AGENDA

THE WEEK'S NEWS FROM OTHER BOARDROOMS

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First-Time Directors Claim More Board Seats

Newbie directors account for 32% of board members elected in 2016

by Amanda Gerut

Last year saw a resurgence in the percentage of directors taking their first public company board seats on S&P 500 boards. **Spencer Stuart**'s 2016 board index reports that 32% of directors who joined boards during the past year were newly minted directors.

The 2016 figures represent an increase over 2015, when 26% of directors were first-timers, but are still a far cry from 2014, when 39% of new directors were rookies, the highest percentage of the past decade.

Nominating and governance chairs and search executives say several dynamics are at play. First, rookie directors are seen as less of a risk than they were five to 10 years ago, and boards have beefed up onboarding processes. Second, boards are prioritizing diversity in searches, which has prompted nom-gov committees to broaden their searches beyond sitting and recently retired CEOs. In addition, the recession, few growth opportunities and business challenges have prompted boards to bring on directors with experience in electronic commerce, cyber security and cloud computing, areas in which many sitting directors only have a smattering of knowledge, says **Jim Schmotter**, nominations and corporate governance committee chairman of the **Ethan Allen** board. Finally, a lot of boards are limiting the number of boards on which directors can serve or at least frowning upon the addition of boards for directors who already serve on two or three.

"I think all of those trends come together, and it makes sense that fewer new board members would have previous board experience," Schmotter says.

Priorities Over Experience

At Ethan Allen, for example, the board in 2016 appointed **Mary Garrett**. Garrett retired from **IBM** in December 2015. She served as vice president of marketing and communications for IBM global sales and distribution, and during her career worked in such areas as digital transformation, big data, cloud computing,

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cognitive analytics, social business and other growth areas in various emerging and mature markets. The appointment was Garrett's first public company board seat, although she has served on the boards of various professional and other associations. Garrett is one of two women on the board.

Other boards such as **Davita**, **FactSet**, **Oshkosh**, **Team, Inc.**, **Rockwell Automation**, **Ventas**, **Winnebago Industries** and **Woodward** also appointed first-time directors in 2016. Indeed, many of the first-timers who joined the aforementioned boards are women, minorities or younger directors whose areas of expertise are in various areas of technology.

Sheila Jordan, for instance, was appointed to the FactSet board in 2016. Jordan serves as the chief information officer at **Symantec** and is a first-time public company director, although she has other board experience.

Similarly, **Thomas Rosamilia** joined the Rockwell Automation board last year. Rosamilia serves as senior vice president for IBM systems and has global responsibility for all aspects of IBM's semiconductor, software, server and storage systems and all of IBM's supply chain. Rosamilia joined IBM as a software developer and in 2015 was appointed as an economic advisor to the governor of Guangdong Province of the People's Republic of China.

Julie Norris, senior client partner at **Korn/Ferry International** who worked with FactSet to recruit Jordan, says board recruiting has evolved significantly over the past five years. The need for expertise that will help the company achieve its strategy has become the most important aspect of finding new directors.

"The priority has become 'Let's bring expertise into the room that's different from what's already here and will help us achieve the strategy,'" Norris says.

Norris says another factor propelling boards to recruit first-time directors is the need for directors with expertise in geographies outside the U.S. Norris says that boards that are interested in cross-border appointments have acknowledged that such expertise is a bigger priority than whether or not the director candidate has previous board experience.

Still, **Julie Daum**, partner and co-practice leader of the board and CEO practice at Spencer Stuart, says boards grapple with the issue of first-time directors. Some boards decide it's more important to get a particular skill set such as technology on the board, while others decide that they need directors with broader experience.

"There's no clear-cut answer," she says.

However, many of the technology executives that she meets with — a lot of whom tend to be younger — are impressive overall. They're just "a little bit earlier in their career" than an executive at the very top of an organization, Daum says.

"That's a reality; they're going to grow into

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the role," she explains. "They've seen some things, but they haven't seen everything yet."

It can also be challenging, Norris adds, to find active executives who are available to serve on a board, can accommodate a board's standing meeting schedule and are free of conflicts.

"It's hard to find an active executive who has time, but is current and who also has prior board experience," Norris says. "Again, it goes back to priorities."

Conducting Due Diligence

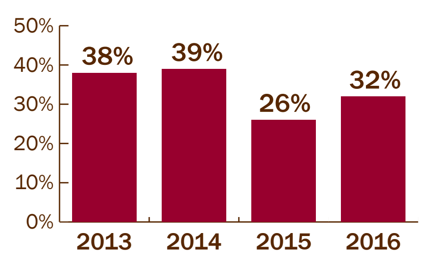
Vada Manager, chair of the governance and nominating committee at **Ashland Holdings**, says previous board service is always a plus when the board is considering a new board member, but it has never been a disqualifier in his experience. Indeed, Manager's first board seat came when he was an executive at **Nike Inc.** Manager says many companies have policies that restrict executives from serving on boards. Such policies don't mean the executives wouldn't make good board members or haven't had previous exposure to boards and governance.

"You have to hedge your bet by doing due diligence with that respective candidate," Manager says. "It doesn't necessarily mean because they haven't served on a board before that they wouldn't be a quick study and able to operate as an effective board member from a strategic level versus a management and operational level."

He agrees that the need for technology experience on boards has been a key component of a greater willingness among boards to generally be open to directors who aren't seasoned directors.

