On November 4, 2019, the 19th panel in the series focused on the role of Corporate Boards in company disclosures.

**Background**

The panelists all had deep expertise in the subject based on their respective experiences on corporate boards, working at the SEC, and on audit issues of public companies.

**The Hon. Cynthia A. Glassman** moderated the panel. Dr. Glassman is an ICR senior research scholar. She served as an SEC Commissioner from 2002 to 2006, including Acting Chairman during the summer of 2005, and served as Under Secretary of Commerce for Economic Affairs from 2006 to 2009. Currently, she is a Director of Discover Financial Services, where she chairs the Audit Committee, and, until its recent sale, was a Director of Navigant Consulting, where she chaired the Nominating and Governance Committee and served on the Audit Committee. She also serves on the Dow Jones Special Committee. She is a former Trustee of the SEC Historical Society and is a member of the Advisory Board of GW Law School’s Business and Finance Law program.

**Alan L. Beller, Senior Counsel based in Cleary Gottlieb’s New York office**

Alan is a member of the Board of Directors and the Audit and Risk committees of The Travelers Companies, Inc., a Dow Jones company. He is also a trustee of the IFRS Foundation, which is responsible for governance and oversight of the International Accounting Standards Board and International Financial Reporting Standards, the global system of accounting standards used in more than 130 countries, and a member of the Sustainability Accounting Standards Board (SASB), which is developing industry-specific sustainability accounting standards that enable public companies to communicate financial material and decision-useful information to investors.

Alan was the Director of the Division of Corporation Finance of the U.S. Securities and Exchange Commission and a Senior Counselor to the Commission from January 2002 until February 2006. During his four-year
tenure, he led the Division in producing the most far-reaching corporate governance, financial disclosure, and securities offering reforms in SEC history. He is a preeminent legal advisor and recognized thought leader regarding securities law, capital markets, and corporate governance. He has frequently been recognized as a top-ranked U.S. lawyer. He received a J.D. from the University of Pennsylvania Law School and a B.A. from Yale College.

**Mark Graf, Senior Advisor at Discover Financial Services**

Until recently, Mark was Executive Vice President and Chief Financial Officer of Discover and a member of the company’s Executive Committee. He was recognized as the top-ranked Consumer Finance CFO in Institutional Investor’s annual All-Star Team rankings in each of the last six years. Prior to joining Discover in 2011, Mark was an investment advisor with New York-based Aquiline Capital Partners, a private-equity firm specializing in investments in the financial services industry. Prior to that, he was a partner at Barrett Ellman Stoddard Capital from 2006 to 2008. In addition, Mr. Graf was Executive Vice President and Chief Financial Officer for Fifth Third Bank from 2004 to 2006, after having served as its Treasurer from 2001 to 2004.

Mark serves on the Board of Directors of Signet Jewelers, where he is a member of the Audit Committee and the Corporate Social Responsibility Committee. He is also on the Board of Imerman Angels, a non-profit organization that provides one-on-one support for cancer fighters, survivors and caregivers. He holds a bachelor degree from the Wharton School of the University of Pennsylvania.

**John S. Jenkins, Jr., Executive VP and General Counsel of TE Connectivity.**

John is responsible for the company’s global legal, compliance, corporate governance, government affairs, intellectual property, security and risk management, and corporate social responsibility activities. He is also responsible for bringing TE’s industry-leading connectivity solutions, engineering, and operations expertise to the emerging markets with focus on India, China, and South America.
Prior to joining TE Connectivity in 2012, John was with Tyco International for ten years and was the Vice President, Corporate Secretary, and International General Counsel. John was responsible for the Board of Directors activities, securities and capital markets transactions and reporting, mergers and acquisitions, executive compensation, global procurement, real estate, and tax planning. Previously, John worked as a litigator with McGuireWoods, LLP. He began his career in 1987 as an Officer in the United States Navy and served as a judge advocate both as Military Prosecutor and Senior Defense Counsel, and finally as Legislative Counsel to the Secretary of the Navy. He serves on the Boards of Delta Sigma Phi and the Judge Advocates Foundation. John earned his law degree from George Washington University with high honors and his bachelor’s degree from the University of Virginia.

