LJN LAW JOURNAL NEWSLETTERS

The Corporate Counselor®

An ALM Publication

Volume 31, Number 5 • August 2016

The User-Friendly Proxy Statement

By Robert B. Lamm

Attention, public companies: While your proxy statement is likely your most read disclosure document, its readership is spotty. Your retail owners and employees likely focus on some of the compensation information, but little else. And many institutional owners — the ones who can determine the outcomes of your voting matters — readily admit that they spend little or no time reading it, in many cases relying on the voting recommendations of proxy advisory firms.

There is, however, a better way. Every year, more and more companies are making their proxy statements more effective as communications and advocacy documents. They are attracting positive attention from institutional and retail investors alike for making their disclosures clear, crisp and readable. And they are resulting in more support for the board's positions and in fewer broker non-votes, which can often make the difference between victory and defeat on shareholder proposals and other "non-routine" matters.

This trend started a few years ago, when a few companies — generally, those who could afford to and some that could not afford not to (due to low levels of voting support on say-on-pay and other matters) — began to rethink their proxy statement disclosures, using their considerable strengths in consumer branding and other areas to support their positions on board- and shareholder-sponsored voting proposals alike. What's the secret sauce? Here are some of the ingredients.

Use Your Proxy Statement Real Estate Wisely

There are many examples of how companies misuse the valuable "real estate" of their proxy statements. For example, consider the section, usually titled "Questions and Answers About the Meeting and Voting," that takes up many of the early pages of the proxy statement — the most valuable proxy statement real estate. Its information includes such topics as how to change a vote, and the differences between beneficial and record ownership of stock. While some of the information is required by SEC rules, much of it is not, and the rules generally do not

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The 'Panama Papers' Leak

How Creditors Can Benefit

By Tim Prudhoe and Anna Gilbert

The removal and release of approximately 11.5 million documents, including 4.4 million e-mails, from the Panamanian law firm Mossack Fonseca in early Spring 2016 has generated countless headlines over the past few months, and it continues to do so as of this writing. The resulting news stories have struck a chord in an era of suspicion toward large international conglomerates and concerns regarding tax avoidance through the use of offshore structures, at a time where public confidence in traditional politics is at a low point across the western world.

For those involved in the financial services industry, including creditors and liquidators, the headlines merely confirmed what was already understood. The use of complex offshore and onshore structures to hide assets is common knowledge to industry insiders. Yet the receipt of this data by the International Consortium of Investigative Journalists, who in turn have released the otherwise confidential information into the public domain, presents unprecedented opportunities.

More Than Just Panama

These opportunities are not limited to entities with

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specify where the required information must be situated. And yet, this valuable real estate goes to waste.

It may have made sense to provide this information up front when retail investors owned most of a company's shares. However, institutional investors currently own upwards of 70% of many public companies' shares, and this information is of no use to them. Some companies have realized this and have moved this information to the "back of the book" — it's there for retail investors who may want it and to comply with SEC rules, but moving it frees up valuable real estate for more meaningful information, such as a proxy summary (more on that below).

There are many other examples of how proxy statements might be restructured to use prime real estate more effectively. such as:

Stock Ownership and Section 16 Compliance

Many companies put these disclosures front and center. However, for companies whose stock is widely held, with no significant ownership on the part of the board and/or management and a few significant positions owned by the "usual suspects" in the institutional community, this information is not very important. The same is true of required disclosures on compliance with Section 16 (relating to insider stock ownership reports). Yet this, too, is often prominently provided. Move it back!

Robert B. Lamm co-chairs the Securities and Corporate Governance practice at Gunster, Yoakley & Stewart, P.A. in Fort Lauderdale, FL. He also serves as an advisory director of Argyle, which helps companies prepare their proxy statements and other investor communications. A member of this newsletter's Board of Editors, he is an Independent Senior Advisor to Deloitte's Center for Corporate Governance and a Senior Fellow of The Conference Board Corporate Governance Center.

Voting Items and Related Information

Many companies put all the voting items in one part of the proxy statement, with supporting information elsewhere in the document. If you're voting on the election of directors, do you really want to have to flip to some other section to find out whether directors' attendance was good? Wouldn't it make more sense to keep the pertinent information in close proximity to the voting item?

Instead, the valuable real estate should be used to focus investors on the key facts they need to see, and to put the company's best foot forward — consistent, of course, with the letter and the spirit of full and fair disclosure requirements. For example, if a company has good governance practices, or tough performance metrics, why not get that information out there? By taking advantage of the proxy statement real estate, companies can, in effect, say "Read this — it's important!"

Communications from the Board

As discussed below, institutional investors want to get a real sense of your board and what it does. One way to achieve this is to provide a letter or other communication from board leadership — a non-executive chair, a lead or presiding director or one or more committee chairs. Investors may not spend much time reading proxy statements — certainly not as much time as companies might wish — but they do read these director communications.

Proxy Summaries

Many companies have introduced proxy summaries in recent years; in fact, most of them have included two summaries — a general one at the beginning and an "executive" summary of compensation information preceding the CD&A and "say on pay" sections.

The proxy summary can be used to "accentuate the positive" — *i.e.*, a company's governance and compensation strengths — in a way more likely to ensure that institutional and retail investors alike will actually

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The Corporate Counselor®

EDITOR-IN-CHIEF . . . . Adam J. Schlagman
EDITORIAL DIRECTOR . . . . Wendy Kaplan Stavinoha
GRAPHIC DESIGNER . . . . Rohit Singh

The Corporate Counselor P0000-233
Periodicals Postage Pending at Philadelphia, PA
POSTMASTER: Send address changes to:
ALM
120 Broadway, New York, NY 10271

Published Monthly by:
Law Journal Newsletters
1617 JFK Boulevard, Suite 1750, Philadelphia, PA 19103
www.ljnonline.com

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Raising Capital

Ask and You May Receive, if Your Ask Makes Sense

By Brian Leventhal

Given the vast competition for early stage venture capital and the increased scrutiny being applied by investors to valuations and business plans, it is more important than ever to approach capital raising thoughtfully, whether you are targeting angels, venture capital firms or even strategic investors. Here are four considerations for increasing your chance of success.

