dinah A. Koehler, *The Responsible Enterprise*, *in* BUSINESS TRENDS 2013 38, 39 (Deloitte Univ. Press 2013), https://www2.deloitte.com/content /dam/Deloitte/ie/Documents/Finance/CFO/2013-SO-Business-Trends_vFINAL.pdf. The authors recommend that firms integrate ESG and financial reporting to build trust with customers, improve understanding of risk, and enable targeted mitigation when things go wrong; also, observing that responsible enterprises attract funding and enjoy a lower cost of capital. *Id.* at 41–42.

[28] *Is Your Nonfinancial Performance Revealing the True Value of Your Business to Investors?*, ERNST & YOUNG GLOBAL LIMITED 3 (2017), http://www.ey.com/Publication/vwLUAssets/EY_-_Nonfinancial_performance_may_influence_investors/$FILE /ey-nonfinancial-performance-may-influence-investors.pdf. The survey gathered responses from 320 decision-makers for institutional investors around the world, a third of which have more than US$10b assets under management. *Id.* at 28.

[29] Dan Morrison, *US Companies Rank Miserably Low on the UN's New Corporate Responsibility Rankings*, QUARTZ (Apr. 19, 2017), https://qz.com/963033/us-companies-rank-miserably-low-on-the-uns-new-corporate-responsibility-rankings/.

sure, in 2016, the California Public Employees Retirement System[30] began asking corporations it invests in to seat climate change experts on their boards.[31]

The regulatory system also requires firms to consider the triple bottom line through the shareholder proposal process under Rule 14a-8, which allows certain shareholders to submit a proposal to be included in the company's annual report for a shareholder vote in proxy statements at the annual meeting.[32] Often these include ESG matters. In fact, of the 827 proposals filed in 2017, 201 concerned social issues filed mostly by pension funds and socially responsible investors.[33] As of the end of 2015, 1 in 5 dollars, or 8.72 trillion dollars, was invested according to socially responsible investing principles.[34]

Finally, influential proxy advisory firm Institutional Shareholder Services ("ISS") bases its 2017 guidelines on the following governing principles:

> [S]ocially responsible investors have dual objectives: financial and social. Socially responsible investors invest for economic gain, as do all investors, but they also require that the companies in which they in-

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[30] The California Public Employees Retirement System's current value as of July 31, 2017, is $345.26 billion dollars. *CalPERS Investment Fund Values*, CALPERS, https://www.calpers.ca.gov/page/investments/asset-classes/asset-allocation-performance/investment-fund-values (last visited Dec. 2, 2017).

[31] Liz Farmer, *Pension Fund Takes Unprecedented Climate Change Action*, GOVERNING (Mar. 17, 2016), http://www.governing.com/topics/finance/gov-climate-change-pension-calpers.html.

[32] Staff Legal Bulletin No. 14, SEC (2001), http://www.sec.gov/interps/legal/cfslb14.htm.

[33] Ronald O. Mueller & Elizabeth Ising, *Shareholder Proposal Developments During the 2017 Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 12, 2017), https://corpgov.law.harvard.edu/2017/07/12/shareholder-proposal-developments-during-the-2017-proxy-season.

[34] *See SRI Basics*, US SIF: THE F. FOR SUSTAINABLE AND RESPONSIBLE INV., http://www.ussif.org/sribasics (last visited Nov. 24, 2017).

> vest conduct their business in a socially and environmentally responsible manner.... Generally, we take as our frame of reference policies that have been developed by groups such as the Interfaith Center on Corporate Responsibility, the General Board of Pension and Health Benefits of the United Methodist Church, Domini Social Investments, and other leading church shareholders and socially responsible mutual fund companies. Additionally, we incorporate the active ownership and investment philosophies of leading globally recognized initiatives such as the United Nations Environment Programme Finance Initiative (UNEP FI), the United Nations Principles for Responsible Investment (UNPRI), the United Nations Global Compact, and environmental and social European Union Directives.[35]

Board members and company executives must therefore consider these factors due to the influence that ISS, other proxy advisory firms, and socially responsible investors such as pension funds have on the investing public.[36] Although the Trump Administration's stated priorities regarding certain social issues may lead a board to consider cutting back on funding CSR or sustainability initiatives, that short-term thinking may have long term consequences for the bottom line and investor relations.

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[35] *United States SRI Proxy Voting Guidelines: 2017 Policy Recommendations*, INSTITUTIONAL SHAREHOLDER SERV. 8 (Jan. 25, 2017), https://www.issgovernance.com/file/policy/2017-sri-us-voting-guidelines.pdf.

[36] *See* Nadya Malenko & Yao Shen, *The Role of Proxy Advisory Firms: Evidence from a Regression-Discontinuity Design*, Forbes Vol. 29, No. 12, (Dec. 2016), https://www.forbes.com/sites/christopherskroupa/2017/06/26/proxy-advisors-their-rise-their-value/#30f26ecf6e10.

II. LAWYERS AND COMPLIANCE OFFICERS AS GATEKEEPERS

Lawyers and compliance officers must ensure corporate compliance with Sarbanes-Oxley, Dodd-Frank, the New York Stock Exchange Listing Rules, and the directives discussed in Part I, but they should also play a pivotal role in developing, implementing, and sustaining an ERM program tailored to both their industry and company.

