A New Presidential Administration? Top Five Impacts in Our Space

With the US election now over, there are a host of outlets out there speculating about what the result means for the world. For our corporate governance and securities space, here are my five quick takes about what the new administration might mean:

1. **A new SEC chair.** A new chair for the SEC will take office sometime next year – and since the SEC chair sets the rulemaking agenda for the agency, all of the pending rulemakings might not be adopted. This Bloomberg Law piece lists some rumored candidates to be the next SEC chair, which includes a few current and former SEC personnel.

2. **A departure of senior SEC staffers.** The directors of SEC divisions likely will turn over within the first six months of the new SEC chair taking office, since those positions typically are filled by the chair. And there likely will be turnover of other senior staffers below that level – particularly if the stock market keeps going up, as experienced staffers will be in high demand if there is plentiful deal flow.

3. **Recent rulemakings unwound.** Rulemakings that the GOP has been fighting may well go under the knife and be removed. For starters, it's easy to predict that the SEC's climate disclosure rulemaking won't need to be complied with – at least for the next four years.

4. **Changes in staff processes.** This one is more of a reach, but this new administration might seek to downsize the federal government, and that could mean a smaller SEC. A smaller SEC would require changes to be made in the staff's processes and procedures – perhaps fewer rulemakings, fewer filings reviewed, and fewer staff interpretations of rules and regulations.
5. **Greater reliance on market practice.** This is sort of a continuation of the demise of the *Chevron* doctrine earlier this year – but it's also related to an SEC that provides less in the way of informal guidance. We might see a rise in groups of law firms putting out white papers to dictate approaches to certain legal issues to gain comfort. Quasi self-regulation. More Wild West.

Ten Shareholder Proposal Trends Gleaned From the Latest Proxy Season

Here are 10 bullets you can tell your senior management team and board based on lessons learned about shareholder proposals from this proxy season (hat tip to Proxy Analytics' Steve Pantina for his help with these):

1. **Alive and well** – Shareholder proposals reached the highest number – 983 – since 2015. Two factors were the growth in anti-ESG proposals and the resurfacing of majority vote proposals. However, note that the average support level for a shareholder proposal fell to its lowest level in years, 22.9%. (Here is a client alert recapping what happened during this proxy season for life science and tech companies.)

2. **Transparency matters** – Much ink has been spilled over the decline in support for E&S proposals – and the decline in the number of E&S proposals overall. That is largely attributable to better disclosure about ESG matters by many companies and not necessarily a reflection of a change in investor interest in the topic – borne out by the fact that E&S is still a hot topic during shareholder engagement.

3. **Hot is hot** – The new hot topic is AI. There were four types of these shareholder proposals this season – and one type (i.e., risks presented by gen AI misinformation) garnered over 40% in support levels. That is quite high for a new type of proposal.

4. **Governance remains hot** – Longtime proponent John Chevedden and his colleagues submitted an increased number of governance-related shareholder proposals (e.g., supermajority voting) and those continue to receive majority support.

5. **Director commitments in the crosshairs** – Director commitments are near the top in investor interest these days. In response to investor demands a few decades ago, many companies implemented hard caps on how many boards a director could serve on. Director overboarding policies have changed over the years as investor demands softened – except for at some smaller companies – but investors still ask companies how they will manage director commitments in the absence of a hard cap.

6. **Things can turn on a dime** – Not surprising given a strong stock market and no major changes in proxy advisor methodologies this year that say-on-pay failures – and say-on-pay, red-zone votes – were way down. Note though that some of the companies experiencing a failure had a high level of

say-on-pay support the year before. This can happen if a company finds its comp program falling into a yellow zone and pulled for greater scrutiny. Once scrutinized, things can go downhill in a flash.

7. **New types of activism** – Year Two of universal proxy saw interesting developments, including an expensive proxy fight, an annual meeting with three sets of proxy cards mailed and a proponent able to submit a total of five shareholder proposals to a single company. Expect the strangeness to continue as activists figure out the boundaries of universal proxy world.