First-Time Directors On The Rise Again

Percentage of all new S&P 500 directors joining their first board



Source: Spencer Stuart

Schmotter adds that every new director has a learning curve when they join a new organization, and says boards should be careful to recruit first-time directors who don't have personality traits that could keep them from being effective directors.

"I think that taking too much air time as a new board member is probably a problem," says Schmotter. "But that's part of a set of personality traits that are independent of whether people have been on boards or not."

Don Parfet, a director on the boards of **Kelly Services**, **Masco Corporation** and **ProNAi Therapeutics**, says having experience always trumps being a novice, but boards that bring on directors who are less familiar with governance can be effective if the board spends adequate time in executive session speaking frankly about the roles and responsibilities of being a director.

"The issue becomes that the board has to work at continuing to be very effective, and as new people join the board and maybe even some directors who are less experienced, you simply commit more time to their engagement and understanding of board work," Parfet says.

That approach often proves fruitful. Once a rookie board member obtains a first board seat, the second is often not far behind. Garrett joined the Ethan Allen board in January 2016, and the **Hill-Rom Holdings** board announced on Jan. 5, 2017, that Garrett would stand for election at the company's 2017 annual general meeting. ■

Amanda Gerut (212-542-1246 or agerut@AgendaWeek.com) covers succession planning, board composition and director pay.

SEC, DOJ to Trim FCPA Enforcement in 2017

Experts see potential for compliance defense, more blockbuster fines

by Melissa J. Anderson

After a record year in Foreign Corrupt Practices Act enforcement in 2016, new leadership at the **SEC** and **DOJ** this year will likely scale back enforcement under the anti-bribery and corruption law, experts say.

However, that's no reason for boards to scale back their anti-bribery and corruption oversight efforts in equal measure. Boards could see new incentives for maintaining rigorous oversight of FCPA compliance under new agency leadership, sources say.

"I do think there are good signals that there could be more reasonableness [in enforcement] for companies that actually can document and demonstrate that they have excellent processes and procedures for training, monitoring and detection," says **Sharie Brown**, partner in **Troutman Sanders**'s white-collar and government investigations practice group.

But while experts expect a decrease in the number of garden-variety FCPA cases being pursued by corporate bribery watchdogs, the agencies are expected to continue to pursue blockbuster enforcement actions such as the $397.6 million **VimpelCom** resolution announced in February and the $419.8 million combined resolution for **Odebrecht** and **Braskem** announced in December.

Additionally, agency leaders under the "pro-business" Trump administration will be looking for examples to show they are not soft on corporate crime.

"I don't think boards or companies' management should be more relaxed about the FCPA, because it may be that the new attorney general and the new chair of the SEC might decide that they want to make a point — to use some company at some point to show they haven't relaxed on this," says Brown, a former federal prosecutor and former ethics and compliance officer in **Mobil Oil**'s office of the general counsel.

"You don't want to be the guinea pig," she says.

Record Year

The SEC and DOJ levied more than $2 billion in FCPA fines and penalties from corporations in 2016, blowing all previous years out of the water in terms of monetary charges. Similarly, with a total of 53 corporate enforcement actions, 2016 saw the second-highest number of FCPA enforcement actions ever, behind 2010.

Experts say the two agencies are due for changes moving forward. For example, **Jay Clayton**, the nominee for SEC chair, is an M&A attorney who chaired a **New York City Bar Association** committee that issued a critical report on the FCPA's impact on cross-border transactions. Under Clayton, the SEC would be likely to scale back the "broken windows" approach to enforcement that it has adopted under current chair **Mary Jo White**'s leadership.

Meanwhile, **Jeff Sessions**, the nominee for attorney general, is viewed as a "prosecute or don't prosecute kind of guy," says **David Simon**, FCPA partner at law firm **Foley & Lardner**. Under Sessions's leadership, the DOJ could take a more black-and-white approach to the FCPA, issuing fewer deferred and non-prosecution agreements over gray-area cases, he says.

Attorneys suggest the new leadership at the DOJ and SEC may offer companies more leeway in cases such as these. The bulk of the cases making up the 2016 enforcement tally dealt with improper gifts or lavish travel and entertainment expenses paid by subsidiary employees to gain business advantages with local officials. Many of these cases were self-reported by the parent company and fines were relatively

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low, accompanied by a standard DPA or NPA.

"You can almost write the script on these types of enforcement actions," says **Mike Koehler**, professor at the **Southern Illinois University** School of Law and author of the FCPA Professor blog. In the majority of these cases, he says, the parent company ultimately charged with FCPA violations had anti-bribery controls and procedures in place, but local staff did not institute official compliance policies correctly.

In fact, Koehler suggests, it may be time to question the efficacy of the FCPA at rooting out bribery and corruption altogether.

"I don't think of a law as being successful when nearly 40 years after its passage, we get a record-breaking year," he says.

"People who have actual FCPA experience and are well versed on some of the foreign business competition that companies face have seen the outrageous amount of money that well-intentioned companies are spending on good-faith efforts to comply with the FCPA," Koehler says. "There does need to be some rethinking of what we're doing here."

Koehler noted that regulators in coming years could take up a 2011 **Chamber of Commerce** proposal that the agencies establish an FCPA "compliance defense" that would enable companies with legitimate anti-bribery and corruption compliance programs to have FCPA charges dropped. Other countries' anti-bribery laws offer a similar compliance defense, he says.

Indeed, Brown says a compliance defense would be consistent with the Department of Justice's 2015 Yates memo, which directed DOJ investigators to focus on bringing charges against specific executives engaged in wrongdoing, and to require companies to name names of executives responsible for misdeeds in order to get credit for cooperating with an investigation.