1. Setting the Size of the Round

The internal discussion around capital raising usually begins with the age-old question: "How much should we raise?" If you search the Internet for the answer to that question, you'll likely find countless articles and blog posts from people who have been on all sides of the table who simply advise, "As much as you can." That may be good general advice, but it's not all that helpful in actually arriving at a number (and downright wrong in many circumstances). The reality is that answering this question is more of an art than an exact science and, therefore, difficult to boil down to a one-size-fits-all formula. The good news for those not well versed in the art of fundraising is that there are guidelines to follow that will help you arrive at an answer that makes sense for your business and that resonates with prospective investors.

Your Pitch

To accomplish both of those goals, your pitch relating to the amount of your raise has to be something better than "$X will buy us Y months of runway at which point we can raise more money if we need it." That approach is not going to sweep any investors off their feet or convince potential strategic investors that they should hitch your proverbial wagons together. It may have done the trick at the height of the late 90s dot-com bubble, but not anymore. According to Sam Rubenstein, President of Panacea Capital Advisors in Bethesda, MD, "when raising capital, it is critical to be able to effectively demonstrate to prospective investors that your deployment of their investment will result in the company achieving something that will increase the value of that investment."

The best practice is to set the total size of the round at what your company would need (conservatively estimated) to do everything it wants to do between the start of the round and a describable future milestone (*e.g.*, launching the next version of an online platform, commencing product production, or entering new markets). At that point the company would be at materially higher ground in its business plan so that either it won't need additional capital, or it will be poised to raise additional capital on terms that are significantly more favorable to the company than those of the current round.

In other words, you need to demonstrate to prospective investors that the current raise is a means to a specific goal (or set of goals) rather than just the price of another stretch of raw runway. Since unexpected developments frequently occur and the adverse consequences of running out of money can be significant, it's a good idea to make sure there is a little padding in your projections so you have some room to cover a reasonable margin of error. But, the more that maximum dollar amount overshoots what you can demonstrate is needed to achieve the goals that form the core of your pitch, the less confidence you will instill in your prospective investors about your plan and your ability to execute it.

According to Hal Shear, Managing Director of Board Assets, Inc., an investment and advisory firm for early-stage companies, the key to making sure the amount you are seeking correlates well to the progress you are selling is "having an accurate understanding of your current "burn rate" and how that metric will be impacted over time as you deploy capital. If you can articulate that, you will give prospective investors comfort that you understand your business and that your projected expenses are reasonable given your plan."

2. Understanding and Setting the Minimum to Close

Once you establish the overall size of your round (*i.e.*, the maximum you will raise), the next critical step is determining your "minimum to close," which is the aggregate amount of investment that you must secure before you actually close on any funds. In other words, it is your promise to early investors that you will hold all funds in escrow until you reach or exceed the minimum.

The point of this term is to give those early investors comfort that they will get their money back if the company is unable to raise at least an amount that you can convince them would still make their investment worthwhile. This is critical to your ability to get those first investors to commit, which is often the hardest part and what helps you build momentum. Setting the minimum too low can force you to explain it as an amount that simply buys you more time to survive. As discussed above, runway for runway's sake is not an easy sale. Setting it too high will require you to wait longer for an infusion of cash which could impact your ability to stay afloat and/or start executing on your plan.

With that in mind, you should set the minimum to close at an amount you can justify to early investors that is sufficient to allow the company

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Brian Leventhal is a business attorney whose experience includes six-plus years as Senior Counsel for a public company, three years as General Counsel of a venture capital firm and over 10 years operating his own business law practice. He can be reached at brian@leventhallegal.co.

Raising Capital

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to make significant progress toward that describable future milestone, such that raising more capital at that point is still viable even if the company wasn't able to achieve all of its goals for the round. That significant progress point should be based on something tangible as well, such as completing a major component of a new website (*e.g.*, user interface or back end), completing a prototype, or entering at least one of your planned new markets.

3. Alleviating Concerns About Being Over- or Undersubscribed

I'm sure some of you are now asking, "But what if we're oversubscribed? Shouldn't we go with a higher number to allow for that possibility?" The short answer is no. There are ways to increase the size of your round if truly necessary or desired, depending on how your offering documents are written and other factors beyond the scope of this article. More importantly, though, if you believe you will be able to generate significant additional interest beyond a maximum that makes sense based on the guidelines above, you are better off pushing those investors into the next round, as that same money is likely to be a lot cheaper at that stage. The point is that excess demand is what we call a "high-class problem" and concerns about having that "problem" should not weigh heavily (if at all) upon your analysis.

For those of you who are worried about how your investors will react if you are not able to fill your round — don't. You may have to do a little hand-holding, but if you've followed my advice on setting your minimum to close, you should be able to put your investors at ease. More importantly, the fact that you didn't reach your max in this round is not likely to be a relevant factor in your ability to attract and/or negotiate with investors in your next round. Instead, the success of that next round will rest on what you've done with the capital you raised in this round and how well you've executed against your plan.

4. Mitigating Risk by Balancing Optimism and Realism

Finally, no matter how confident, driven and motivated you and your team may be or how good a salesperson you are, it is important not to overreach in deciding which describable future milestone should serve as the basis for the size of your offering. While you don't want to set yourself up for more trips to the capital markets than necessary, in the end, prospective investors have to believe that your goals are achievable and be able to visualize the path you are laying out for them. The higher the mountain you tell them you want to scale with this round, the more they will see unpredictable variables, room for error, and a greater execution challenge.