8. **Activists and proponents continue to advance their agenda outside the scope of the SEC's rules** – Not only are shareholder proponents using the exempt solicitation process to promote their position, third parties continued the trend from last year of filing exempt solicitation materials to provide their views on positions taken in shareholder proposals. Or even beyond what the shareholder proposals seek.

9. **Support for anti-ESG proposals was minimal** – Even though the number of anti-ESG shareholder proposals rose to a record 107, no anti-ESG proposal received greater than 10% support.

10. **Will larger shareholders become proponents?** – The day may come when a sizable investor decides to get into the business of submitting shareholder proposals on a wide-scale basis. That day has not yet come. But it could happen someday.

    Some larger investors are getting more involved in promoting the campaigns of others. And there certainly is more coordination among larger investors in a variety of ways than there used to be.

D&O Questionnaires: How In-House Practitioners Must Use Their Judgment

It's that time of year. Time to dust off your D&O questionnaire and figure out what to do now for the upcoming proxy season. The D&O questionnaire is an important part of the proxy drafting process.

When Broc joined Cooley, he was pleasantly surprised to find out that we have our own electronic D&O questionnaire product – Cooley D+O. He was talking with Luci Altman about it, and she said Cooley D+O seems superior to the popular electronic D&O questionnaire product she was using at the in-house job she just

left a few months ago, so it might be worth checking out for yourself. If you want to try a demo, please reach out to me or your Cooley contact.

Getting back to the importance of D&O questionnaires, it's notable that several recent SEC enforcement actions involving a failure to adequately disclose perks called out the D&O questionnaire process – and one of these enforcement actions specifically mentioned a company's failure to have a formal written policy for the completion of D&O questionnaires.

According to a 2019 study by QDiligence, the average length of a D&O questionnaire is 40 pages, comprising eight sections and 65 questions. I imagine that average has only gotten longer in the past five years. That's an imposing document for an insider with little time on their hands to receive!

This is not a fun task for insiders. As the corporate secretary, you'll rarely get questions from directors and officers about it, which reflects that it's not the highlight of their day. Yet, it's important that they take it seriously. You have to be sympathetic and patient – but diligent and firm – so that you get all the information you need.

Here are nine aspects of the D&O questionnaire process for which in-house lawyers must use their judgment (this is Part 1 of a two-part blog series):

1. Figure out your lead time
2. Set the tone
3. Structure the questionnaire
4. Frame the questions properly
5. Pre-populate answers
6. Rely on director assistants
7. Analyze answers
8. Prod non-responsive insiders
9. Use answers for other purposes

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1. Figure out your lead time

D&O questionnaires are distributed for completion during the last month of the company's fiscal year. For a company with a December 31st fiscal year-end, the questionnaires often are distributed sometime in January.

Of course, all companies have fairly well-defined timelines that accommodate all of the steps involved in their proxy season. Those timelines typically are spelled out in a written document, typically called the "Time & Responsibility Schedule."

Your timeline should allow for ample time to accommodate multiple rounds of review, include a hard deadline for receiving responses, and then bake in a short period for your analysis of the responses and the time it will take to seek clarifications from those who filled out the D&O questionnaire.

Time is often tight during this process. That's why more and more companies are leveraging technology to facilitate the activity – including using Cooley D+O. Some build an electronic framework on their own.

According to data collected by QDiligence, those using a digital D&O questionnaire shorten their lead time significantly from three months to one. Electronic questionnaire users often can shave a week from their deadline, from 3-4 to 2-3 weeks.

Those who have lived through it know that the proxy season flies by, so although the questionnaire responses are important for diligence purposes, companies don't wait for responses to begin drafting their Form 10-Ks and proxies. They start drafting well before receipt of the completed questionnaires.

When doing so, it's important to place brackets around – or otherwise highlight – draft disclosures that need to be verified by questionnaire responses.