Meanwhile, it's unclear whether the DOJ's FCPA pilot program, established in 2016, will continue under the new administration. The program offers penalty discounts and other incentives to companies that self-disclose, self-remediate and cooperate with investigations involving FCPA matters.

"My optimistic side says if the new administration is trying to make this more of a pro-business paradigm, they'll actually take it further and build more certainty in," says Simon.

Global Enforcement

Clayton's NYC Bar report criticized the FCPA for, among other things, putting U.S.-listed companies at a disadvantage, since, at

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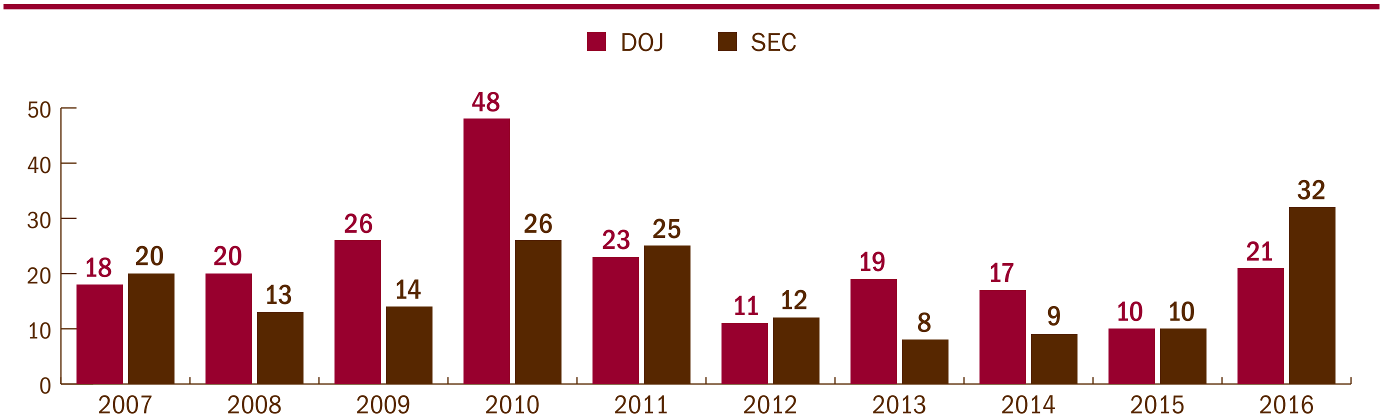
Number of FCPA Enforcement Actions



Source: Gibson Dunn

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the time it was published in 2011, the U.S. was largely the only country pursuing aggressive enforcement against international bribery and corruption.

Today, however, Brazil, China, the U.K. and other countries have adopted their own anti-corruption legislation and begun enforcing it. Similarly, U.S. enforcement has also gone global. The SEC and DOJ regularly cite efforts by international authorities in their resolutions when bringing bribery charges against companies. For example, U.S. investigators relied heavily on Brazilian authorities in the Odebrecht/Braskem case, according to Deputy Assistant Attorney General **Sung-Hee Suh** of the Justice Department's Criminal Division.

Corporate Settlement Amounts Involving FCPA

2007	$149 million
2008	$885 million
2009	$645 million
2010	$1.4 billion
2011	$503 million
2012	$260 million
2013	$720 million
2014	$1.6 billion
2015	$139 million
2016	$2.4 billion

Source: FCPAProfessor.com

During a media call on the case, in which investigators uncovered an entire business unit within Odebrecht dedicated to paying bribes, Suh said Brazilian law enforcement was "critical" to the resolution, which involved an "extraordinary amount of coordination and collaboration" with foreign officials. Odebrecht and Braskem have agreed to pay at least $3.5 billion to Brazilian, Swiss and U.S. enforcement agencies, and the two companies may face additional charges in other countries.

According to Simon, the Odebrecht/Braskem and VimpelCom cases, as well as many other cases resolved this year with international cooperation, show that enforcement of the FCPA has been globalized.

"This suggests the U.S. is part of something much bigger in terms of global anti-corruption and bribery enforcement, and I don't think it's going to be possible to dramatically change that," he says.

"The idea that other countries are getting more comfortable with and aggressive on enforcement suggests from the compliance perspective and the board perspective that you still have to really prioritize anti-bribery and corruption compliance. It would be foolhardy not to," Simon says. ■

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Boards Seeking Directors With Investor Perspective

The past year saw a steep rise in new directors with investment experience

by Amanda Gerut

Last year the percentage of new directors with investment management expertise climbed higher than at any time during the past 15 years. Experts attribute the rise to boards' dealings with activist shareholders and the need for independent directors to evaluate strategic issues and stock buybacks.

Spencer Stuart's most recent board index reports that during the period of 2013 to 2016, demand for directors with financial backgrounds in banking, finance, investment or accounting led to an increase in the percentage of new directors with such backgrounds on S&P 500 boards, from 18% to 25%. The increase in the finance cohort has been fueled by the rising percentage of new directors with investing and investment management backgrounds. In 2016, new directors with such backgrounds made up 12% of new directors added to boards, compared to 4% in 2011.

Julie Daum, partner and co-practice lead of the board and CEO practice at Spencer Stuart, says some of the increase is due to activist investors' taking board seats themselves. Other board seats have gone to investment-minded directors based on activist investors' recommendations.