Julie Bell Lindsay, Executive Director of the Center for Audit Quality (CAQ)

As Executive Director since May 2019, Julie is responsible for carrying out the mission and vision of the CAQ’s Governing Board, which is comprised of CEOs from eight leading public company auditing firms and the American Institute of CPAs, as well as three independent members from outside the public company auditing profession. Previously, beginning in 2017, Julie served as a Managing Director and the Deputy Head of Global Regulatory Affairs at Citigroup, where she worked to formulate and execute Citi’s regulatory policy priorities and strategy across the numerous regulatory agencies overseeing Citi. Julie joined Citi in February 2009 as General Counsel – Capital Markets and Corporate Reporting. In this position, Julie was the lead lawyer responsible for Citi’s public disclosures and global capital markets activities.

Prior to Citi, Julie served as Counsel to Commissioner Cynthia Glassman at the SEC, where she counseled the Commissioner on a range of matters including public company disclosure obligations, corporate governance, the Public Company Accounting Oversight Board and Financial Accounting Standards Board. Julie also has securities and public company reporting and governance experience at law firms in Washington, DC and Palo Alto, CA.
Julie graduated from The Ohio State University and received her JD from the Vanderbilt School of Law. She is President of the Board of Directors of the Association of Securities and Exchange Commission Alumni, as a Member of the Advisory Board of the Department of Political Science at The Ohio State University, and as Co-Chair for the 2019 Foundation for the National Institutes of Health Award Dinner.

Under Federal securities laws, public companies must disclose certain information to the public, including material information that investors would consider important. One role of the Board of Directors is to oversee the financial reporting. This oversight may occur at the full board level or by the Audit Committee. The main requirements are to produce annual and quarterly reports to shareholders as well as the proxy statement for the annual meeting and notices of major events.

Over the years, disclosures have expanded from the financial performance of the company to cover a wider range of topics such as risk factors, compensation of directors and officers, and the CEO pay ratio. Further, the Sustainability Accounting Standards Board (SASB) is developing standards for companies to disclose on ESG (environmental, social, and governance) issues.

The content, quality and timeliness of disclosures are important to Boards for a variety of reasons. First, they do not want the company subject to regulatory enforcement or shareholder litigation resulting from misleading or inaccurate disclosures, such as:

- The FTC’s fining Facebook for misleading disclosures regarding misuse of user data
- SEC enforcement actions:
  - Against Marvel Technology for misleading investors about a revenue management scheme to meet revenue guidance
  - Against Mylan for disclosure failures relating to EpiPen
  - Against Herbalife for its false ad with misleading statements about its China business model
And against Nissan, its former CEO and a former Director for disclosure omissions relating to the CEO’s retirement pay.

Further, disclosures affect the company’s reputation with customers, employees, shareholders, analysts, and activist investors: Done well, they can be a competitive advantage.

Discussion

The discussion revolved around what directors of publicly traded companies actually do to carry out their oversight responsibilities of both traditional and of evolving disclosures. The panelists distinguished between required disclosures and voluntary reporting.

- Required disclosures are those that are required by law or regulation.
- Voluntary reporting are communications that the company wants to convey to its stakeholders, employees, community, and investors.

However, the point was made that the Boards do not think about disclosures in such terms. Rather, the principal drivers of disclosures are understood to be investor demands, the company’s desire to tell its story, and avoiding surprises in the market, not just to follow legal requirements. Boards spend more time thinking about the best way to disclose information that is not required and rely on the lawyers to get the legal requirements right. Getting disclosure right is largely about doing the right thing, just like any governance or compliance issue. “If it is bothering you when you go to sleep at night, it is probably the wrong answer.”

In general, the panel thought that disclosure is “too important to leave mainly to the lawyers.” Lawyers are an important voice but not the only voice, nor should they be the loudest voice. While legal requirements are the baseline, the CFO, Chief Accounting Officer (CAO) and Investor Relations, (IR) all provide input into strategic considerations in company communications. In fact, it is entirely possible to have excellent disclosures from the legal perspective but have investors think the company is not communicating well with them. It is critically important that investors have the information about management’s approach to the business to enable
them to evaluate the risk and reward associated with investing in the company.

Required Disclosures

While there are numerous disclosures that companies are required to make, the major ones in the U.S are the annual and quarterly reports (the 10-K and the 10-Qs) and the proxy statements prepared for the annual shareholder meeting. These requirements are established by law and overseen by the Securities and Exchange Commission (SEC). Companies operating in the U.S., but domiciled in other countries, have additional requirements from those countries.

Typically, the company’s General Counsel (GC) and Chief Financial Officer (CFO) lead the teams that prepare the drafts of the documents. There is an annual calendar and rhythm to the process. The Audit Committee plays a key role in this process; it does the heavy lifting. The Audit Committee reviews the 10-K and 10-Q drafts, makes comments and suggestions, and obtains input from the firm’s external auditors on compliance with GAAP (Generally Accepted Accounting Principles). When comfortable with the financials and the narrative, the committee favorably recommends the report to the Board. The Board members have to sign the 10-K and have liability for the documents’ contents. As one panelist noted, “Board members don’t write a word of it, but are responsible for all of it.”

