

University of Cincinnati
College of Law
Spring 2011

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Room 422
556-0113

CORPORATIONS II

Special Note:

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

Required Materials:

Page references are to Eisenberg, *Corporations and Other Business Organizations* (9th ed. Unabridged). The other materials are available online; please let me know if you have any problems in retrieving them. All federal securities statutes and regulations are at the Securities Lawyer's Deskbook at <http://www.law.uc.edu/CCL/>.

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

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

Recommended Materials:

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

Class Attendance and Course Preparation

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

Corporate Reporting Project

You are required to follow a large publicly traded corporation. Since we are focusing on the NYSE Governance Rules, it may be simpler to choose a NYSE-listed corporation, although you are free to choose a NASDAQ corporation if you prefer. You will be expected to make brief oral reports about your corporation throughout the semester, make an oral presentation during the final weeks of the semester and write a report that will be due at the end of the semester. (Additional information about these reports will be available later.) **Please e-mail me the name of the corporation you wish to follow as soon as possible. I want every student to follow a different company, so if you have a strong preference you should act quickly.**

Grading

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

Office Hours

I am generally available in my office between 3-4:30 p.m. on Tuesdays and Thursdays. You may stop by at other times; if it is not convenient for me, we will schedule a meeting for a mutually convenient time. In addition, you may e-mail or call to schedule an appointment.

Assignment for First Week

We will cover the materials under The Nature of the Public Corporation. Our first class will focus on the issues addressed in Chancellor Strine's article; see below.

Reading Assignments

The Nature of the Public Corporation

Introduction

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

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

Class discussion will focus on the following questions:

1. What is wrong with the rhetoric used by activist shareholders advocating for corporate democracy, according to Chancellor Strine?

2. Chancellor Strine argues that most major shareholders lack a focus on long-term profitability. What is his evidence for this? What are the consequences of this?
3. What, in Chancellor Strine's view, are appropriate areas of shareholder concern? What are not?
4. "Boards have never been more sensitive to what shareholders want" (p.16). What can be wrong with this?
5. What does he assert is the conflict between investment vehicles like mutual funds and pension plans and those who invest in those vehicles?

The Proxy Solicitation Process

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

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

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

The Role of the Institutional Shareholder

Review: (1) the Council on Institutional Investors homepage at <http://www.cii.org>, and read About The Council at <http://www.cii.org/about> and its Statement on the Value of Corporate Governance at <http://www.cii.org/UserFiles/file/Statement%20on%20the%20Value%20of%20Corporate%20Governance.pdf>, and

(2) the CalPERS homepage at <http://www.calpers-governance.org>, and read the Introduction and Purpose (pp.5-6) of its Global Principles of Accountable Corporate Governance at <http://www.calpers-governance.org/docs-sof/principles/2010-5-2-global-principles-of-accountable-corp-gov.pdf>

The Influence of Proxy Advisory Firms

SEC, Concept Release on the U.S. Proxy System (supra); read Part V.A.1 (The Role and Legal Status of Proxy Advisory Firms)

Review: (1) the RiskMetrics Group --Proxy Advisory Services at http://www.riskmetrics.com/proxy_advisory; and

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

Professional Responsibilities of the Corporate Attorney

SEC Standards of Professional Conduct for Attorneys Appearing and Practicing before the Commission in the Representation of an Issuer, available at <http://www.law.uc.edu/CCL/p205/index.html>.

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

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

Former Mayer Brown Partner Joseph P. Collins Settles SEC Fraud Action, SEC Litig. Rel. No. 21555 / June 14, 2010, at <http://www.sec.gov/litigation/litreleases/2010/lr21555.htm>

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

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

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

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

Corporate Social Responsibility

Review: (1) the Business for Social Responsibility website at <http://www.bsr.org/>, and read About BSR at http://www.bsr.org/files/About_BSR_2010.pdf, and (2) the Global Reporting Initiative website at <http://www.globalreporting.org/home>, and read About GRI at <http://www.globalreporting.org/AboutGRI/WhatIsGRI/> Kasky v. Nike, 27 Cal.4th 939 (2002)

"Workers and Factories: Improving conditions in our contract factories," at http://www.nikebiz.com/responsibility/workers_and_factories.html

Holzer, "Retailers Fight to Escape 'Conflict Minerals' Law, WSJ (Dec. 2, 2010), available at

<http://online.wsj.com/article/SB10001424052748703865004575648992964733232.html?KEYWORDS=conflict+minerals+law>

Bill Gates, A New Approach to Capitalism in the 21st Century (Davos Jan. 24, 2008), at <http://www.microsoft.com/presspass/exec/billg/speeches/2008/01-24wefdavos.msp>

Corporate Governance

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

All of the Chiquita Brands Int'l Inc. materials listed below are available at <http://www.chiquitabrands.com/InvestorRelations/Governance.aspx>

Board of Directors: Composition and Functions

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

Chiquita Brands Int'l, Inc., Governance Standards and Policies of Board of Directors
Note on Independence, pp. 978-982

The Nominating/Corporate Governance Committee

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

NYSE 303A.04

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

Chiquita Brands Int'l, Inc., Charter of the Nominating and Governance Committee

The SEC adopted changes to the proxy rules that would, in certain circumstances, permit shareholders to nominate directors through the management proxy statement; Rel. 34-62764 (Aug. 25, 2010), available at <http://www.sec.gov/rules/final/2010/33-9136fr.pdf>.

The SEC stayed the effectiveness of the rules until resolution of litigation brought by the U.S. Chamber of Commerce challenging the rules;

<http://www.sec.gov/rules/final/2010/33-9151.pdf>. The extent to which we will discuss these in class will depend on the status of the litigation.