For instance, as *Agenda* has reported, an anonymous shareholder and blogger spurred more than half of the **Pico Holdings** board to turn over. The new directors who joined the board in the past year include **Raymond Marino**, an investment advisory executive who evaluates investments for third-party investors; **Daniel Silvers**, managing member of investment firm **Matthews Lane Capital Partners LLC**; and **Eric Speron**, an analyst and portfolio manager for clients of **First Foundation**.

Other boards, however, are specifically seeking directors with an investment background to add to their overall mix of skills and perspectives, says Daum.

"That's something that we had not really seen," she says.

Daum also attributes the rise in directors with investing backgrounds to the general investor community's growing more vocal about board composition and encouraging nominating and governance committees to recruit more directors with strong financial backgrounds. Directors with a history of investment or asset management have "a slightly different take" on such issues as balance sheet analysis, investments and risk management than former auditors and chief financial officers, Daum says.

In the past year, companies such as **DeVry Education Group**, **Green Plains**, **PulteGroup**, **United Continental Holdings** and **United Technologies** have added directors whose executive careers were spent at investment management firms.

Homebuilding company PulteGroup appointed three new directors last July, including **Scott Powers**, who most recently served as executive vice president of **State Street** and president and CEO of State Street Global Advisors. SSGA, the investment management arm of State Street, has more than $2 trillion in assets under management.

Similarly, United Continental Holdings appointed **James Kennedy**, former president and CEO of global investment management organization **T. Rowe Price Group**, following his 2015 retirement. United cites Kennedy's "stockholders' perspective and expertise in management and finance" among the reasons for his board appointment.

Kennedy wasn't the only T. Rowe Price veteran to get a board invitation in 2016.

United Technologies appointed longtime

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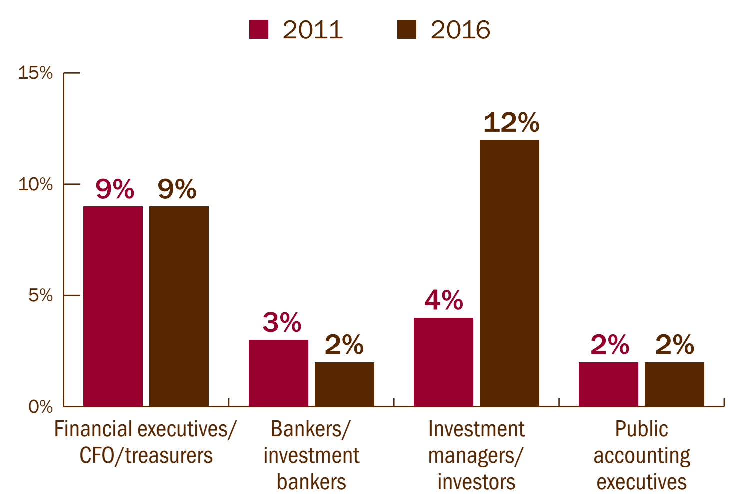
chairman **Brian Rogers**, who also serves as T. Rowe's chief investment officer. Rogers, who will retire from the investment management firm in March, served as portfolio manager of the **T. Rowe Price Equity Income Fund** from its inception until October 2015. The company says Rogers provides "unique expertise and perspective on public company performance, opportunities and investor expectations" and has "significant knowledge of risk management and oversight."

Growing Presence of Investment Managers on Boards

Among new directors with financial backgrounds, expertise in investment management saw the greatest growth



Source: Spencer Stuart

Buybacks Versus Growth

The move to appoint more directors with investment management backgrounds also comes at a time when boards face considerable pressure to buy back stock. About 350 public companies in the S&P 500 have bought back shares in each of the past 10 quarters, according to the most recent **Lead Director Network** ViewPoints publication.

The LDN holds roundtable discussions with lead directors on current events, and at a recent gathering many lead directors were "skeptical" about investors' wanting companies to focus on long-term performance and dealing with varying incentives among constituents. One director noted that fund managers are under pressure to produce returns, despite verbal support for more effective corporate governance and long-term focus from investment leaders such as **BlackRock** CEO **Larry Fink**.

In addition, lead directors noted that boards are balancing "return to shareholders with growth," the LDN report states. If an investment in the business doesn't pan out or a transaction doesn't produce returns, boards and CEOs risk losing investors' trust, the report explains. As a result of such issues, some companies are convening management or board committees "that identify and evaluate investment opportunities," the LDN report states. The board can oversee the committee's work by reviewing the opportunities that advance, and those that don't, in addition to the overall growth or decline in the volume of investment ideas.

Given the complex pressures on boards internally and the external pressure to engage with investors, a director with investment or asset management experience could be a strong addition, says **Vada Manager**, chairman of the governance and nominating committee at **Ashland Global Holdings**. In fact, Manager says that given the resurgence of corporate asset sales and M&A activity, directors that have a deep understanding of a company's value creation chain are more desirable. Ashland recently spun off its **Valvoline** business into a separate public company, and Manager led the process of evaluating the needs of both boards as well as finding directors for the new company.

"Obviously, when you're going through either an IPO or a corporate split, you want to be sure you're going to be successful," notes Manager. "Otherwise, why do it?"

Don Parfet, a director on the boards of **Kelly Services**, **Masco Corporation**, **ProNAi Therapeutics** and **Rockwell Automation**,

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says another benefit to recruiting directors with investment management expertise is it gives boards another potential chair of the audit committee. Investment and asset managers that have overseen funds and large transactions can handle the audit committee chair assignment, says Parfet. Another "great combination" is directors with investment management and operating experience in their careers, he says.