Prudent firms conduct ERM assessments, and rating agencies and investors expect them to do so because they view ERM "as a leading indicator of a firm's ability to operate within a controlled risk/reward framework." [37] ERM extends to strategic, operations, reporting, and compliance risks as outlined by the Committee of Sponsoring Organizations ("COSO"), the standard-bearer for ERM.[38] COSO defines ERM as a "process, effected by an entity's board of directors, management and other personnel, applied in a strategy setting and across the enterprise, designed to identify potential events that may affect the entity, and manage risk to be within its risk appetite, to provide reasonable assurance regarding the achievement of entity objectives."[39]

COSO encourages boards to focus on: (1) what the firm is willing to accept as it pursues shareholder value; (2) a knowledge of management's risk management processes that have identified and assessed the most significant enterprise-wide risks; (3) a review of the risk portfolio compared to the risk appetite; and (4) whether management is properly responding to the most significant risks and apprising the board of

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[37] Mark Murray, *Rating Agencies Are Positive on ERM: Why Insurers Need to Pay Attention*, WILLIS TOWERS WATSON (Sept. 2013), https://www.towerswatson.com/enUS/Insights/Newsletters/Global/emphasis/2013/rating-agencies-are-positive-on-erm (explaining ERM's increasing influence on ratings and regulations and determining that the methodologies employed by rating agencies and the reporting requirements set by regulators have become more prospective in nature).

[38] *See* COMMITTEE OF SPONSORING ORGANIZATIONS OF THE TREADWAY COMMISSION (COSO), THOUGHT LEADERSHIP IN ERM DEMYSTIFYING SUSTAINABILITY RISK 3 (MAY 2013) [hereinafter COSO ENTERPRISE RISK MANAGEMENT]; *See also* COSO EXECUTIVE SUMMARY, ENTERPRISE RISK MANAGEMENT - INTEGRATED FRAMEWORK, 3 (2004) [hereinafter COSO EXECUTIVE SUMMARY]

[39] COSO EXECUTIVE SUMMARY*, supra note* 38, at 2.

those risks.[40] Firms must also carefully consider the external environment, since the achievement of the strategic and operations objective is often due to events outside of the entity's control.[41] The political landscape under President Trump serves as but one example. Further, auditors and accounting firms must now advise companies to quantify non-financial risks and to prioritize them based on materiality as it relates to the company's operational and financial performance.[42]

Rating agencies pay attention to firms' ERM efforts as well. Standard and Poor's ("S&P") considers: how the organization has established risk tolerances and how these tolerances are applied to the overall strategic decision-making process; risk-control processes for each firm; and how the firm manages emerging risks.[43] S&P also analyzes earning loss, enterprise value, and other financial metrics for various risks.[44]

ERM in the past was relegated to financial and audit personnel, but lawyers now play an increasingly important role as gatekeepers—a role academics have talked about for years.[45] Among other things, the lawyer/gatekeeper protects the public and the shareholders from malfeasance or excessive risk taking by management and the board.

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[40] Id., at 1.

[41] *Id.*, at 3; COSO ENTERPRISE RISK MANAGEMENT, *supra* note 38, at 4.

[42] *See* Marcy Murninghan, Redefining Materiality II: Why It Matters, Who's Involved, and What It Means for Corporate Leaders and Boards 4, (Ted Grant ed., 2013).

[43] *See generally* SRIDHAR MANYEM, S&P'S ERM FRAMEWORK (2015), http://www.ulti-risk.com/pdf/ultimate-risk-may-2015-sridahr-presentation.pdf.

[44] *Id.* at 16.

[45] *See* JOHN C. COFFEE, JR., GATEKEEPERS: THE ROLE OF THE PROFESSIONS IN CORPORATE GOVERNANCE 192 (Oxford 2008) (focusing on the role of corporate counsel on reviewing due diligence and corporate transactions); John C. Coffee, Jr., *The Attorney As Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1297 (2003) ("[G]atekeepers are independent professionals who are so positioned that, if they withhold their consent, approval, or rating, the corporation may be unable to effect some transaction or to maintain some desired status."); Peter J. Henning, *The New Corporate Gatekeeper*, 62 WAYNE L. REV. 29, 29–30 (2016).

This risk-mitigation role has never been more important because of the myriad of compliance and CSR issues facing corporations and the potential for deregulation, as promised by President Trump. Thus, it may be a good thing that by 2020, 31% of New York Stock Exchange-traded companies expect to add a chief risk officer role to their general counsel's responsibilities and 25% will add a Chief Government Relations Officer.[46] These responsibilities will add to the corporate secretary and chief compliance officer titles that many general counsels already hold but will ultimately serve both shareholders and stakeholders of companies that may engage in more risk in an era of volatility and deregulation.[47]

The pioneer of the in-house counsel revolution, Ben Heineman, Jr., explains the modern-day inside lawyer's role this way:

> Without question, *the most basic job of the General Counsel is to determine what is the law and to help shape messages, systems, and processes so that the corporation adheres to law and avoids legal hazard all across the globe . . . . Compliance avoids harm to the corporation, but it also creates value inside the corporation, in the marketplace, and in broader society by underscoring the corporation's commitment to integrity and differentiating it from less scrupulous rivals.*[48]

It is not surprising then, that when 1,100 chief legal officers were surveyed about what issues "keep [them] up at night" in the two months prior to the 2016 election, 74% cited ethics and compliance and 71% cited regulatory or governmental changes.[49] Twenty-eight percent of re-

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[46] *General Counsel Pay Trends 2016*, EQUILAR 7 (Nov. 2016), http://www.barkergilmore.com/hubfs/Docs/Equilar_GC_Pay_Trends_2016_Report.pdf?t=1480526974922.

[47] *Id.*

[48] BEN W. HEINEMAN, JR., THE INSIDE COUNSEL REVOLUTION: RESOLVING THE PARTNER-GUARDIAN TENSION 131 (2016) (emphasis in original).