With respect to the proxy statement, the Compensation Committees and the Nominating and Governance Committees play a significant role along with the Audit Committee in providing content and reviewing its tone and accuracy.

Over the past 20 years or so, a wide range of new disclosures has been required or expected, generally within the existing reporting requirements, including:

- Expansion of risks including climate change,
- Compensation Disclosure and Analysis,
- The pay ratio between the CEO and the median employee,
- Board Diversity,
• Cybersecurity risk and incidents,
• New GAAP requirements by FASB (Financial Accounting Standards Board) such as revenue recognition, lease accounting, and allowance for loan losses under CECL (Current Expected Credit Losses), and
• The Auditor report on Critical Audit matters, or CAMS.

It is important that the Board be kept up to date as these new issues arise. They need to be involved in decisions such as whether to provide information voluntarily or wait until it is required, whether and when to communicate more than is required, and how to get the company’s message out to all stakeholders, not just investors.

Well-established (i.e. Black letter) law says that Directors can rely on information that is provided to them by management as long as they have no reason to believe it is false. They are expected to rely on the experts with whom they work: the GC, CFO, CAO, and others in management. What the Board members should do is make sure that they are being kept up to date on evolving requirements, “atmospherics,” and what competitors are doing.

Especially regarding GAAP requirements, The Center for Audit Quality (CAQ) was mentioned as a good resource for Audit Committees on new accounting standards. Examples include information on the new Revenue Recognition standard as well as CECL, the new credit loss standard. Based on its work with the SEC and PCAOB as well as with audit firms, the CAQ provides information on its website that is helpful for Boards, including questions the Audit Committee members should be asking and disclosures to consider.

**Voluntary Reporting**

The earnings release is a quarterly press release describing the company’s financial performance. While not statutorily required, it is probably the single most critical piece of information from an earnings perspective that the company provides. It generally will affect the stock price in one way or another. The Board has a responsibility to be involved in the content and
wording of the earnings release on a regular basis to make sure the message is consistent and provides the appropriate “pieces of the puzzle” that investors look for.

If the company provides earnings guidance, it is typically included in the earnings release. Given its responsibility to investors, the Board has an important role in deciding whether the company should even provide earnings guidance and, if it does, should “pressure test” it to make sure that the guidance management is proposing is reasonable.

The discussion then turned to the topic of the increasing use of Non-GAAP financial disclosures. These are financial metrics that are not calculated within the GAAP standards. When used, non-GAAP measures tend to be in the earnings release or analyst presentations. The panelists highlighted the fact that people often do not realize that auditors are not involved in, nor do they have a process for, auditing non-GAAP metrics; “they are non-GAAP by definition”. Auditors do have a responsibility to look at the information if it is within a document that includes the GAAP financial information to make sure there is nothing materially inconsistent or missing.

Because the use of non-GAAP measures is seen as a “political hot potato,” the view was that the Board should ask management if this is critical information that will help investors understand the company better than they do without the information. The concern is that such measures may be misleading. However, although regulators and auditors generally frown on the use of non-GAAP financial measures, there are times when they are especially helpful to investors.

In deciding whether to disclose non-GAAP measures, the Board needs to understand why it is important to provide this information in explaining the performance of the company and to be comfortable that there is a rigorous process around the development of the disclosed metrics. This is especially important because there is no independent check on the numbers by the external auditors. If the decision is made to disclose non-GAAP measures, it is key that they meet SEC guidance and that:
• there is a clear statement that these measures do not conform with GAAP,
• they are reconciled with GAAP measures,
• they are not more prominent than the GAAP numbers, and
• there is a clear explanation of why the company believes that this information is helpful to the user of their financial statements.

Finally, the panel addressed non-financial disclosures, specifically those relating to Environmental, Social, and Governance (ESG) reporting and communications. Such information has become an increasing focus for companies and their stakeholders. In fact, ESG related disclosures were the majority of shareholder proposals for the past 3 years. The type of investors that care about ESG issues seem to fall into two groups, “like a barbell.”

• One group is smaller, very socially focused funds that are actively pushing agendas that they think are correct and right.
• The other end of the spectrum are very large, institutional investors who see that ESG activities enhance the brand equity and value of a business because that is what shareholders want.