Still, Parfet notes that recruiting directors with investment management expertise isn't the only way to bring on directors with a deep understanding of capital allocation and financial pressures on businesses. Parfet says plenty of operating executives have deep expertise in such areas as well. ■

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LEGAL & REGULATORY

Volkswagen Agrees to Pay $4.3 Billion Settlement

Volkswagen AG last week announced that it has negotiated a settlement worth $4.3 billion with regulators in the U.S. who have accused the automaker of cheating on emissions tests, Reuters reports. In addition to the settlement, the company will also plead guilty to criminal misconduct.

According to Reuters, the guilty plea is a resolution to the civil and criminal lawsuits the company has been subject to since admitting in September that it had equipped 11 million of its vehicles with software that allowed them to post inaccurate results on emissions tests. Various news outlets have also reported that six Volkswagen executives were arrested this week and charged with conspiracy to defraud the United States, defraud customers and violate the Clean Air Act.

The New York Times reports that the fine will cover the criminal and civil portions of the U.S. government's case against the company and that the latest amount means that the scandal has now cost the company close to $20 billion in the U.S. In July, a federal judge approved a massive $14.7 billion settlement that went mostly toward a program to buy back affected vehicles from customers.

The deal was approved by Volkswagen's management and board on Wednesday but still needs the approval of Judge **Sean Cox**, a federal district court judge in Detroit. In a financial disclosure, the company said the funds it had set aside for costs related to the scandal were now "insufficient" after the newest agreement. The company has said it set aside about 18.2 billion euros ($19.2 billion) for costs related to the emissions scheme, which the *Times* calls "one of the most costly corporate scandals in history." ■

— *Jack Buehrer*

For GCs, the More Equity Incentives, the Less Gatekeeping

Participation in bonus and stock award programs can cause governance conflicts

by Gavin Pierce

The pay of general counsel is being linked more to company performance and equity as they become more involved in company strategy, experts say. This link could cause conflicts of interest if pay-for-performance goals emphasize strategic objectives over the general counsel's traditional gatekeeping responsibilities. As a result, more boards may find themselves with the challenge of designing compensation plans for GCs that reward them for both strategic and gatekeeping functions.

According to **Equilar**'s 2016 GC Pay Trends report, long-term time-vested and performance stock awards made up roughly 42% of the median pay packages of GCs at companies with revenues of more than $15 billion in sales. In an extreme example, in 2016, **Apple** general counsel **Bruce Sewell** was paid $22.8 million, after receiving $25 million the prior year, according to the company's 2017 proxy statement. Deferred equity awards made up approximately 87% of Sewell's total compensation. Experts say providing high levels of equity pay does not assure governance lapses by gatekeepers, but may increase the risk.

The gatekeeper and strategic roles for the GC are both full-time jobs, and sometimes the "gatekeeping gets sidelined for strategic interests," says **Adair Morse**, professor of finance at the **Haas School** of Business at the **University of California at Berkeley**. Further, she believes that if the firm values strategic input more than gatekeeping, they may use equity compensation to lure executives to concentrate on the strategic initiatives.

Morse co-authored a study in 2014 that examined executive gatekeepers' role in preventing governance failures and the negative effects created by equity compensation. "We found that when there is more equity compensation, … there is less gatekeeping being done," says Morse, "[and that] when you have significantly more of the executive compensation being performance pay [or] equity pay, then the amount of fraud that gatekeeping successfully hinders reduces by 25%."

David Larcker, a professor at **Stanford Law School** and co-author of the 2012 study "Fixed or Contingent: How Should Governance Monitors Be Paid?" says that when their compensation is tied to corporate performance, corporate monitors such as GCs have an incentive to turn a blind eye when management operates in gray areas (such as questionable sales practices, insider stock sales, etc.). Recent history has shown that lapses related to compliance and governance can have significant consequences including government probes, regulatory fines, management shake-ups and reputational damage. That's why **Nejat Seyhun**, professor of business administration at the **University of Michigan**, says, "I don't think it is a good idea to make GCs participate in bonuses [or] stock options or [for them] to be compensated similarly to other top executives." He contends that it makes it impossible for them to play the role of an "honest gatekeeper."

Limiting Conflicts of Interest

One possible solution for boards when dealing with potential conflicts of interest is using a structure that pays a fixed salary, but no short- or long-term bonuses, says Larcker. "This would avoid the problem of the GC possibly ignoring governance risk that adversely affects accounting performance and stock price because he or she does not want to experience the personal decrease in compensation or wealth when a governance problem is found and disclosed,"

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he says.

Governance experts, however, concede that some form of incentive pay is needed to provide the proper incentive for GCs to be attentive to their gatekeeper role. According to Larcker, a fixed compensation system might not provide sufficient incentive for vigilant monitoring, and this could cause GCs to become lax in their oversight duties. Further, not providing incentive pay might make it more difficult for a company to attract the best monitors.

Experts suggest that boards consider the gatekeeping role when determining the optimal split between equity pay and cash compensation for GCs and other gatekeepers. **Ben Heineman**, a former general counsel at **General Electric** and a senior fellow at the **Harvard University School of Government**, says significant portions of GC compensation should be deferred over time and "a 50-50 division between deferred equity and deferred cash is appropriate."