[49] *ACC Chief Legal Officers 2017 Survey*, ASS'N OF CORP. COUNS. 1, 4 (2017), https://www.acc.com/vl/public/Surveys/loader.cfm?csModule=security/getfile&pageid=1449472&page=/legalresources/resource.cfm&qstring=show=1449472&fromLibrary=1&title=ACC%20Chief%20Legal%20Officers%202017%20Survey%20%20Executi

spondents have been targeted by a regulator in the past two years.[50] Board members in a September 2016 survey also expressed concern about regulatory changes and scrutiny as a top risk.[51] These pre-election survey results make sense because at the time the surveys were answered, most people expected a democrat to win, and that could have theoretically led to more stringent regulations on business.

This regulatory uncertainty should, diminish under a Republican Congress and Republican President, particularly a President with an avowed pro-business, deregulatory agenda. However, other than a complex and controversial tax plan that strongly favors some business types over others, no other major substantive legislation has passed in the first twelve months of the Administration.[52]

Moreover, President Trump's unexpected and often controversial executive orders have actually increased regulatory uncertainty. In fact, in a study of 10-Ks and 20-Fs filed between September 1, 2016 and

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ve%20Summary&recorded=1. The Association of Corporate Counsel Chief Legal Officers 2017 Survey is the largest global study of the issues and challenges facing chief legal officers in corporate legal departments.

[50] *Id.* at 4.

[51] *See* N.C. State Poole College of Management, *Executive Perspectives on Top Risks for 2017: Key Issues Being Discussed in the Boardroom and C-Suite*, PROTIVITI 7, https://www.protiviti.com/sites/default/files/united_states/insights/nc-state-protiviti-survey-2017-top-risks.pdf (last visited Nov. 24, 2017). North Carolina State University's ERM Initiative and Protiviti surveyed 735 C-level executives, 55 percent of whom are based in the United States. *Id.* at 2.

[52] The tax cuts went into effect on January 1, 2018 for businesses but as of the time of this writing, it was too early to tell the effects of the cuts. Several commentators have questioned whether the plan favors larger businesses over smaller business. *See e.g.*, Joe Ciolli, *An Econ Professor Turned Small-Business Owner Breaks Down his 3 Big Problems with the GOP Tax Plan*, BUS. INSIDER (Dec. 21, 2017, 6:03 AM) http://www.businessinsider.com/small-business-effect-of-trump-gop-tax-bill-2017-12; Brittany De Lea, *What Tax Reform Really Means for Small Businesses*, FOX BUS. (Dec. 28, 2017), http://www.foxbusiness.com/markets/2017/12/28/what-tax-reform-really-means-for-small-businesses.html; Andrew Soergel, *GOP Tax Bill Rewards Real Estate, Oil Wile Hurting Hospitals*, U.S. NEWS & WORLD REPORT (Jan. 1, 2018, (12:01 AM), https://www.usnews.com/news/economy/articles/2018-01-01/gop-tax-bill-rewards-real-estate-oil-while-hurting-hospitals.

April 30, 2017, approximately 600 companies disclosed Brexit-related risk and almost as many—approximately 550—disclosed risk factors relating to the Trump administration.[53] These risk factors related to the very issues that he campaigned on—tax reform, health care, trade, immigration, and environmental concerns.

III. KEY CORPORATE COMPLIANCE AND GOVERNANCE CONCERNS

In this Part, I will address key compliance risks that companies face now, particularly under the Department of Labor ("DOL"), the Department of Justice ("DOJ"), and the Securities and Exchange Commission ("SEC").[54] I have chosen these three agencies as examples because they have jurisdiction over all public companies and, in some instances, over those in their supply chains. For each agency, I will highlight a few areas of interest to illustrate the potential risk areas that stem from uncertainty. From a practical perspective, companies must determine whether to increase or decrease compliance spending in light of the stated priorities. Decreasing compliance budgets and pulling back on policies may lead to more risk in the long term, even if such actions comply with the letter of the law under President Trump.

The DOL, which implements dozens of labor laws affecting applicants, workers, federal contractors, and retirees, has often been at odds with the business community. Labor Secretary Acosta has only provided some measure of relief for corporate America. In one "victory" for employers, the DOL has pulled back on Obama-era changes to the overtime rules, stating in a request for public comments that "[t]he Department is aware of stakeholder concerns that the standard salary level

[53] Michal Berkner et al., *SEC Disclosure Trends Related to Brexit and the Trump Administration*, SKADDEN (May 25, 2017), https://www.skadden.com/insights/publications/2017/05/sec-disclosure-trends-related-to-brexit.

[54] Although over 65% of chief legal officers raised data breaches and information security as top concerns, those topics are large and important enough to merit a separate article, and thus I will not discuss them here even though they are or will likely be on every board agenda in the country. *See ACC Chief Legal Officers 2017 Survey*, *supra* note 49, at 4. Board members listed those as top 10 concerns, as well. *See Executive Perspectives on Top Risks for 2017: Key Issues Being Discussed in the Boardroom & C-Suite, supra* note 51, at 7.

set in the 2016 Final Rule was too high. In particular, stakeholders have expressed the concern that the new salary level inappropriately excludes from exemption too many workers . . . ."[55]

Secretary Acosta at first did not satisfy business leaders or President Trump by delaying the implementation of the so-called fiduciary rule, which raises the fiduciary standard of brokers to be the same as the standard of Registered Investment Advisors.[56] Many business leaders had complained that the Obama-era rule was overbroad, capricious, paternalistic, and unnecessary, and, in June 2016, five lawsuits were filed against the DOL.[57] Providing some measure of hope to the business community, in February 2017, President Trump signed an executive order requiring a review of the rule explaining:

> One of the priorities of my Administration is to empower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses, such as buying a home and paying for college,

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[55] *See* Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 82 Fed. Reg. 34616 (proposed July 26, 2017) (pending comments), https://www.federalregister.gov/documents/2017/07/26/2017-15666/request-for-information-defining-and-delimiting-the-exemptions-for-executive-administrative.