In other words, don't make it any harder than it needs to be. As put by Craig Adler, Executive Vice President and Chief Financial Officer of DLT Solutions, LLC in Herndon, VA, "I can't emphasize enough the need to find the right balance between optimism and realism. You have to be aggressive enough to show prospective investors that you are serious, but at the same time you don't want to set yourself up to underachieve and ultimately lose the confidence of your investors." Moreover, getting someone's money because they believe in your ability to achieve something totally unrealistic is not success, it's a prelude to a lawsuit.

The bottom line is that your target should be a point that: 1) constitutes meaningful growth; 2) would position you well for the next phase of your financial plan (whether that's raising more capital at a higher valuation or achieving/increasing positive cash flow or profitability); 3) you can sell to investors; and 4) you have a good chance of actually hitting with the money you raise within the timeframe you promise.

Happy hunting.

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see it and pay attention. Some of the key elements of the summary are:

- The reasons why shareholders should vote in accordance with the board's recommendation.
- A recap of the strengths the company's governance and compensation structures and practices used in governance and compensation — sometimes in the form of "what we do" (good things) and "what we don't do (bad things).
- A summary of the company's business and strategy. Surprisingly, many shareholders are not familiar with these and find this information useful.
- A recap of changes in governance and compensation in the most recent year — pointing out, among other things, the reasons behind the changes and whether they were made in response to shareholder input.

Throughout these and other elements of the proxy summary, companies should make use of infographics to bring home key points at a glance without forcing shareholders to read paragraphs or even sentences.

Avoid Unnecessary Repetition

So many companies repeat information that doesn't need to be repeated. The best example that comes to mind is the meeting agenda — the list of matters to be voted upon at the meeting. This information is frequently contained in a letter to shareholders, in the notice of meeting, in the proxy summary, and in the table of contents — and that may not be an exhaustive list.

Of course, there are exceptions to every rule. Sometimes repetition can be helpful, for example, reminding shareholders (and proxy advisory

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Bilingual Trials

By Javier A. Lopez and Maia Aron

With the growth in international commerce and diversity of the United States population, general counsel are increasingly finding themselves dealing with bilingual trials. Perhaps the company witnesses speak only English, while the opponent witnesses speak only Spanish; it's likely that a significant percentage of the documents produced are in another language; and the case is litigated in the United States, so depositions and trials must be conducted in English.

In these situations, it is critical that general counsel work with outside attorneys experienced with conducting bilingual trials, along with all the difficulties and challenges these types of trials present. Here's some advice for general counsel who are working with outside counsel to win a bilingual trial.

1. Never underestimate the importance of having an attorney on your trial team who speaks the language. There is no substitute for having an attorney on your trial team who speaks the language. That attorney must have full command of the syntax and must be able to communicate with the clients directly — both before and during trial. Just as important is for that attorney to understand the opposing party's cultural and linguistic idiosyncrasies. This attorney can also help to:

- Check whether the interpreter is translating correctly — both documents and at depositions before and at trial. Many attorneys might overlook the importance of a relationship with your interpreter for trial. Tone, cadence, and accuracy are critical and can determine the outcome.
- Translate documents: Having a certified interpreter translate documents is an expensive endeavor. You may want to consider working out an arrangement with opposing counsel where attorneys for each side translate documents, turn them to the other side for review, and attempt to negotiate translation disagreements. If disagreements persist, then an interpreter can translate the documents. This arrangement can save your company thousands of dollars.
- Review documents in the foreign language: the attorney can review all documents and decide which documents to translate for use at depositions and trial.

The more attorneys on your team that speak the language, the more efficient and cost-effective your team will be.

2. Ensure that you're comfortable with the interpreter who will be used at trial. Consider working with the same interpreter you worked with at depositions for the case that is going to trial. That way, the interpreter will be familiar with the names and subject matter of the case. You also need to be comfortable with the interpreter's skills. Different interpreters have different skills. Get to know your interpreter before trial.

3. Make sure the interpreter has the tools necessary to translate a document at trial. If documents were not translated for trial for whatever reason (this situation should be the exception), make sure the interpreter has access to a laptop and a printer. The interpreter can translate the documents for you, print them, and certify them on the spot.

4. Make sure your outside counsel knows what to do at trial when the interpreter hired by your opposing counsel is interpreting unfairly. The interpreter hired by your opposing counsel can use wrong words in his or her translation, or change the tone of the testimony by overdramatizing or underdramatizing the testimony. Your outside counsel should object, then go to sidebar and explain the issue to the court. He or she should ask the court to instruct the interpreter to stick to the witness's testimony and demeanor. This is an appealable issue, so your attorneys will make sure to preserve it for the record.

5. Use the interpreter you hire for your direct and cross-examinations. Your opposing counsel may hire their own interpreter for trial. You and your outside legal team should hire your own interpreter as well. You will feel more comfortable working with the interpreter you hire. It also will not be the first time you work with that interpreter. It is important that you feel comfortable with the interpreter because examinations at trial with an interpreter are slower and take away from the momentum.

6. Be mindful of pretrial document translation. What do you do if 90% of the documents in your case are in another language? Getting your entire document production translated by an interpreter is cost-prohibitive. It is essential that you have an attorney on your team who speaks the language. That attorney can review documents and decide which documents should be translated.

Let's say you and your outside legal team identify 50 documents in another language to be used at a deposition. This can be very expensive, so instead of having an interpreter officially translate them all to English, consider bringing an interpreter to the deposition, which will be conducted in English, solely for the purpose of translating documents on the record. You can direct the interpreter to the specific portions of the document you want translated. The interpreter will then read the translated portions in English on the record.