The Equilar report shows that boards may already be taking a more conservative approach to awarding equity than the 50% threshold that Heineman suggests because the median amount of equity stands at 42%. The Equilar data also shows that a majority of the equity awarded in GC pay plans is deferred for three years before vesting. Heineman says that any deferred compensation should only vest if certain affirmative performance metrics — including integrity metrics — are met by the GC. He also suggests that integrity metrics should account for at least one third of the comp plan of GCs.

Metrics for Gatekeeper Pay

According to Equilar, relative total shareholder return (TSR) and earnings were the top two metrics used by boards for GCs' long-term incentive plans, at 28.6% and 12.5%, respectively. The metrics used for GCs with gatekeeper roles should not be the same as those that are used for other top executives, says Seyhun. Metrics for GCs should instead focus on their ability to avoid lawsuits and limit settlement costs.

Heineman believes the metrics used for GCs should also take into account "integrity issues." Such metrics could include trends in compliance, specific annual goals and objectives, and companywide surveys of employee integrity issues.

"Since the GCs are sort of the 'chief governance officers,' it makes sense to use some quantitative measures, such as the number of serious compliance problems and Foreign Corrupt Practices Act [FCPA] concerns," according to Larcker. Some pay experts, however, note that it could be challenging to use quantitative metrics related to compliance targets, as these goals may be difficult to measure.

Wal-Mart decided to link a portion of the annual cash bonus payments for senior executives to certain compliance targets following its FCPA bribery probe related to Mexico, which was first disclosed in 2012. According to the company's proxy, the purpose of the move was to emphasize its commitment to compliance. Wal-Mart's board does not disclose which specific metrics are used, but its proxy states that the company considers factors that include anti–money laundering, health and wellness compliance and health and safety compliance. The board's audit committee is then given the discretion to use its judgment to reduce annual bonus payments when compliance targets are not met based on its qualitative assessment.

In general, Larcker says the choice of incentives for general counsel must take into account the characteristics of the firm (e.g., tone at the top), quality of management and corporate governance. There is not a "one size fits all" solution.

When boards are setting GC incentive pay, "the management and compensation committee should set pay criteria for [the] CEO and top staff or operations officers," says Heineman. He says these committees should determine whether the criteria have been met when de-

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ciding the amounts to award under the various categories of compensation, and then their findings should be reviewed by the entire board in its executive session.

Meanwhile, clawbacks could be useful to help insure that general counsel are more attentive to their gatekeeper role, says Morse. "All major corporations today should have 'compensation recovery' programs that 'hold back' or 'claw back' compensation when the GC [and other officers] act badly as determined by a special committee of the board," she says. Granting certain whistle-blower protections to general counsel could also improve gatekeeping abilities, says Seyhun. He says that it is unclear whether whistle-blower protections apply to GCs because current rules give protections to employees but not management. If some future rule or law specifies that GCs are protected under whistle-blower statutes, this could make GCs less afraid to perform their gatekeeping function. ■

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2016 Bonuses May Be a Mixed Bag: Report

Apple chief executive officer **Tim Cook** made headlines earlier this month when it was announced that his 2016 pay was down 15% from the previous year as the company failed to reach its annual sales targets.

Cook took home $8.7 million last year after earning $10.3 million in 2015. He even earned less than he did in 2014, when he received a total payout of $9.2 million in salary and bonuses. Most notable about his 2016 compensation package wasn't that his base salary rose from $2 million to $3 million, but that his bonus took a hit. This year, Cook's bonus fell to $5.4 million, from $8 million in 2015. According to CNNMoney, Apple awarded its CEO and other executives 89.5% of their target instead of the maximum amount. And they weren't alone.

According to a poll conducted by consulting firm **Willis Towers Watson** near the end of last year, 2016 bonuses for CEOs will be "decidedly mixed," likely fluctuating on an industry-by-industry basis. During its December webcast on the 2017 proxy season, the company polled 260 corporate executives and compensation professionals and found that a little more than one third of the participants (35%) anticipated paying out bonuses at 90% of target or below. Another 29% of those polled said they expected to pay incentives "close to target."

Still, 36% percent of the companies responding to the poll said they anticipated paying bonuses exceeding 110% of target.

Andrew Goldstein, head of the North American executive compensation practice for Willis Towers Watson, said he was surprised by the number of companies that expected to pay bonuses above target given the "tepid" revenue and earnings growth in so many sectors — including tech — in 2016.

"While ... shareholder returns surged late in the year, the underlying corporate financial performance for much of 2016 was mediocre overall, which might have suggested a continuation of the downward trend in bonus payouts that we saw in 2015," he said. "But without question, third-quarter financial results improved, so the strength of the fourth quarter could alter the balance." ■

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Time for the U.S. to Lead in Placing Women in the Boardroom

CED wants to see women represent a third of corporate directors by 2020

by Steve Odland and Maggie Wilderotter

Maggie Wilderotter is former chairman and CEO of **Frontier Communications** and currently serves on the boards of **Costco Wholesale Corporation**, **DreamWorks Animation**, **Hewlett Packard Enterprise** and **Juno Therapeutics, Inc.** **Steve Odland** is the CEO of the **Committee for Economic Development** and currently serves on the boards of **General Mills** and **Analogic**.

Despite growing calls in recent years to increase the number of women on U.S. corporate boards, progress has been agonizingly slow.

Women occupy fewer than 20% of directorships at S&P 500 companies, according to a recent report from **Catalyst**, a nonprofit dedicated to accelerating women's progress in the workplace. While that's an increase of approximately 5 percentage points over the last decade, those numbers should be larger, since women make up 50% of the workforce.