[56] *See* Definition of the Term "Fiduciary"; Conflict of Interest Rule–Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24 & 86-128, 82 Fed. Reg. 16902 (proposed Apr. 7, 2017) (to be codified at 29 C.F.R. pt. 2510), https://www.federalregister.gov/documents/2017/04/07/2017-06914/ definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice-best; *see also* John Hilton, *Trump's DOL Backs Fiduciary Rule in Legal Brief*, INSURANCENNEWSNET.COM (July 5, 2017), https://insurancenewsnet.com/innarticle/trumps-dol-backs-fiduciary-rule-legal-brief#.WeUYWxNSzFQ.

[57] *See* Jacklyn Wille, *Labor Department Faces Five Lawsuits Over Fiduciary Rule*, BLOOMBERG BNA (June 10, 2016), https://www.bna.com/labor-department-faces-n57982073912/.

> and to withstand unexpected financial emergencies. . . . [The Fiduciary Rule] may significantly alter the manner in which Americans can receive financial advice, and may not be consistent with the policies of my Administration.[58]

However, surprising many observers, just a few months later, Secretary Acosta filed a brief responding to the litigation. He explained:

> [The] DOL reasonably determined, on the basis of the extensive record before it, that conflicted transactions involving certain annuities should be required to satisfy the BIC Exemption . . . . DOL concluded that the exemption's conditions are necessary to protect retirement investors from the harms posed by conflicted transactions involving these complicated products.[59]

At the end of November, Secretary Acosta reversed position on the delay of implementation and now enforcement will not occur until the middle of 2019, leading some to believe that the rule may never go into effect.[60] This means that while the review is pending, firms must determine whether to develop systems and structures to comply with the rule.

The Trump Administration further confounded the business community during oral argument in a Supreme Court case, heard in early October 2017, which could have a significant impact on an estimated

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[58] Memorandum on Fiduciary Duty Rule, 2017 DAILY COMP. PRES. DOC. (Feb. 3, 2017) (available at https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule).

[59] *See* Hilton, *supra* note 56.

[60] Mark Schoeff Jr., *Delay of DOL Fiduciary Rule Enforcement Mechanisms Now Final*, Investment News (Nov. 27, 2017, 2:04 PM), http://www.investmentnews.com/article/20171127/FREE/171129942/delay-of-dol-fiduciary-rule-enforcement-mechanisms-now-final.

55% of employers and 25 million employees.[61] The Court will opine on the controversial use of class action waivers and mandatory arbitration in the employment context. Specifically, the Court will decide whether mandatory arbitration violates the National Labor Relations Act[62] ("NLRB") or is permissible under the Federal Arbitration Act.[63] The Trump administration reversed position and supported the employers instead of the employees as the Obama Administration had done when the cases were first filed. The current administration also argued in Court against its own NLRB position that these agreements are invalid.[64] Although many business leaders were pleased with the change in position that would allow mandatory arbitration of employment disputes, that position is not consistent within the Trump Administration, as evidenced by the Supreme Court oral argument. Accordingly, until the President fills the slate of labor commissioners, companies cannot be sure of how the NLRB will rule on key policies and cases.

Congress has also slashed the 2018 budget for both the DOL and NLRB,[65] and therefore key Obama-era proposals may never be final-

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[61] Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017); Lewis v. Epic Systems Corp., 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017); Murphy Oil USA, Inc. v. N.L.R.B., 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017).

[62] *See Frequently Asked Questions*, N.L.R.B., https://www.nlrb.gov/resources/ faq/nlrb (last visited Oct. 16, 2017).

[63] *See* Asa Lopatin, *What Constitutes Arbitration for Federal Arbitration Act Purposes?*, A.B.A. (June 16, 2014), http://apps.americanbar.org/litigation/committees/adr/articles /spring2014-0614-federal-arbitration-act.html.

[64] For more information and to read the filed briefs, *see National Labor Relations Board v. Murphy Oil USA, Inc.*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/national-labor-relations-board-v-murphy-oil-usa-inc/ (last visited Nov. 25, 2017).

[65] U.S. DEP'T OF LAB., FY 2018 BUDGET IN BRIEF (2017), *available at* https://www.dol.gov/sites/default/files/FY2018BIB_0.pdf; Bourree Lam, *The Jobs Programs Trump's Budget Would Cut*, ATLANTIC (Mar. 17, 2017), https://www.theatlantic.com/business/archive/2017/03/trump-budget-dol/519933/; Celine McNicholas & Samantha Sanders, *Policy Watch: Cuts to DOL Budget, Attacks on Joint Employer Standard*, ECON. POL'Y INST.: WORKING ECONS. BLOG (July 14, 2017), http://www.epi.org/ blog/policy-watch-cuts-to-dol-budget-attacks-on-joint-employer-standard/.

ized and enforcement efforts will likely decrease due to lack of resources. The potential under-enforcement may thus lead to higher risk taking in labor and employment matters, and particularly in health and safety.

The DOJ under Jeff Sessions has also added uncertainty for corporate America, particularly as it relates to corporate investigations and voluntary disclosure of wrongdoing. Former Deputy Attorney General Yates under President Obama had announced in September 2015 that if companies wanted leniency credit during an investigation, they would have to engage in an unprecedented level of cooperation, including providing names and investigation reports about corporate insiders who had committed wrongdoing.[66] The six elements outlined in what is known as the "Yates Memo" are as follows: 1) cooperation credit is only available if companies provide "all relevant facts"; 2) "criminal and civil corporate investigations should focus on individuals from inception"; 3) criminal and civil DOJ attorneys should communicate often and refer cases; 4) there is no protection for individuals from liability in corporate resolutions absent "extraordinary circumstances"; 5) the DOJ must have a clear plan to resolve individual cases before statute of limitations runs and declinations require approval; and 6) the government should not focus on an individual's ability to pay when looking at civil cases.[67]

As many critics (including me) have pointed out, this policy inevitably leads to potential erosion of the attorney-client privilege and to company executives seeking their own counsel, thus slowing down investigations.[68] Although companies did not generally agree with this policy statement, they have adapted to the new normal over the past two years. Current Deputy Attorney General Rod Rosenstein announced in September 2017 that the DOJ would likely change the parameters of the

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[66] Individual Accountability for Corporate Wrongdoing, Att'y Gen. Memo, 2 (Sept. 9, 2015), *available at* https://www.justice.gov/archives/dag/file/769036/ download.