7. Know that your expert witnesses should speak the language. The best practice in bilingual trials is to retain an expert who speaks the foreign language. That way, the

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Javier A. Lopez is a shareholder and **Maia Aron** is an attorney with law firm Kozyak Tropin & Throckmorton. They can be reached at jal@kttlaw.com and ma@kttlaw.com, respectively.

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expert can review documents in the foreign language and you will save translation costs. The expert should also understand the idiosyncrasies and culture involved in the case, and factor them in to his or her opinion. For example, it is customary to seal a deal on a handshake in certain cultures.

Conclusion

To summarize, ensure you work through all of these issues with your outside legal team before the bilingual trial begins, since the language issues can easily double the amount of work and expenses. You can control these issues if you work with experienced outside counsel to manage them correctly from the beginning.

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firms) about a robust shareholder outreach program that has validated the board's decisions on certain matters — but that is not true of the meeting agenda, where once really is enough.

Give Shareholders What They Want, Even if It's Not Required

Understandably, shareholders want to get a real sense of your board and what it does. Investors cannot (and really don't want to) have access to the boardroom, so the proxy statement must suffice for this purpose. However, many companies limit their proxy statement disclosure to what is required and no more. Instead, discuss relevant topics in which investors are legitimately interested, such as the board's oversight role in:

- management succession and strategic planning oversight — arguably the two most important responsibilities of the board;
- cybersecurity issues; and
- sustainability.

You don't have to disclose confidential or potentially anti-competitive information, and you don't have to make promises that you may not be able to keep (for example, that you're fully equipped to handle a cyber-breach). However, these and other topics are top-of-mind to investors, and merit disclosure.

A similar opportunity exists with respect to board committees. The SEC rules in this area are stultifying. They require you to disclose matters such as whether the committee operates under a board-approved charter and how many meetings it held during the prior year. Exciting stuff, no? No! As a public company audit committee chair once told me, the proxy statement tells what the committee *is*, but not what it *does*. And most audit committees (and other committees, too) do a great deal. Why not talk about each committee's major projects during the year? Achievements? Plans for the next year? The SEC has acknowledged that disclosures in these areas can be improved. For example, in a 2015 "concept release" (http://bit.ly/29UOhiU), the Commission pointed out a number of areas in which disclosures about audit committees could be enhanced. In a 2015 speech, Keith Higgins, Director of the SEC's Division of Corporation Finance, raised similar issues with respect to compensation committees (http://bit.ly29OrQZ1).

Unfortunately, many companies are reluctant to do anything other than what they've done before; and some are terrified. Whenever the above or other changes are suggested to those companies, the first reaction is "who else has done this?" And unless you can produce a list of companies (not just one or two) that have done "this," most companies won't go there.

Don't Be Such a Lawyer!

Lawyers bring a lot to the table when it comes to proxy statements and other disclosures. However, they also pose some problems when it comes to improving the quality of proxy statements. Here are a few lawyerly traits that might best be left at the door of the drafting room.

Fear of being assertive: Many lawyers, especially securities lawyers, are reluctant to draft straightforward, declarative sentences. Instead, clear statements are surrounded by cautionary and conditional language that weakens the disclosure. It is possible to draft assertive disclosures without risking liability.

Building to a conclusion: Lawyers (even non-litigators) like to build to a conclusion, marshalling their arguments so that their conclusions are inevitable. That may be great for a brief, where the reader is likely to devote the time and attention that the prose deserves. However, institutional investors — if they read the proxy statement at all — are unlikely to give it more than 20 minutes of their time, at most. If you wait to the end of a section to pound home your points, you may be pounding in vain because the reader may never get there.

Use a well-written newspaper article as a model: The key takeaways are usually in the first sentence or two, and the rest of the story builds the case for what's already been asserted.

Drowning the reader with facts: A related point is that lawyers often feel they must provide each and every fact supporting a position. While it's possible that the 89th fact may win over someone who's not been persuaded by the first 88, in the context of a proxy statement, the chances are that that someone won't get past the first few or facts — much less to the 89th.

Think Outside the Box

Slowly but surely, companies are beginning to think outside the box when it comes to their proxy statements. At a minimum, companies are realizing that there are ways to make the proxy statement more user-friendly, engaging and meaningful while remaining in full compliance with disclosure requirements. We've already made some suggestions, but here are few more.

Humanize your directors: Most director bios and skill set disclosures are, well, boring and

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Investing in New Technologies

Corporate Legal Departments Are Leading the Way

By Doug Luftman

Until recently, corporate legal departments often had more leeway in complying with corporate operational and budgetary expectations than other departments. Typically, management accepted this lower level of predictability because the GC's office was perceived as handling "legal" matters that were "different" and "more variable." This perception, however, is waning. Now, companies are expecting legal departments to more accurately predict the quality, timing and cost for their services.

This shift is driving corporate legal departments to invest more than ever before in refining their operations to deliver more efficient and predictable legal services. To do so, many departments are looking to technology to assist with automation of processes, resource and budgetary management, and tracking. Many of these departments, though, quickly find themselves in unfamiliar territory. Fortunately, there are pioneers tackling these issues on a daily basis and their experience, as discussed here, can provide orientation for peers seeking a successful approach forward.

The Brave New World Of Corporate Legal Tech

Legal technology available to companies has greatly improved over the last decade to meet this new demand. While older technology required companies to dramatically change their processes to align with how the software was designed and operated, newer technology is more flexible. Today's software can be configured to specifically adhere to a company's operational needs, rather than the other way around.