2. Set the tone

You're giving this lengthy questionnaire to people that are more senior than you. People who are busy. People who may despise lawyers. They don't want to fill the thing out. That dislike for the questionnaire only grows when they see the repetitiveness of the questions. They want you to make the document simpler. To make it go away.

To make your job easier, educate them as to why you're going through this exercise. This is an important compliance matter. And that you're doing all you humanly can do to make it as easy for them as you can.

One of the best suggestions I've heard is to place a "cheat sheet" at the forefront of the document. It ties all the different rules and regulations to specific questions in the document – and should help hit them over the head with the seriousness of the

matter. It’s best to do this up front to make the point rather than loading up the document with footnoted citations they would otherwise ignore – although electronic D&O questionnaires often link to the related rules and regulations, which isn’t such a burden.

3. Structure the questionnaire

Before you send out your D&O questionnaires, you first need to check whether any regulatory changes have happened over the year that require any updates to your model form. Some years there are updates, some years there aren’t. There is definitely a herd mentality about what the questionnaires ask for. They are fairly standardized, which makes sense since the questionnaire is closely tied to SEC rules that require certain disclosure.

As a result, the content, question types and organization are remarkably similar for all companies. Interestingly, though, there is significant diversity about how companies gather information within each category. For example, according to that QDiligence study, every company requests biographical information – but some achieve that in four questions while others may require as many as 10 questions.

Some companies work hard to reduce the number of questions, gathering what information they can from alternate sources. Others include all information within the confines of each questionnaire, which increases the length of the questionnaire, but may be more convenient for insiders.

Slightly more than half of companies use a single model form for all respondents. If you’re using a third-party electronic questionnaire, I believe you’re using just a single model form. Those that aren’t relying on third-party vendors might have slightly different versions of their model questionnaire for their directors, officers and the CEO. The versions really aren’t “different” – they just omit sections that aren’t relevant. For example, questionnaires received by management don’t need to include the independence sections or sections about audit or compensation committee qualifications.

4. Frame the question properly

It’s important how you frame the question. This bears repeating: It’s important how you frame the question. For those areas where you expect there might be answers that lead to disclosures needing to be included in your SEC filings, you want to frame the question to elicit all the information you need.

A good example is in the complicated area of related-party transactions. You might have directors who have done well in life and have gotten involved in many business endeavors. Their business interests might be structured in a complex web of trusts. Family trusts can be particularly challenging.

There isn't a lot of SEC guidance or case law in this area. You need to elicit as much detail as you can from the questionnaire, so you can make a judgment call about what is required to be included disclosure. Or so you at least know enough so you can ask the proper follow-up questions.

5. Pre-populate answers

Pre-population and personalization are two common practices used to make the process faster and more convenient. Pre-population – also referred to as pre-completion – is the practice of entering responses for a respondent prior to distribution.

Pre-population is popular. The QDiligence survey says that the vast majority of companies do it – and that makes sense for those situations where the responses are already known and unlikely to change. If you want to please your insiders, you're pre-populating as much as you can. Most companies pre-populate a subset of responses for each questionnaire, and many pre-populate entire questionnaires using the prior year's responses, according to the QDiligence survey.

Examples of common pre-population areas include bios, a list of family members or other directorship positions, compensation, third-party employment and board participation.

An example of a section **not** to pre-populate is a director's independence. Let them tell you all the facts in their words so you can make that determination. It's a tricky area. And even if your director's story hasn't changed – let them tell you that. Don't assume it.

Be careful with pre-population. You want to reduce the risk that the process becomes too mechanical, with directors and officers failing to carefully consider each question and their response. Sometimes they need to conduct appropriate diligence of their own affairs. It's not uncommon that they have a handle on all their affairs. For example, whether a "family member" now works for the company, whether the respondent's spouse has donated money to the company's foundation, etc.

Personalization is the practice of tailoring a questionnaire for an insider, eliminating questions that don't apply to that particular person or revising the question so it better matches who they are.

Examples include removing questions discerning director independence from an officer's questionnaire, eliminating questions about experience or qualifications for participating on a specific committee, or including copies of a respondent's Form 4s to help them list their ownership in the company's stock.