[67] *Id.* at 2–3.

[68] *See e.g.,* Nathan Huff, *One Year Later: Yates Memo Remains a Threat to the Privileged Status of Internal Investigations*, A.B.A. WHITE COLLAR CRIME COMMITTEE NEWSL., Winter/Spring 2017, https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/wcccn2017_huff.authcheckdam.pdf.

Yates Memo.[69] Because there were no specifics regarding whether the DOJ would abrogate or merely tweak the policy, corporate counsel and compliance officers are now stuck in limbo.

Voluntary disclosures and corporate leniency programs figure prominently in the enforcement of the Foreign Corrupt Practices Act ("FCPA") as well. Both the DOJ and SEC share enforcement power, and firms should assume that both agencies will continue vigorous enforcement. Attorney General Sessions made clear that:

> [C]orruption harms free competition, distorts prices, and often leads to substandard products and services coming into this country. It also increases the cost of doing business, and hurts honest companies that don't pay these bribes.
>
> [The DOJ] wants to create an even playing field for law-abiding companies. [The DOJ] will continue to strongly enforce the FCPA and other anti-corruption laws.
>
> . . . .
>
> The Department of Justice will continue to emphasize the importance of holding individuals accountable for corporate misconduct. It is not merely companies, but specific individuals, who break the law.[70]

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[69] Sarah N. Lynch, *Justice Department Mulls Changing Corporate Prosecution Policy*, REUTERS (Sept. 14, 2017), https://www.reuters.com/article/us-usa-justice-whitecollar/justice-department-mulls-changing-corporate-prosecution-policy-idUSKCN1BP2KD.

[70] S*ee* Attorney General Jeff Sessions, Remarks at Ethics and Compliance Initiative Annual Conference (Apr. 24, 2017) (transcript available at Department of Justice at https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual).

In keeping with Sessions' comments, in early 2017, DOJ announced the extension of an Obama-era pilot program under which companies that voluntarily self-report violations, cooperate with the government, and remediate a violation may receive reduced penalties, including a declination of prosecution and disgorgement.[71] In November 2017, the DOJ announced a new, revised FCPA policy.[72] Notably, Deputy AG Rosenstein introduced the policy by announcing,

> The new policy enables the Department to efficiently identify and punish criminal conduct, and it provides guidance and greater certainty for companies struggling with the question of whether to make voluntary disclosures of wrongdoing . . . . Establishing internal policies helps guide our exercise of discretion and combat the perception that prosecutors act in an arbitrary manner. The new policy does not provide a guarantee. We cannot eliminate all uncertainty. Preserving a measure of prosecutorial discretion is central to ensuring the exercise of justice.[73]

Critics have pointed out that this new, nonbinding policy fails to provide a true compliance defense and provides guidance without clear reassur-

[71] Press Release, U.S. Dep't of Just. Fraud Sect., The Fraud Section's Foreign Corrupt Practices. Act Enforcement Plan and Guidance (Apr. 5, 2016) (available at https://www.justice.gov/criminal-fraud/file/838416/download); Acting Att'y Gen. Kenneth A. Blanco, Remarks at the A.B.A National Institute on White Collar Crime (Mar. 10, 2017) (transcript available at https://www.justice.gov/ opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-american-bar-association-national).

[72] United States Attorneys' Manual § 9-47.120 (2017), available at https://www.justice.gov/usam/usam-9-47000-foreign-corrupt-practices-act-1977.

[73] Deputy General Rod J. Rosenstein, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017) (transcript available at https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign).

ance because of the discretion allowed to prosecutors.[74] Significantly, this policy does not protect individuals and thus executives, officers, and board members could all face liability without the leniency offered to the company that may turn their names over to the government as culpable individuals.

SEC Chair Jay Clayton has indicated his support for rigorous enforcement of the FCPA as well, stating during his confirmation hearing that he plans to work "with [his] fellow Commissioners, Enforcement Division staff, and other authorities in the U.S. and abroad to coordinate enforcement of the FCPA and other anti-corruption laws."[75] Companies should therefore stay the course related to FCPA training, policy development, and compliance initiatives particularly because other SEC staff have reaffirmed the agency's commitment to enforcement.[76]

Public companies must not only consider the enforcement priorities of the DOL, NLRB, and DOJ, but they must also consider the SEC. The year 2016 was a record year for the SEC with 868 enforcement actions of financial reporting misconduct, 160 cases against investment advisers or investment companies, and 21 FCPA enforcement actions.[77] Significantly, the SEC also touted its enforcement against gatekeepers, including attorneys.[78]

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[74] *Statement on the DOJ's New "Revised FCPA Corporate Enforcement Policy",* FCPA PROFESSOR (Nov. 29, 2017), http://fcpaprofessor.com/statement-dojs-new-revised-fcpa-corporate-enforcement-policy/#more-23708.

[75] *See Questions for the Nomination of Mr. Jay Clayton to be a Member of the Securities and Exchange Commission, from Ranking Member Sherrod Brown*, S. Comm. on Banking, Housing, & Urban Affairs 115th Cong. 9 (2017), *available at* http://src.bna.com/nBm.