In-house counsel, therefore, is understandably dropping archaic software and turning to these newer technologies to propel them in a more efficient direction. With access to advanced machine learning and searching capability, in-house attorneys and staff also can gather and analyze information more quickly. Accessing such big data services provides valuable insight into legal and business trends. Decisions once based largely on subjective information can now be informed and substantiated by data.

Data Takes Center Stage

Connie Brenton is co-founder of Corporate Legal Operations Consortium (CLOC) (www.cloc.org), a nonprofit association of legal operations executives sharing best practices and driving guidelines, process, and innovation. She explains, "Corporate executives expect the GC's office to be a business counselor to the firm, and to discuss numbers, data and analytics. Efficiency is now essential for legal departments, and this has advanced software's role and accelerated technology adoption."

Jeremiah Chan, Legal Director, Global Patents at Google, also is seeing more technology embraced by the GC's office, pointing out notable changes in the management of intellectual property (IP) law. Chan has observed "drastic changes in the way corporate legal is leveraging technology, particularly concerning in-house patent departments. With patents in particular, we're on the verge of a data revolution due to the convergence of two things: the availability of data and major improvements in analytical tools. Now, any IP department can harness the power of data in ways never before possible."

Chan explains that the desire for good data is prompting corporate legal departments to hire people with new skillsets, like database administrators (DBAs) to organize the data and data scientists to extract insights. "Legal departments now demand clean data, made possible by automated tools that verify and validate it. The more you can give companies access to clean data, the more they can do with it. There is an enormous quantity of data available, but it needs to be clean. For example, in IP, the U.S. Patent & Trademark Office releases tons of trademark and patent data in bulk for anyone to access. You can use all of this data to your advantage and increase transparency, but first you must ensure that the data integrity is intact."

Dana Rao, Vice President, Intellectual Property and Litigation at Adobe, explains that data is important, but analyzing the data is equally crucial. He says most in-house counsels are now operating within a corporate environment that is dependent on analytics. "At Adobe, we sell a data analytics solution. Our corporate strategy is based on the usefulness of data analytics, especially for marketing departments, and so it only made sense for us to focus on doing the same for legal."

Essential Tech for Corporate Legal

In addition to gathering and analyzing data, the GC's office needs to modernize old systems and leverage new tools as well. Often, a good strategy is to replace, when possible, or integrate legacy products with new systems that can be tailored to fit the department's specific needs.

Many useful technologies can benefit corporate legal including the following categories:

E-billing is "foundational technology" according to Brenton, "because it tracks spending — particularly for outside counsel fees — and integrates all the financial data in one place."

Contract management can be very useful. Tracking important contract terms and conditions has always been crucial, but ensuring

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Doug Luftman is chief innovation officer and general counsel at Lecorpio, an intellectual property (IP) management and analytics software solutions company. He may be reached at doug.luftman@lecorpio.com, or on LinkedIn: www.linkedin.com/in/dougluftman.

GCs and New Tech

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accurate information is consistently entered has been problematic. Contract management software deftly steps in, automating the creation and tracking of contracts and their content. Turnaround time for review and execution improves, dates are not missed, relevant information is accurately recorded and lawyers have fewer "touches" to consume their time.

Document management was once a task that either soaked up large amounts of in-house resources or was outsourced. But with the latest technology, organizing documents is easier than ever.

E-discovery technology, such as electronic document collection and review, is helping identify discoverable documents, transforming a historically, manually intensive and expensive process into an efficient litigation document management service.

E-signature software speeds document execution. At Adobe, Rao finds that Adobe's own Adobe Sign functionality has helped them accelerate the patent filing process. While getting signatures from inventors on patent documents used to slow the process down by weeks, implementing e-signature technology built right into PDFs allows Adobe to collect the necessary signatures in a matter of days.

Brenton also points to e-signature software as incredibly helpful for tactical contracts such as non-disclosure agreements (NDAs). She says, "It is no longer acceptable to have 20-year veteran attorneys working on something as low-risk and high-volume as NDAs. Instead, these kinds of tasks are being converted to a self-serve model, where the sales team creates its own NDAs, pre-signed by the General Counsel."

Dashboards are definitely trending upward in corporate legal. Such analytics technology aggregates data from various sources and presents the information in a centralized, visual interface. Legal departments then are able to react and operate more efficiently by relying on such aggregated real-time information.

IP management and analytics solutions are transforming the management of intellectual property portfolios. Companies can integrate many of the capabilities described above as well as enhance and automate their workflow processes to gain more insight into their IP portfolio's strengths and weaknesses and enhance the business relevance of their IP. Further, they can track various key operational metrics to improve efficiencies in their department.

Convincing the C-Suite to Invest in Tech

Even though these technologies are exciting and brimming with promise, when the issue of investing in technology is on the table, corporate decision-makers must see a clear return on investment. Rao says it comes down to this: "Are you making processes more efficient so people can spend more time on high-value tasks, rather than redundant, non-fulfilling parts of their jobs? When making a case, make sure your points can be proven."

Chan advises doing your homework first, to lay the groundwork for future success. "Before buying technology, figure out the user stories — how will your team members actually use the data and for what purpose? Is there a clear way to make the data 'actionable'? If you get a mountain of data, it can be quite overwhelming, and most attorneys won't know what to do with it. That's why you need data experts who know how to extract insights and figure out how to leverage the data for particular business goals." He proposes a measurable approach, recommending that companies define their criteria for success up-front. "Here's the goal, here's the data. Then, based on the data, make informed decisions to achieve those goals."

When the time comes to show the return on investment for the technology purchased, Rao admits, "It's rare that someone says to us, 'Show me how many man-hours have been saved by this tool,' but I do send positive feedback to management about employees who are satisfied with the solutions. Our management is invested in keeping employees happy so I like to show how much happier the employees are after a change to a new tool, as at least one way of showing that ROI."