The Compensation Committee

NYSE 303A.05

Dodd-Frank §§ 951, 953, 954

Chiquita Brands Int'l, Inc., Charter of the Compensation and Organization Development Committee

Note on CEO Compensation, pp. 648-650

Note on the Compensation of Nonexecutive Directors, pp. 652-654

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

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

The Audit Committee

Sarbanes Oxley §§ 301, 404

NYSE 303A.06, 303A.07

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

Risk Management

Review Committee on Sponsoring Organizations of the Treadway Commission (COSO) website at www.coso.org, and read (1) Enterprise Risk Management—Integrated Framework, Executive Summary, at

http://www.coso.org/documents/COSO_ERM_ExecutiveSummary.pdf, and

(2) Effective Enterprise Risk Oversight: The Role of the Board of Directors, at

<http://www.coso.org/documents/COSOBoardsERM4pager-FINALRELEASEVERSION82409.pdf>.

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

Corporate Compliance

Sarbanes Oxley § 302

SEC, Proposed Rules for Implementing Whistleblower Provisions (Rel. 34-63237) (Nov. 3, 2010), available at <http://www.sec.gov/rules/proposed/2010/34-63237.pdf>

Rule 13a-15, at <http://www.law.uc.edu/CCL/34ActRls/rule13a-15.html>

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

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

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

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

SEC Regulation FD, available at <http://www.law.uc.edu/CCL/regFD/index.html>

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

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

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

Complaint in SEC v. Tenet Health Care, at

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

Structural Changes: Corporate Combinations and Tender Offers

Sale of Substantially All Assets

Del. Corp. Code § 271

pp. 1074-1075

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

Statutory Mergers

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

Triangular Mergers and Share Exchanges
Terry v. Penn Central Corp., pp. 1075-1081

The Appraisal Remedy
Del. Corp. Code § 262
pp. 1049-1050, 1053-1055
Louisiana Mun. Police Employees' Retirement System v. Crawford, 918 A.2d 1172 (Del. Ch. 2007) (Read Parts I, VI, and VII)

Tender Offers; Directors' Responses
Securities Exchange Act §§ 13(d), 13(e), 14(d), 14(e)
pp. 1116-1124
Unocal Corp. v. Mesa Petroleum, pp. 1124-1135
Unitrin v. American General Corp., pp. 1135-1138
Blasius Industries v. Atlas Corp., pp. 167-175
Mercier v. Inter-Tel, 929 A.2d 786 (Del. Ch. 2007) (read Part I only)
Gantler v. Stephens, 965 A.2d 695 (Del. 2009) (do not read Parts II and III)

The Revlon Duty
Revlon v. MacAndrews & Forbes, pp. 1163-1174
Paramount Communications v. QVC Network, pp. 1176-1195
Omnicare, Inc. v. NCS Healthcare, Inc., pp. 1206-1221
In re Topps Co. Shareholders Litig., 926 A.2d 58 (Del. Ch. 2007) (focus on Parts IV and V)
In re Dollar Thrifty Shareholder Litigation, 2010 Del. Ch. LEXIS 192 (Sept. 8, 2010) (focus on Parts I and III.B)

Poison Pills
Moran v. Household Int'l, pp. 1138-1148
Note on Carmody v. Toll Brothers, pp. 1148-1151
Quickturn Design Systems v. Shapiro, pp. 1151-1163
Yucaipa American Alliance Fund II. L.P. v. Riggio, 1 A.3d 310 (Del. Ch. 2010)
Versata Enterprises v. Selectica, Inc., 5 A.3d 586 (Del. 2010)

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

In re John Q Hammons Hotel Inc. Shareholder Litig., 2009 WL 3165613 (Del. Ch. Oct. 2, 2009)

In re CNX Gas Corp. Shareholders Litig., 2010 Del. Ch. LEXIS 139 (July 5, 2010) (Do not read Part II.A.) (The Delaware Supreme Court subsequently refused to hear the appeal.)

Spring 2011

CORPORATIONS II CORPORATE REPORT

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

1. Provide a brief description of your corporation’s principal business(es).
2. Give your assessment of the corporation’s website and, in particular, the corporate governance section. How attractive and user-friendly is the site?
3. Review the major corporate governance documents and identify (a) items that appear to be “best practices” and go beyond what the NYSE (or Nasdaq) standards require and (b) ways in which they implement or expand upon the NYSE (Nasdaq) standards.
4. Review the corporation’s most recent proxy statement. (Many corporations have calendar fiscal years, in which case they may have the 2011 proxy statement available this spring in time for this report. Otherwise, you will have to use the 2010 proxy statement. If you’re not sure, check the date of the 2010 proxy statement; this year’s will be publicly available approximately a year later.) (a) Does it contain shareholder proposals? What is the subject matter of the proposal, who submitted it, and what was management’s response? If the annual meeting has already taken place, what was the outcome of each proposal? (b) Whether or not it is the subject of a shareholder proposal, does the corporation take a position on electing directors by majority voting. (c) Does the proxy statement set forth the company’s policy on stock option grants? If so, briefly describe it. (d) Review and comment on the proxy statement’s discussion of executive compensation contained in the Compensation Discussion and Analysis.
5. Review and comment on the § 404 internal controls reports: (a) management’s assessment of internal controls in the 10-K Report and (b) the auditor’s report on the management’s assessment (which may be in the 10-K Report or in the Annual Report to Shareholders).
6. Listen (preferably in real-time) to a webcast of a conference call discussing your corporation’s quarterly earnings between management and analysts. Describe briefly the content and tone of the call.
7. Has your corporation been involved in any newsworthy events recently: major litigation, a corporate scandal, an acquisition or merger, etc. Describe the matter and how it relates to the matters we have studied this semester.

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