Europe has had much greater success increasing gender diversity in the boardroom. Women now account for an average of 25% of directors at companies represented on the Stoxx Europe 600 Index. In Britain, the number of women on the boards of FTSE 100 companies doubled, to more than 26%, between 2011 and 2015.

The slow pace of change in the U.S. threatens our competitiveness in the global marketplace. Numerous studies indicate that diversity in corporate decision-making improves financial performance. Having more women on the board also powerfully affirms a company's commitment to diversity, which is imperative to attracting the talent that can drive superior long-term performance.

Mandatory quotas have been the preferred route to ensuring gender diversity in many European countries, including Germany, Spain, France, Italy, Norway and Iceland. While this approach has increased the number of female directors, it's also become clear that quotas are no panacea. Their adverse effect has been well documented in Norway, where a 2003 law required publicly listed firms to reserve at least 40% of board seats for women. In the years following implementation, Norwegian firms declined in value, according to research conducted by the **University of Michigan**. The quota system led to "younger and less-experienced boards" and "deterioration in operating performance, consistent with less-capable boards," the study found. The Norwegian experience also reveals another corrosive effect of their quotas: the creation of a prominent group of women directors called "the golden skirt club," some of whom hold as many as 25 directorships.

By contrast, Britain eschewed quotas when it launched an initiative in 2011 to increase the number of women directors. The effort has been a huge success, not only boosting the representation of women directors, but also dramatically decreasing the number of all-male boards, from 152 to none in the FTSE 100 and to just 15 in the FTSE 250. The leaders of the **Women on Boards** initiative credit the "voluntary and inclusive action of British business" for driving the social and cultural change that has brought rapid success.

It's time to speed similar progress in the U.S. To that end, the **Committee for Economic Development** (CED) launched the Every Other One initiative in 2015. The premise is simple: If boards filled every other open seat with a woman, while retaining their existing female

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seats, women would occupy nearly a third of corporate board seats by 2020.

CED agrees that quotas are not the answer. Rather, we are working to drive change through voluntary one-on-one dialogues among peers. In 2016, CED's network of business leaders engaged in conversations with approximately 50 Fortune 1000 CEOs and chairs of board nominating committees. Already, we've seen several companies cross the 20% gender diversity threshold on their boards. CED by no means claims full credit for these achievements, but we believe our conversations have played an important role in accelerating progress.

Through the Every Other One initiative, CED has gathered many insights on factors that can help — or hinder — progress. We've learned that strong board leadership and vocal support for diversity are essential. Most companies say they prioritize diversity when considering a new director, but then lack strong voices committed to increasing the number of women on boards. In other words, the slow progress is more about a lack of demand rather than an inadequate supply of qualified women.

Another issue is that many companies focus their search for directors solely on former or sitting CEOs. Since women remain underrepresented among the ranks of CEOs, this approach reduces the chances of adding a woman to the board. To broaden the ranks of qualified women directors, nominating committees must broaden their search to include other C-suite executives, entrepreneurs, former audit and legal partners, leaders of nonprofit companies, academics and international candidates. Boards must insist that search firms present them with expanded slates of qualified women director candidates.

In the end, boards must recognize that gender diversity is not just the right thing to do, it's a business imperative. The research is clear about the economic benefits that diversity brings to firms. It's also clear that women, who play a prominent role in economic decision-making in all sectors, are a key customer segment that should be represented among companies' directors. Board leaders should understand that and be vocal about why gender diversity is important to their companies' business success.

For years, we've heard this argument: Board diversity will increase as women become a greater part of the workforce. We now know it's not that simple. Without thoughtful action, it could take generations to reach gender parity in the boardroom. That would be harmful to the vitality of individual companies, and to the competitiveness of the U.S. as a whole.

This is a problem that won't fix itself. It's not enough to simply agree on the value of diversity as a concept or to improve the recruiting process in ways that don't produce more women on boards. Real results are what matters. ■

Correction: In our Jan. 3 article, "Boards: Be Deliberate About Your Capital Tolerance," we mixed up the order of the words, qualitative and quantitative used by Joe Mayo.

The correct sequence should have said, "[Joe] Mayo, who heads up **J.W. Mayo Consulting Services**, says most organizations today use qualitative measurements for all six risk contexts…"

Later in the story, we should have written his quote as, "That's why I'm staunch advocate of quantitative risk assessments."

GM, Ford Boost Shareholder Payouts

General Motors and **Ford Motor** have been in the news recently for their public spats with President-elect **Donald Trump**. But even as Trump slams them on social media for their decisions to manufacture cars in Mexico, both companies managed to deliver good news to their shareholders.

Last week, GM said it expects its earnings to rise between 8% and 9% this year and plans to buy back $5 billion worth of its own shares, the *Detroit Free Press* reports. The company says it expects continued growth despite the fact that auto sales have increased each of the last two years and interest rates have begun to rise. Those factors, along with an increase in auto loan delinquencies and more vehicles coming off leases than in previous years, don't seem like indicators of a boom year. But the *Free Press* reports that the company's "bullish outlook" is based on new plans to cut costs by $6.5 billion by the end of 2018.

Ford, meanwhile, says it will increase its first-quarter dividend by $200 million as it remains on pace to post a pretax profit of more than $10 billion for 2016. That special dividend of 5 cents per share is in addition to the same 15 cents per share that the company paid last year, the Free Press reports in a separate story.

"We are pleased to, once again, reward our shareholders with a regular and supplemental dividend, as we continue delivering profitable growth for all," says Ford CEO **Mark Fields**.