Inviting Outside Counsel to Work More Efficiently

Most corporate legal departments rely on outside counsel to provide various aspects of legal services. The proliferation of the use of data to improve operational efficiency impacts them as well, since they are extensions of the GC's office. If law firms are performing well, the client knows, but if the firm's performance is deficient, the client knows that, too.

Brenton says she gathers data to closely examine the percentage of spend in-house versus using outside counsel. "We measure everything now and outside counsel spend is a big focus. We can capture 'best in class' metrics about legal spend to see if we are above or below target numbers. For outside counsel firms, we are requiring more alternative fee arrangements such as fixed and capped fees, anything other than hourly billing."

At Google, Chan explains, "We're trying to motivate outside counsel to become better service providers by using the data to increase transparency." However, he predicts that even though the law firms' adoption of new technology may take a long time, corporate legal departments are no longer waiting for them. "There is a lot of tension surrounding these issues. Law firms have developed tried and tested practices over decades, and now there's an opportunity to develop areas of legal practice that will future-proof the industry and drastically improve efficiency."

As corporate legal departments forge ahead in their quest for more efficiency and cost-effectiveness, they are fortunate to have access to the latest developments in technology, data and analytics. Software and services that offer rich functionality,

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Private Equity Investment Funds, Beware!

Recent Opinion: PE Firms Liable for ERISA Violations by Portfolio Companies

By Elizabeth Vandesteeg, Matthew Schiff and Tricia Schwallier

On March 28, 2016, the United States District Court for the District of Massachusetts released a controversial opinion that could have a chilling effect on private equity funds considering whether to invest in companies with pension obligations. The court granted the New England Teamsters and Trucking Industry Pension Fund's (Teamsters) Motion for Summary Judgment against Sun Capital Partners III, LP and Sun Capital Partners IV, LLP (Sun), holding that the Sun Funds were liable for the debtor's withdrawal liability under the federal Employment Retirement Income Security Act (ERISA) and the Multiemployer Pension Plan Amendments Act (MPPAA). *Sun Capital Partners III, LP v. New Eng. Teamsters & Truckers Indus. Pension Fund*, 2016 WL 1239918 (D. Mass., Mar. 28, 2016).

ERISA/MPPAA

Under ERISA and MPPAA, affiliated organizations can be liable for participating employer's pension obligations, including the responsibility for payment of withdrawal liability when a plan terminates or an employer withdraws from a multiemployer plan. In order to be liable for withdrawal liability, the affiliated entity must be a partnership or joint venture that is: 1) considered a trade or business; and 2) under common control with the obligated employer.

Background

Scott Brass, Inc. (SB) was a metals manufacturer. Its workforce was represented by the Teamsters and SB contributed to the Teamsters' pension funds. The assets of SB were purchased by Sun Scott Brass, LLC (SSBL), which was formed by Sun Fund III with 30% ownership, and Sun Fund IV (collectively, Sun Funds) with the remaining 70% ownership. Sun Funds were private equity funds created by Sun Capital. Each Sun Fund is a limited partnership that serves as a vehicle for pooling the money of its partners and investing that money. SSBL appointed advisers to help improve SB's efficiency and financial health. In spite of these efforts, SB filed for Chapter 11 bankruptcy in 2008 and incurred withdrawal liability under the MPPAA. The Teamsters' actuary assessed withdrawal liability of approximately $4.5 million.

The Sun Funds sued for a declaratory judgment that they could not be jointly liable for withdrawal liability owed by Scott Brass, Inc. The district court granted the Sun Funds' motion, holding that a private equity fund could not be a "trade or business." The U.S. Court of Appeals for the First Circuit reversed, finding that a private equity fund could be a trade or business, and remanding the case back to the district court to determine whether the Sun Funds were in fact engaged in "trade or business" and whether they were under "common control" sufficient for liability. A petition for certiorari was denied.

Partnership/Trade or Business

In its decision on remand, the district court noted that no partnership-in-fact based on conventional theories existed between Sun Fund III and Sun Fund IV because the funds had separate tax returns, financial statements, reports to partners, etc. The court found the Sun Funds to be engaged in a "limited partnership" because they were not merely passive investors in SB, but rather engaged in joint management activity in deciding whether to co-invest and on what terms to do so, such as the decision to split their ownership stake 70/30. As stated by the court, "[t]he smooth coordination is indicative of a partnership-in-fact sitting atop the LLC: a site of joining together and forming a community of interest."

Even where a partnership is deemed to exist, an organization is still not liable under the MPPAA unless it is a "trade or business." Applying the "investment-plus test," the court found the limited liability private equity investment funds were a "trade or business." The Sun Fund's received economic benefit in the form of offset against management fees, without which, the Sun Funds would have had to pay its general partner for managing its investment in SB. This was a benefit that would not otherwise be available to an ordinary, passive investor who did not engage in management activities.

Common Control

Once the court determined that the Sun Funds were a "trade or business," it then turned its attention to the issue of "common control." The "common control" provision of the MPPAA pierces the corporate veil, disregarding formal business structures and imposing withdrawal liability even where no economic nexus otherwise exists between the target entity and the withdrawing employer.

The Pension Benefit Guaranty Corporation (PBGC) imposes liability if one organization owns at least 80% of the other. The court noted that this 80% ownership rule "appears to be a roadmap for exactly how to contract around withdrawal liability."

The Sun Funds conceded that an important reason for dividing the ownership of portfolio companies between multiple funds was to keep ownership by any single entity below 80%. Regardless, the Sun Funds maintained that they adopted the limited liability structure for their

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Elizabeth (Lisa) Vandesteeg and **Matt Schiff** are partners and **Tricia Schwallier** is an associate at Sugar Felsenthal Grais & Hammer. They can be reached at evandesteeg@sugarfgh.com, mschiff@sugarfgh.com, and tschwallier@sugarfgh.com, respectively.