[76] Steven R. Peikin, Co-Director, Enforcement Division, Reflections on the Past, Present, and Future of the SEC's Enforcement of the Foreign Corrupt Practices Act, Speech at New York University School of Law (Nov. 9, 2017) (transcript available at https://www.sec.gov/news/speech/speech-peikin-2017-11-09).

[77] Press Release, S.E.C., SEC Announces Enforcement Results for FY 2016 1 (Oct. 11, 2016) (available at https://www.sec.gov/news/pressrelease/2016-212.html).

[78] *Id.* at 3.

While former SEC Chair Mary Jo White used a "broken windows approach," enforcing minor violations to promote less risk taking and more compliance,[79] the SEC under Chair Clayton will likely employ a different strategy. In a July 2017 speech laying out his priorities, he made it clear that he would focus on "Main Street investors" and stemming the 50% decline in listed companies by requiring more reasonable, material disclosures.[80] Among other things, the agency will now focus on: enforcement actions related to cybersecurity; improving disclosure for investors, including through the now partially-enacted Fiduciary Rule described above; and "root[ing] out fraud and shady practices in the markets, particularly in areas where Main Street investors are most exposed."[81]

In this section, I have discussed only a fraction of compliance, governance, and CSR issues that counsel, management, and boards must consider in the Trump era. Some firms, regardless of size or whether they are publicly traded, must keep track of hundreds of regulations promulgated by dozens of agencies at home and abroad. Companies in their supply chains must also focus on this ever-changing regulatory landscape, particularly in the age of disclosure. Although there is likely to be less regulation, and, in some cases, deregulation in the Trump era,[82]

[79]Mary Jo White, SEC Chair, Remarks at the Securities Enforcement Forum (Oct. 9, 2013) (transcript available at https://www.sec.gov/news/ speech/spch100913mjw); Ed Beeson, *SEC Enforcement Chief Says 'Broken Windows' is Working*, LAW360 (Oct. 15, 2015), https://www.law360.com/articles/715013/sec-enforcement-chief-says-brokenwindows-is-working.

[80] Jay Clayton, S.E.C. Chairman, Remarks at the Economic Club of New York (July 12, 2017) (transcript available at SEC at https://www.sec.gov/news/ speech/remarks-economic-club-new-york).

[81] *Id.*

[82] President Trump touted his record of rolling back regulations in a December 14, 2017 speech. Justin Sink & Alan Levin, *Trump Boasts of Bringing a "Screeching" Halt to Growth Regulations*, BLOOMBERG POLITICS (Dec. 14, 2017, 2:53 PM), https://www.bloomberg.com/news/articles/2017-12-14/trump-boasts-of-screeching-halt-to-growth-of-u-s-regulations. His Administration released a regulatory plan as well. Office of Information and Regulatory Affairs, Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions, REGINFO, https://www.reginfo.gov/ public/do/eAgendaMain (last visited Jan. 5, 2018). Some of the rollbacks that the Ad-

that does not necessarily make counsel's job easier when shareholders and stakeholders, including employees and customers, play such an important role in corporate success.

IV. WHAT DOES IT MEAN TO BE SOCIALLY RESPONSIBLE IN THE TRUMP ERA?

Public perception of companies matters. According to a recent study, 63% of Americans want businesses that will take the lead to drive social and environmental change moving forward, in the absence of government regulation; 78% want companies to address social justice issues; 87% will be more likely to purchase a product because a company advocated for an issue they cared about; and 76% state that they will "refuse to purchase a company's products or services upon learning it supported an issue contrary to [their] beliefs."[83] Perhaps responding to this socially conscious customer, CEOs have publicly criticized the President's policies and actions, even if they don't name the President himself. They have issued statements, either as individuals or for their companies, on wide ranging topics such as the travel ban, climate change, transgender rights, diversity, immigration, racial violence in Charlottesville, Virginia, and gun control.[84]

Notwithstanding public support for socially responsible companies, firms with strong CSR commitments may perceive a conflict between shareholder wealth maximization and stakeholder norms. For ex-

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ministration takes credit for had already died under President Obama. https://www.bloomberg.com/news/features/ 2017-12-11/trump-takes-credit-for-killing-hundreds-of-regulations-that-were-already-dead

[83] *2017 Cone Communications CSR Study*, CONE COMMUNICATIONS, http://www.conecomm.com/2017-cone-communications-csr-study-pdf (last visited Nov. 25 2017). I have argued that people do not always practice what they preach when it comes to actually purchasing products or boycotting companies. Marcia Narine Weldon, *Disclosing Disclosure's Defects: Addressing Corporate Irresponsibility for Human Rights Impacts*, 47 COLUM. HUM. RTS. L. REV. 84, 136–38 (2015). However, these statistics about consumer preferences are still important as companies try to build and maintain their brands.

[84] Leslie Gaines-Ross, *What CEO Activism Looks Like in the Trump Era*, HARV. BUS. REV. (Oct. 2, 2017), https://hbr.org/2017/10/what-ceo-activism-looks-like-in-the-trump-era.

ample, the Trump Administration has announced a rollback of a number of Obama-era environmental rules and has disbanded a number of scientific advisory committees.[85] In June 2017, the President pulled out of the Paris Climate Accord (the "Accord"), an agreement that almost 200 nations had pledged to support.[86] As the President explained,

> [t]he Paris Climate Accord is simply the latest example of Washington entering into an agreement that disadvantages the United States to the exclusive benefit of other countries, leaving American workers -- who I love -- and taxpayers to absorb the cost in terms of lost jobs, lower wages, shuttered factories, and vastly diminished economic production.[87]

In what some consider one of the biggest rollbacks, on October 10, 2017, the Environmental Protection Agency ("EPA") proposed a repeal of the Clean Power Plan ("CPP"), the centerpiece of President Obama's climate change plan stating, "[r]epealing [CPP] will also facilitate the development of U.S. energy resources and reduce unnecessary

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[85] Michael Greshko et al., *A Running List of How Trump Is Changing the Environment*, NAT'L GEOGRAPHIC (Oct. 25, 2017), http://news.nationalgeographic.com/ 2017/03/how-trump-is-changing-science-environment/. *See generally* Lisa Friedman & Brad Plumer, *E.P.A. Announces Repeal of Major Obama-Era Carbon Emissions Rule*, N.Y. TIMES (Oct. 9, 2017), https://www.nytimes.com/ 2017/10/09/climate/clean-power-plan.html.