Other automakers have reported similar successes as the U.S. has seen a spike in consumer confidence in the wake of Trump's victory in November. But analysts warn that automakers need to beware of becoming complacent — especially when it comes to vehicle pricing.

"[Sales numbers are] not going down, but the double-digit sales growth is not going to happen," **Maryann Keller**, an independent auto analyst, tells Bloomberg, citing the unlikely-to-be-repeated dual trends of cheap credit and low fuel costs. "They have had the wind in their sails for five years. How can it get better than that?" ■

— *Jack Buehrer*

Trump Cabinet Likely Packed With Former Directors

With confirmation hearings for President-elect **Donald Trump**'s cabinet now in full swing, a number of his nominees have begun announcing that they are stepping down from the various corporate board seats they hold. And should they all be confirmed, they will leave several high-profile board seats in their wake on their way to Washington.

The Associated Press reported last month that **Steven Mnuchin**, whom Trump has tapped to be his Treasury secretary, announced that he would be stepping down from the board of **Sears Holdings Corp** — a directorship he held for more than a decade thanks, in part, to having been roommates at **Yale University** with the company's chairman and CEO, **Eddie Lampert**.

According to the *Texas Tribune,* former Texas governor **Rick Perry**, nominated to be Trump's energy secretary, just last week announced that he was resigning from the board of Dallas pipeline company **Energy Transfer Partners**, the company behind the controversial Dakota Access Pipeline project that was at the center of violent demonstrations that erupted between

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law enforcement and Native American protestors late last year.

Perry joined the company's board shortly after stepping down as governor in 2015. Energy Transfer Partners is headed by CEO **Kelcy Warren**, a longtime Perry donor.

General **James Mattis**, Trump's pick to be secretary of defense, has left two high-profile boards since being nominated by the president-elect. Mattis came under criticism briefly after his nomination for his close ties to the defense industry, including a seat on the board of defense contractor **General Dynamics**. He has since agreed to divest his stock and step down from the board should he be confirmed, according to *The Hill*. Mattis also has resigned from the board of embattled blood-testing start-up **Theranos**.

Perhaps the biggest corporate name who could be heading to D.C. is former **ExxonMobil** chairman and CEO **Rex Tillerson**, who last month announced his retirement from the positions he has held for 10 years. Tillerson was required to retire in May, as he would be turning 65 — the required retirement age for Exxon CEOs — but his nomination to Trump's cabinet accelerated the process, leading to the board's negotiating a complicated $180 million severance package, *Agenda* reported earlier this month. Tillerson was replaced by company president **Darren Woods**. ■

— *Jack Buehrer*

Why Boards Should Think Like Activists on Diversity

With board diversity once again promising to be a major governance issue in 2017, boards would be wise to begin learning how to think like the activist investors who have long been pushing companies to become more inclusive.

So says **Olga Mack**, an attorney and founder of **Women Serve on Boards**, a group that advocates for gender diversity among directors and executives. In a recent analysis for the business intel site JD Supra, Mack says that the strategies employed by activists who fight for boardrooms to be more inclusive are ones that management and boards themselves should pursue to improve diversity throughout their businesses.

"If more corporate leaders thought like these activists, we might see more diversity, including gender diversity, in all levels of companies," she writes.

Activist investors, she says, are fearless when it comes to asking difficult questions and don't shy away from benchmarking against peers. Asking tough questions also means being unafraid of the answers. Mack says that getting anonymous feedback from women employees "could identify areas where members of these groups have experienced disparity. Asking these difficult questions may lead to unexpected or unpleasant answers but would inform the company's future efforts toward diversity."

Management and boards should also "understand and appreciate the details of the diversity landscape they need to change," just as activist investors understand these same details in the companies they pursue. Companies should also be able to identify areas where they may be unintentionally excluding women.

And like their activist counterparts, boards should always be looking to engage with shareholders to find out what their investors think about and consider when it comes to diversity.

"There should be a mutual understanding that increased diversity will lead to a more successful company and more satisfied shareholders," she says. "Adding diverse candidates, especially women, to boards makes business sense for every company."

Dodd-Frank Critic Will Head House SEC Watchdog

One of the most vocal critics of the Dodd-Frank Act has been named chairman of a House subcommittee tasked with overseeing all aspects of the **Securities and Exchange Commission** operations, according to Michigan's statewide news service, Mlive.com.

U.S. Rep. **Bill Huizenga** (R-Mich.) was tapped by House Financial Services Committee chairman **Jeb Hensarling** to head the committee's Markets, Securities and Investment Subcommittee, the news service reports.

"My goal moving forward is to use free market principles to enact substantive yet commonsense reforms that will increase efficiency within the financial system, ensure proper liquidity in the markets, and strengthen market structure," Huizenga said.

More specifically, Huizenga will likely be taking dead aim at Dodd-Frank. The 2010 law, passed in response to the financial crisis that took hold in 2008, is on President-elect **Donald Trump**'s repeal list, and many expect him to quickly push through legislation that eases the strict financial and corporate regulations that have been implemented since the legislation was enacted. Huizenga, whose longtime friendship with Vice President-elect **Mike Pence** has earned him insider status in Trump's administration, will likely play a major role in pushing through Trump's plan.

In addition to its role as SEC watchdog, the subcommittee also has jurisdiction over all legislation related to the agency and the areas it oversees, including corporate governance, the **Government Accounting Standards Board** and the **Public Company Accounting Oversight Board**, Mlive.com reports. ■

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