6. Rely on director assistants

Should questionnaires be sent to a director's assistant? Or the director's personal accountant or lawyer? Yes, particularly for those directors who have a full-time day job. Note that these should be copies, and the directors should receive the questionnaire forms too as it is their responsibility to complete them accurately and completely, and few assistants would have all of the information necessary to complete the forms on their own.

It's "Corporate Secretary 101" that it's helpful to establish relationships with director assistants, as they can be instrumental in ensuring that the questionnaires are completed – and completed on time.

These relationships are key, so you can do your diligence to verify if the assistants are doing their own homework. Are they really spending the time necessary to conduct their own diligence when filling out the questionnaire for their boss? It's not uncommon for that answer to be "no."

Find out whether this particular assistant is doing this task for more than one directorship. In other words, you'll want to share intel with the corporate secretaries at the other companies where that director also serves on the board. I know it's gossip – distasteful – but it really is important so you can properly do your job.

Always offer to review the questionnaire forms with the assistants to help ensure that the appropriate information is obtained.

And be prepared to answer questions about why their company's form of questionnaire varies from yours. It's best to be open-minded, as perhaps the practices at other companies might be more effective than yours – and comparing the two might help you improve your processes.

You'll find out the degree to which your director relies on others. Some directors rely on their assistants for most everything related to their outside board seats (this chore included, but certainly more than this), whereas others are much more independent and use their assistants only for more administrative tasks – like collecting receipts, transmittals and scheduling.

For directors who are senior managers at another company, their assistants may limit their involvement in filling out these questionnaires due to company policy or protocol, because they are being paid by the company for company-related work. A company may frown upon an assistant's time being used to provide services for other companies.

7. Analyze answers

Some companies turn the entire process of analyzing questionnaires over to outside counsel, but most review them in house. You should review each response individually to identify any significant changes to information that may require clarification.

Check all responses, even ones that you think you know the answer to – sometimes you get a real surprise. And, of course, pay even closer attention to those areas that are the hot spots – director independence, ownership of the company's stock and related-party transactions.

Some folks get really organized and create spreadsheets of responses, which are then used to document decisions regarding individual responses for future reference. Sometimes you will need to share some information with another department – like HR – for further analysis. And often, you will need to share some information with your accounting reporting team. Frequently, the independent auditors will also want to see the questionnaires, and the list of family members and their employers is provided to accounts payable to run searches to see if the company had made any payments to them.

From its survey, QDiligence reports that responses are clarified after their initial submission 10% of the time. That might sound like a low number, but it's actually quite a lot. That means you can't steamroll through a questionnaire after it's been filled out.

8. Prod non-responsive insiders

Sometimes an insider will fail to turn in a questionnaire despite repeated prodding. If you're caught in this bind, make sure to document your requests for the questionnaire. Tell them they're holding up an SEC filing. If they've ignored you thus far, you'll probably need to enlist someone with more authority – the general counsel, CEO or chair of the governance committee – to help deliver the message.

It's not uncommon for a questionnaire to be returned without all of the items being answered – or being answered incompletely. Sometimes they tell you in a cover note that they left something blank, but often there is no warning.

Note that Cooley D+O doesn't allow the questionnaire to be signed until all questions are answered. In fact, our platform will take you directly to the unanswered questions – you don't even have to hunt for them. If you want to try a demo, please reach out to me or your Cooley contact.

If this happens, you should follow up to find out why. Maybe it was simply an oversight, or perhaps the instructions relating to the item were unclear.

But sometimes a response is too complex – or sensitive – to be reduced to writing. This is precisely the type of situation that the questionnaire process is designed to capture. So you place a call. And if a response is then given over the phone, you should take written notes and add them to the returned questionnaire.

9. Use answers for other purposes

You'll typically only need to collect information once per year. But some have to do this heinous task more than once during the year for a variety of reasons. In these off-cycle instances, you can either ask insiders to reconfirm all of their responses from the prior questionnaire or ask them to specifically confirm information about related third-parties, etc. with a much smaller questionnaire.