GCs and New Tech

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flexibility in configuration and a verifiable return-on-investment will be essential allies to the GC's office in the years ahead. Law firms will be challenged to pursue similar streamlined processes, like their clients, to demonstrate their own efficiency. This will allow some firms to differentiate from other firms that are more reluctant to adopt technology and new approaches to servicing their clients. Much progress has been made in legal technology, but more exciting territory still lies ahead. Many GCs' offices today, like those mentioned in this article, are truly in pioneer mode, striking out to discover new possibilities and breaking through old boundaries on a daily basis.

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Private Equity

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risk management of the investment in SB and that the court should respect this corporate organizational formality. Unpersuaded, the court responded that "[t]he question of organizational liability is not answered simply by resort to organizational forms, but must instead reflect the economic realities of the business entities created by the Sun Funds for their acquisition of Scott Brass, Inc. The LLC appears to be better understood as a vehicle for the coordination of the two Sun Funds — and an attempt to limit liability — than as a truly independent entity." Based on this rationale, the district court disregarded the corporate formality of the LLC and aggregated ownership interests between the funds, resulting in the Sun Funds' 100% ownership interest in SSBL.

Conclusion

Ultimately, the district court held that the Sun Funds' partnership was a trade or business in common control with SB, and the Sun Funds were therefore jointly and severally liable for SB's withdrawal liability under ERISA and the MPPAA. The legal implications of *Sun Capital* are that private equity, venture capital, and other private investment funds should use caution when structuring transactions and in determining whether to invest in a portfolio company with any unfunded multiemployer pension plan liability.

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Proxy Statements

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don't convey any sense of what the director brings to the board. In 2016, one company posted a video of its lead independent director on its website, and it really provided a sense of what made the director tick. If a video is too costly or unconventional, consider having a personal statement from each director as to his/her goals as a board member, personal areas of interest in the company's business, etc. This is a leading practice outside the U.S. and merits consideration here.

Use infographics wherever possible: So many proxy statements consist of long paragraph after long paragraph, when a tabular or graphic presentation would get the same points across more quickly and effectively. For example, why give a narrative description of stock ownership guidelines when a table could show the guidelines and demonstrate that the board members are in compliance?

Use captions to tell the story: Don't force your shareholders to read a full paragraph when a caption can tell the story. If you encourage your board members to engage with shareholders, consider a paragraph where the caption, in boldface, says "our directors engage with shareholders" or something like that. If a reader wants to get the details in the paragraph, she can read the full text; on the other hand, you may have given that reader all she needs with a comprehensive but succinct caption.

Use call-outs: Call-outs take actual text from a paragraph and highlight it in a box or some other graphic in the margins. It's a great way to emphasize certain things without — again — forcing the reader to get all the details.

Use color and fonts to highlight important items: You can call attention to disclosures that you want your shareholders to read by putting them in a different color or font (or both), or shading the paragraphs you want them to read. This can be useful when presenting opposition statements to shareholder proposals and can be done in online versions only to save money on printed copies.

Consider how you deliver your proxy materials: The Internet has opened up new and innovative ways to make your proxy materials more impactful. For example, consider an annual meeting website that has convenient links to your proxy materials and provides for voting. These and other devices make it more likely that your materials will be read and that your owners will vote their shares, reducing broker non-votes and generating higher levels of support for your board's position on voting items.

Draft carefully: All of the above and other devices to make your proxy statement user-friendly may come to naught if you keep using last year's text without bothering to edit it and make it read better. Many suggest that you should draft from scratch rather than marking up last year's document, but that's never going to happen. Instead, give it a critical, close read; you'll be surprised at what pops up. Use short, simple sentences, active rather than passive voice, and consider a variety of techniques that your high school English teacher tried to drill into you.

Conclusion

The devices outlined above will not outweigh poor performance, weak governance or excessive compensation; the old saying about turning sow's ears into silk purses remains true. However, it is possible to make the most of what you have by making your proxy statement into a user-friendly, effective communication and advocacy document.

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Panama Papers

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geographic links to Panama. The reference to Panama in this context is misleading: of the 213,136 companies themselves forming part of the data, just over 22% of them are actually Panamanian incorporations. The majority of the entities, just over 53%, were incorporated in the British Virgin Islands (BVI). Panama's companies legislation, which is derived from Delaware's equivalent legislation in 1927, is arguably no more a facilitator of financial secrecy than the legislation in force within various other Caribbean financial centers. The fact that the leaks arise from a source in Panama is part of the back story, but it does not constrain the resulting opportunities from manifesting themselves across the offshore and onshore financial world.

These asset tracing and seizure opportunities for creditors coincide with mounting international pressure and consensus in favor of financial transparency. The leak of the "Panama Papers" marks the single greatest leak of confidential information to date. There can be no doubt that the data leak was intentional. The volume of the data can be difficult for those outside of the IT industry to fathom: It consists of 2.6 terabytes, each terabyte consisting of 1 million bytes, of client information. Downloading that volume of data would take approximately 120 days using high-speed broadband connections, running at 24 hours per day. Further, the reference to a "leak" in this context is potentially misleading; in the absence of legal support, and regardless of public interest, it may be more appropriate to describe the disclosures as the theft and publication of client information. Yet the characterization, and arguably the acceptance of that characterization, of these leaks as a victory for transparency, is a strong indicator of the hardening of attitudes towards those seeking to evade financial scrutiny.

Tim Prudhoe is a commercial litigator and trial advocate at Kobre & Kim, resident in the British Virgin Islands. He represents companies and individuals in cross-border insolvency matters. **Anna Gilbert** is a litigator at the firm.