The gap between the two groups is closing. The smaller, more socially conscious funds are starting to attract more assets and are getting more aggressive. Larger, institutional funds are putting out annual letters to CEO’s essentially saying “here is how we expect to see companies in which we invest behave.” With ESG disclosures growing in importance, it is critical that Boards focus on ESG, especially from the brand equity perspective, and to demonstrate that the company is a good corporate citizen. There is growing attention, including by boards and audit committees, as to whether, and if so, how companies should go about providing at least some level of third-party assurance. The topic is an evolving area in which directors should be part of the conversation.

Questions that have been raised about disclosures of these activities include:

• How much information to disclose or communicate?
• Where to provide the information - within a required filing, on the website, or someplace else?
• When to provide the information - in the same timeframe as quarterly filings or on a different cycle?
• How to measure ESG?
• What to measure?
• What internal reporting and accountability activities should be adopted?

With respect to what to disclose, there is both a tactical and a strategic approach. The tactical piece is to make sure that the ESG disclosures are accurate and complete and cover issues that are very specific to the business of the company. For example, a manufacturing company might address in its risk factors in the 10-K and 10-Qs climate change, environmental factors, waste byproducts, and the like to show investors that it won’t be the next target of high-profile litigation.

The strategic approach is embedded in the discussion of whether the goal of the company is to create long term value not just for investors, but for a broader stakeholder community. If the latter, then expectations of shareholders, state and federal legislators, other stakeholders and other countries all come into play. As pressures mount from various directions, the GC may advise the Board that “We need to talk about this because we can either disclose it voluntarily today – frame it and disclose it truthfully in a manner that is consistent with the company’s messaging – or wait 6 years and be told how to do it, thereby losing control of the dialogue and debate.”

As to where and when to disclose ESG information, the suggestion was made that it be separated in time from the quarterly financial reporting requirements. The rationale is that the breathing space allows better focus on what the company is doing in the ESG area.

What to measure and how to measure ESG activity is an ongoing dialogue within the ESG ecosystem. There are two fundamental directions. One is the Global Reporting Initiative (GRI), which focusses on the social impact of ESG issues. According to its website, “GRI helps businesses and
governments worldwide understand and communicate their impact on critical sustainability issues such as climate change, human rights, governance and social well-being... A sustainability report is a report published by a company or organization about the economic, environmental and social impacts caused by its everyday activities. A sustainability report also presents the organization's values and governance model, and demonstrates the link between its strategy and its commitment to a sustainable global economy.” The panel described the GRI approach as using extensive survey responses.

SASB takes a different approach. It focuses on which ESG issues lead to disclosure of financially material information that provides investors with useful information in their investment and proxy voting decisions. In their deliberations, SASB realized early-on that the metrics are very industry specific. For example, what is financially material for a bank is different from what is financially material for a beverage company. As a result, SASB has developed metrics for 77 specific industries in 11 different sectors. Further, their metrics are research driven. If you cannot see the financial impact in the numbers, that activity is not included in the standards. Gender and other diversity factors have been shown to have an impact on financial performance, so are included in the standards, whereas political contributions have not.

From a company and Board perspective, not having a consistent standard, be it market driven, the GRI approach, the SASB approach, or other countries’ approaches, creates challenges in developing ESG disclosures. Despite the challenges, the panel believes that it is important for Boards to be discussing these issues. The nature of the discussions and the ultimate disclosures depend on the company’s circumstances. For example, conflict minerals disclosures are generally less relevant for a bank than for a global jewelry retailer. Each company should focus on what is important for investors, stakeholders, and other users of the statements who care about the issue and how it relates to the business.

In developing ESG disclosures, governance is critical. A concern is that too many companies are relying on relatively junior staff to write ESG reports without real oversight by the CFO, Audit or Risk Committee, or the Board.
The panelists highlighted the need for governance and a process framework around ESG disclosure. Here, too, as with GAAP issues, the CAQ is providing information to help Boards ask the right questions. Key themes regarding ESG disclosures include:

- They are a prime example of an investor driven disclosure as opposed to a legal requirement.
- They are a way for companies to communicate the long-term value of the company; the problem is that it is difficult to fit into the current reporting framework.
- They are not something that auditors are looking at; if the company is going to put this information out, they have to get it right, so Board Directors should be thinking about the risk and assurance of their disclosures in a new way.

**Conclusion**

Overall, the underlying theme of the discussion was that, whether required or voluntary, disclosures tell the company’s story. In its oversight role, the Board of Directors should be involved in making sure the company has a good story to tell its investors and other stakeholders, and that the story is told accurately and effectively.