[86] Press Release, President Donald Trump, Statement by President Trump on the Paris Climate Accord (June 1, 2017) (available at https://www.whitehouse.gov/ the-press-office/2017/06/01/statement-president-trump-paris-climate-accord); Mike James, *195 Countries Signed Paris Climate Agreement, 2 Oppose it. For Now.* (May 31, 2017, 6:28 PM), https://www.usatoday.com/story/news/nation/2017/05/31/only-two-nations-out-197-oppose-climate-pact---and-us-may-next/102360164/; United Nations Climate Change, Paris Agreement – Status of Ratification, http://unfccc.int/paris_agreement /items/9444.php (last visited Jan. 5, 2018).

[87] *Id.*

regulatory burdens associated with the development of those resources . . . ."[88]

The Trump Administration's complete reversal from the Obama Administration's policies on climate change and the environment[89] poses a dilemma for companies that have already publicly committed to minimizing their environmental impacts. Prior to the President's withdrawal from the Accord, some of the nation's largest companies publicly urged him to remain in the Accord.[90] Hundreds of CEOs and dozens of state and local governments pledged to voluntarily comply with the Accord's standards, notwithstanding the President's actions.[91] Seventy-one percent of Fortune 100 and forty-three percent of the Fortune 500 companies have already publicly indicated an intent to increase spending on renewable energy and sustainability initiatives.[92] In 2015, more than 5,600 companies—close to 60% of the market capitalization of the world's largest stock exchanges—disclosed environmental data through the Carbon

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88 Press Release, EPA, EPA Takes Another Step To Advance President Trump's America First Strategy, Proposes Repeal Of "Clean Power Plan" (Oct. 10, 2017) (available at https://www.epa.gov/newsreleases/epa-takes-another-step-advance-president-trumps-america-first-strategy-proposes-repeal).

89 Jennifer Hansler, *5 Major Changes to US Environmental Policy in 2017*, CNN POLITICS (Dec. 30, 2017, 8:01 AM), http://www.cnn.com/2017/12/30/ politics/environmental-policy-moments-2017/index.html; Michael Grenshko, Laura Parker & Brian Clark Howard, *A Running List of How Trump is Changing the Environment*, NAT'L GEOGRAPHIC (Jan. 5, 2018), https://news.nationalgeographic.com/2017/03/how-trump-is-changing-science-environment/.

90 *Businesses Urge President to Remain in Paris Agreement*, CTR. FOR CLIMATE & ENERGY SOLUTIONS, https://www.c2es.org/international/business-support-paris-agreement (last visited Nov. 25, 2017).

91 Seth Feigermen, *Apple, Facebook, Google Join Hundreds of Businesses in Support for Paris Agreement,* CNN TECH (June 5, 2017), http://money.cnn.com/2017/06/05/technology /business/businesses-paris-climate-agreement/index.html; Hiroko Tabuchi & Henry Fountain, *Bucking Trump, These Cities, States & Companies Commit to Paris Accord*, N.Y. TIMES (June 1, 2017), https://www.nytimes.com/2017/06/01/climate/american-cities-climate-standards.html.

92 *2016 Corporate Advanced Energy Commitments*, ADVANCED ENERGY ECON. (Dec. 2016), https://info.aee.net/hubfs/PDF/F100_F500.pdf?t=1508158577960.

Disclosure Project ("CDP"), a UK-based nonprofit.[93] Twenty percent of the world's emissions of greenhouse gases are accounted for through the CDP portal, and 827 investors representing $100 trillion USD access company climate change data through CDP.[94] "In 2016, 533 cities, [over] 100[] state governments, and thousands of companies voluntarily reported their climate impacts through the CDP platform."[95]

Investors have also demanded action. Companies faced 144 environmental proposals in 2017, and 69 related to climate change.[96] Although most did not pass, one notable exception was ExxonMobil. Shareholders of ExxonMobil—a company under investigation by a number of state regulators for misleading the public on climate change[97]—have demanded an accounting of climate change risks.[98] Blackrock and Vanguard, two of the company's largest investors, led the charge for disclosure.[99]

How then should companies react in light of the Trump agenda and his appointment of Scott Pruitt, who has sued the EPA over a dozen times and who has, along with President Trump, questioned the scientific consensus on climate change?[100] Should boards now reconsider how

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[93] *About Us*, CDP, https://www.cdp.net/en/info/about-us (last visited Nov. 25, 2017).

[94] *Disclosing as a Company*, CDP, https://www.cdp.net/en/companies-discloser (last visited Nov. 25, 2017).

[95] Amberli Young, *Transparency is a Key Ingredient for City Climate Action*, INST. FOR MKT. TRANSFORMATION (Apr. 20, 2017), http://www.imt.org/news/the-current /transparency-is-a-key-ingredient-to-city-climate-action.

[96] Mueller & Ising, *supra* note 33.