How Do You Know Who to Engage With?

Who makes the voting decision at a particular investor can vary. For the larger investors, they tend to have stewardship teams who vote and handle engagements – and that is straightforward. Sometimes stewardship teams are referred to as proxy committees.

Beyond that, it can be tricky and take experience to learn how each investor operates and who are the players. You could have an active portfolio manager who makes the voting decision and sits alongside the stewardship person who just

provides advice. Even more tricky – there could be several active portfolio managers who make the ultimate voting decision, and they could disagree and decide to split the vote.

On the other side of the coin, there might be an index fund where there's no dedicated analyst and, as a result, all the voting decisions are made within the stewardship group. It's helpful to understand where that final decision about the vote is coming from when setting up an engagement. And the roles – and personnel – change within investors all the time, and this all can be a moving target.

Broc points out that there are engagements with shareholders that aren't related to soliciting votes for the annual shareholders meeting. Your IR team, CFO and CEO will handle meetings with portfolio managers and analyst teams – as well as the call backs after each post-earnings call. Occasionally, they want the governance folks present during those meetings, but that's rare because much of the discussion for these types of meetings center on the company's business strategy, plans and financial analysis.

What Does a Shareholder Engagement Program Look Like?

You need an organized set of engagement procedures with priorities and the ability to call on internal cross-department coordination – and director participation – when needed, depending on what is on the engagement agenda. Some companies have a written shareholder engagement policy to memorialize their processes and procedures and help set the company's ground rules.

You should tailor your engagement approach depending on which investor you're dealing with and the issues to be discussed. A mature and seasoned engagement program is key to successful engagement. Like most things in life, it's quality over quantity.

It also depends on where you are as a company. If you're just starting your first off-season engagement program, during your initial engagement, you should ask the investor about their engagement preferences (e.g., what time of year, how frequent, what topics and who they like to attend calls).

Some companies start with a list of their top 50 – or maybe it's only 25 – shareholders. Newly public companies may start with just a handful of institutional investors because founders and venture capitalists still have significant holdings and their investor base hasn't matured yet. The number will vary at each company – and perhaps over time – depending on the issues that the company faces, as well

as the current level of resources at the corporate secretary's department. If there are important issues on the year's meeting ballot, the company might hire a proxy solicitor to help bring in the vote.

They look at that group of top shareholders and try to reach out to all of them over the course of the year. Each company will have a smaller subset of important shareholders and prioritize those engagements.

Which investors are in that smaller subset might change year to year, but it should remain fairly static. In addition to a company's largest shareholders, that subset might include shareholders with a smaller stake who are vocal on issues that are crucial to the company. These issues might be ones that management finds near and dear to the heart. Or they might be issues where other investors are likely to follow the lead of the vocal shareholders. Or the issues at hand might draw media attention. Any serious reputational risk is worth engaging over.

You want to make sure that the shareholders you deem most important feel heard and that they have an open channel of communication. Always make sure – even if they don't respond – to give them the opportunity to engage.

In addition to this subset of top shareholders, a second bucket should be the shareholders that have reached out to you – or to your management team – on governance and ESG issues. Engagement isn't only phone calls, online video meetings and in-person meetings. Most companies receive many investor letters throughout the year (telling us why they voted a certain way, asking questions, etc.) that they track and respond to – and depending on the nature of the letter, sometimes the response would come from IR, sometimes from the corporate secretary, sometimes from the board chair or a board committee chair. Whomever is the most appropriate to respond.

Try to always respond and address questions or concerns from that bucket of shareholders. Particularly if you had a close call on a similar vote at the annual meeting last year. Reach out to those shareholders who didn't vote your way on that agenda item and find out their sticking points.

And then the third bucket is everybody else. All of the other *stake*holders in addition to other *share*holders. This third bucket is important too. Don't let anyone fall through the cracks if you can help it. But you should be organized and prioritize your engagements, particularly if you have limited resources.