Recovering Assets

The recovery of assets arising out of sophisticated corporate entity structures has long been akin to a game of cat-and-mouse, often with good reason. For professionals in the financial services industry, these entity structures are commonplace and often serve legitimate commercial purposes. Yet public, political, and potentially judicial, acceptance for opaque corporate structures is waning in the post-Panama climate.

The recovery of assets arising out of sophisticated corporate entity structures has long been akin to a game of cat-and-mouse, often with good reason.

Regulators have responded to the public mood. Onshore service providers, including many law firms with long-established reputations, have already received regulatory requests for information detailing their involvement. Many jurisdictions that traditionally enable financial secrecy are shifting toward regimes requiring some form of beneficial ownership disclosure to regulatory authorities.

Legislators have followed suit. In April 2016, 40 countries, including the UK, Cayman Islands, Bermuda, Anguilla and India, agreed to share information regarding the beneficial ownership of corporate entities. Because of the constitutional relationship between the UK and the major Caribbean offshore jurisdictions (such as Bermuda, the BVI and Cayman), this will generate significant pressure for similar changes to be introduced in the offshore financial centers.

For example, the Cayman Islands' Confidential Information Disclosure Bill is intended to facilitate release of certain confidential information to regulatory and enforcement authorities. That bill could be passed as early as this year. Plans are also underway to require corporate service providers in the BVI to hold information on the beneficial ownership of corporate entities. Set to be introduced as early as 2017, corporate service providers in the BVI will be required to hold details of the names, addresses, dates of birth and passport numbers of BVI registered companies. That information is intended to assist information sharing with law enforcement bodies in the United Kingdom, but it may yet be judicially discoverable.

Impact on Creditors

When considering the impact of these measures, it is necessary to consider where specific information-gathering and custodial responsibilities lie and how that information is accessed. Currently, corporate service providers owe duties in connection with the collection and maintenance of beneficial ownership information, for use in response to regulatory requests. That maintenance of information via authorized providers outside jurisdictions such as the BVI is unlikely to succeed in the long term, not only in light of overseas pressure, but also as a result of local legislation initiatives. These new initiatives will impact the relationship between corporate services providers and introducers of work from outside the BVI, thereby transitioning out qualified intermediaries who are able to hold that information on the basis that it can be provided on demand. It is in this context that the potential leads for creditors provided by the Panama Papers are likely to be so significant.

With judicial support, creditors may be able to obtain discovery of

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Panama Papers

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information on beneficial ownership for the purpose of tracing and seizing assets through otherwise opaque structures. For the creditor who is fortunate to find relevant information from the leaked data, that information could, on its own, be sufficient enough to enable creditors to obtain court orders for asset identification, freezing and delivery. In this regard, the Panama leaks of 2016 have given creditors a new set of tools to locate and recover assets in a regulatory environment that favors transparency.

There is at least some evidence to suggest that courts are following this trend. In late April 2016, Mr. Justice Nugee of the High Court of England and Wales considered the potential for opaque and "labyrinthine" corporate structures to be abused by debtors:

> Those who use offshore structures, especially complex structures involving nominees and fiduciaries, may do so for entirely proper and bona fide reasons, but the experience of those who practice and sit in these Courts is that such structures do lend themselves to being abused. It is notorious that the use of offshore trusts, and companies incorporated in jurisdictions which do not require detailed financial reporting, and the use of fiduciaries and nominees which enable the beneficial ownership of assets to be switched easily and without visibility, are aspects of a structure that enables those who wish to move assets around or to hide them to do so more easily.

Holyoake and Hotblack Holdings Limited v Candy and Candy and Ors [2016] EWHC 970 (Ch) at paragraph 27.

In this interim judgment, the English court determined that the use of a complex structure of onshore and offshore companies (some 140 live and dormant companies had been identified) and the ease with which assets could be moved beyond reach and without notice, warranted additional protection for the claimants (plaintiffs). As a consequence, the High Court granted a "notification injunction" requiring defendants to provide seven days notice in advance of any intended asset transaction or disposal. The scope of the notification order included assets valued in excess of £1 million that were beneficially owned by claimants, including those held by offshore companies. This creditor-friendly decision is consistent with international pressure that continues to mount in favor of financial transparency. Although it is not binding in other jurisdictions, it is likely to have some persuasive precedential value in English law-derived jurisdictions such as the Cayman Islands and the BVI.

Coupled with information sufficient to garner judicial support, creditors can seek pre- and post-judgment discovery both onshore and offshore.

Coupled with information sufficient to garner judicial support, creditors can seek pre- and post-judgment discovery both onshore and offshore. For example, new evidence could facilitate asset-tracing strategies such as motions for injunctive relief and freezing orders, pre-action discovery orders, and orders in support of freezing injunctions. Information obtained through the leaks could also be used to obtain injunctive relief and freezing orders. These can be obtained in appropriate jurisdictions, including the well-known English law-derived offshore jurisdictions, both on a domestic and world-wide basis. These orders can be obtained on an urgent basis and without notice to the debtor.

Conclusion

Astute financial industry professionals, particularly creditors and insolvency practitioners, can be expected to act swiftly in light of opportunities for identifying, tracking and recovering assets in the wake of the Panama Papers leaks. The collection of information on beneficial ownership of assets is a new requirement to be introduced in numerous offshore and onshore jurisdictions. This confidential, but potentially discoverable, information will enable creditors to rapidly identify assets and asset ownership in real time. Further, regulators, legislators and at least some members of the English judiciary appear to be losing patience with the structural opacity which, prior to the Panama leaks, enabled various high-profile figures to conceal their assets. Continuation along this creditor-friendly spectrum, away from banking and fiduciary confidentiality and toward information-sharing and disclosure, will yield lucrative gains for those positioned to seize these new opportunities.

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