[97] Geoffrey Supran & Naomi Oreskes, *Assessing ExxonMobil's Climate Change Communications (1977–2014)*, ENVIRON. RES. LETT. 12 (Aug. 23, 2017), http://iopscience.iop.org/article/10.1088/1748-9326/aa815f.

[98] Diane Cardwell, *ExxonMobil Shareholders Demand Accounting of Climate Change Policy Risks*, N.Y. TIMES (May 31, 2017), https://www.nytimes.com/2017/05/31/business /energy-environment/exxon-shareholders-climate-change.html.

[99] *Id.*

[100] Coral Davenport, *E.P.A. Chief Doubts Consensus View of Climate Change*, N.Y. TIMES (Mar. 9, 2017), https://www.nytimes.com/2017/03/09/us/politics/epa-scott-pruitt-global-warming.html; Dominique Mosbergen, *Scott Pruitt Has Sued the Environmental Pro-*

to allocate shareholder resources away from climate change and environmental initiatives by perhaps investing in new products, increasing dividends, or buying back shares?

I argue that boards of socially responsible companies should not reverse course under the Trump Administration. Instead, boards and executives should serve both shareholder and stakeholder interests by staying the course even when legislative changes related to the environment, social issues, and corporate governance may allow firms to relax standards or eliminate programs. At a minimum, firms impacted by climate change regulation should disclose the potential impact of these policies and potential regulator changes to their shareholders.

V. CONCLUSION

In Part II, I laid out the COSO ERM framework, and I will close this Essay with ERM questions and concerns that compliance officers, boards, management, and shareholders should consider when managing and mitigating risk in the Trump/Pence era.

1) **What is the firm willing to accept as it pursues shareholder value?** To answer this question, firms must answer (and possibly reconsider): a) what is shareholder value, b) who are the shareholders, and c) what do they want? In many companies, institutional investors now own most of the shares. They drive the shareholder proposals, and they have the ear of the company's investor relations department and executive management. The "Main Street investor" that SEC Chair Clayton wants to protect mainly invests through mutual funds (an institutional investor). These institutional investors now expect more, not less information about ESG factors and how they affect the business and the larger community. The ExxonMobil vote on climate change was initiated by powerhouse investors Blackrock and Vanguard, not an environmental non-governmental organization. Taking ad-

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tection Agency 13 Times. Now He Wants to Lead It, HUFFINGTON POST (Jan. 17, 2017), https://www.huffingtonpost.com/entry/scott-pruitt-environmental-protection-agency_us_5878ad15e4b0b3c7a7b0c29c.

vantage of the new regulatory landscape by reducing expenditures on ESG initiatives and compliance programs may only provide "value" to short-term investors. Further, it will increase the risk-taking behavior that led to Sarbanes-Oxley and Dodd-Frank. In other words, short term risk taking under a less stringent regulatory regime may in fact lead to an increase in regulation during a future administration.

2) **What are management's risk management processes that have identified and assessed the most significant enterprise-wide risks**? As stated earlier, the counsel/gatekeeper role will and should increase in importance. Even those counsel who do not add a "risk officer" title to their names must keep Ben Heineman's words in mind: in-house counsel are responsible for helping to shape the systems and processes so that the companies can avoid legal hazards. This means that counsel and compliance officers must hone new skills that help them proactively assess risk in areas of regulatory scrutiny that may increase such as cybersecurity.

3) **Review the risk portfolio compared to the risk appetite**. If companies face less regulation or even deregulation, risk appetite may go up. If the firm no longer has to worry about compliance and audits by certain regulatory agencies, some managers and employees may choose to relax or ignore rules, or more likely, cut back on funding for training and internal monitoring. This will inevitably change the compliance and ethics culture. This could, in turn, to lead to more whistleblowers or failure to report wrongdoing. Counsel, therefore, should work with operations and management to re-evaluate the risk profile considering current and pending legislation, as well as potential stakeholder reaction. For example, a company may suffer higher turnover rates and disengagement from employee and stakeholders if it chooses to relax its safety program to comply with the bare minimum required by law under the Trump Administration. A review of the risk appetite also includes a discussion of whether the company is willing to risk voluntary disclosure of a compliance failure to re-

ceive cooperation credit from the government, even at the expense of criminal charges being levied against executives and/or board members.

4) **Whether management is properly responding to the most significant risks and apprising the board of those risks.** The counsel/gatekeeper must help develop and assess the portfolio of risks, understand the risk appetite, recalibrate if necessary, and ensure that management and the board is aware of the risks, including the risk of regulatory uncertainty, particularly in light of the board's *Caremark* obligations. To properly apprise the board, counsel must work in a more interdisciplinary way with the IT, human resources, internal audit, health and safety, and marketing departments to assess risk cross-functionally, rather than working in silos as happens in so many organizations.

In sum, counsel must expand beyond merely knowing the law. They must graduate from being risk-adverse to being risk intelligent by reevaluating their company's vulnerability, and balancing that vulnerability in the context of financial, regulatory, reputational, and legal risk in a volatile political climate.[101] This risk intelligence must include a discussion with the board and executive management regarding the changing demands of the consumer market and the investor community particularly on ESG matters, notwithstanding clear signals from President Trump that the Administration will minimize regulatory scrutiny. The new environment may also require additional transparency in public filings and with government regulators as uncertainty increases. Finally, counsel and compliance officers as gatekeepers must redouble efforts to strengthen ethical culture and ensure that the company's compensation and other incentives structures promote the appropriate level of risk taking at all levels in the organization.

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[101] *See The Risk Intelligent Gen. Counsel: Discard the Compass and Get a GPS,* DELOITTE 5, https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Governance-Risk-Compliance/dttl-grc-riskintelligentgeneralcounseldiscardthecompassandgetgps.pdf (last viewed Nov. 25, 2017).