

Chapman *Insights*

Corporate Governance Quarterly Update

Q4 2014

Is 75 the New 68? Director Tenure, Mandatory Director Retirement and Related Issues in a Time of Heightened Scrutiny of Boards

Background

Director tenure, board entrenchment and board refreshment are corporate governance buzzwords that increasingly are becoming hot-button issues for institutional investors, proxy advisory firms, shareholder activists and other governance advocates.¹ One board's experienced and knowledgeable director, however, may be viewed by a shareholder activist as an "entrenched" director. Although views of various stakeholder groups differ as to whether a board should adopt a director tenure policy explicitly limiting the number of years (or terms) a director may serve, there is little debate that the issue is under heightened scrutiny. Contributing to that debate are conflicting research findings (as to whether expressly limiting director tenure correlates positively with corporate performance) and persuasive arguments supporting both sides of the issue.

In addition, the focus on director tenure is taking place against a landscape where companies have raised "mandatory" director retirement ages, which trend makes it difficult for companies to respond to calls to increase gender and racial diversity on boards. Board diversity itself is a hot-button topic for corporate governance advocates, including shareholder activists who, since 2008, have submitted approximately 100 proposals (with more than half those proposals being submitted in 2013 and 2014) requesting that U.S. companies adopt board diversity policies and undertake certain diversity-related initiatives.² Further contributing to the director tenure debate are recent survey results that find that despite the fact that two-thirds of directors believe it is important to refresh the board with new members, directors rated themselves least effective in encouraging board turnover to create a board that has a balance of needed skills and diversity.³

This corporate governance update (1) provides general information concerning director tenure, mandatory director retirement and related issues, including a synopsis of arguments for and against adoption of a director tenure policy, (2) summarizes director tenure positions of several of the largest asset managers and public pension funds, select proxy advisory firms, certain corporate governance advocates and various foreign jurisdictions and (3) presents other director tenure-related considerations to facilitate boardroom and C-suite discussion, including potential elements of a director tenure policy and certain information in connection with the upcoming 2015 proxy season.

Director Tenure, Mandatory Director Retirement and Related Issues

There is growing concern among institutional investors, proxy advisory firms, shareholder activists and other corporate governance advocates that once a director reaches a particular length in tenure, a director's independence from management may become compromised. Institutional Shareholder Services Inc. ("ISS"), a proxy advisory and corporate governance ratings service, found that 74% of surveyed institutional investors indicated that long director tenure is problematic (as a director's ability to serve as an independent steward is diminished when the director has served too long and/or lengthy director tenure limits a board's opportunity to refresh its membership).⁴ Further, advocates argue that lengthy director tenure at U.S. companies entrenches current board members and inhibits both board diversity efforts (primarily in terms of both gender and racial diversity) and new perspectives, skills and ideas. In 2014, the average tenure of directors at S&P 500 companies is 8.4 years, down from 8.6 years in 2013.⁵

Despite this increased focus on director tenure, most U.S. public companies do not explicitly address director tenure in their corporate governance documents or place term limits on their board members. One study revealed that only 16 boards of S&P 500 companies (or 3%) have director term limits in their corporate governance guidelines (none of which is less than 10 years, with the longest term limit being 30 years), 65% explicitly state that they do not have term limits and 32% do not mention term limits at all.⁶ In another recent survey, 77% of public company directors stated that their board was not even considering or discussing the issue of director term limits.⁷

Although most U.S. public companies do not have (or publicly disclose) a formal director tenure policy, many

companies have adopted a mandatory retirement age policy for board members. An increase over the years by U.S. companies of their mandatory director retirement age has added to the debate regarding director tenure and board diversity.⁸ Like director tenure, mandatory director retirement policies are a hotly debated corporate governance topic. Companies argue, however, that such policies effectively manage and address many of the concerns associated with lengthy director tenure.

There are conflicting views whether director term limits promote better corporate governance. Arguments in support of and against the adoption of a director tenure policy expressly limiting the number of years a director may serve on a company’s board include the following:

In Support of	Against
<ul style="list-style-type: none"> ▪ such a policy strengthens actual and perceived director independence (as lengthy tenure may foster a culture of deference to management) ▪ such a policy increases the opportunity for new perspectives, skills and ideas ▪ extended tenure may lead a non-management director to begin thinking like an insider ▪ such a policy facilitates increased board diversity ▪ longer-tenured directors may be less inclined to keep current with respect to industrial and technological developments ▪ less-tenured directors may focus their loyalties on the company and shareholders, not management ▪ such a policy combats so-called “zombie” directors (directors who have served on a board for so many years they lose energy and enthusiasm for the job and simply go through the motions) ▪ certain institutional investors and shareholder activists support director term limits ▪ long-tenured directors may raise independence concerns by proxy advisory firms ▪ many foreign jurisdictions support limiting director tenure and have adopted corresponding laws, regulations, specific policies or require companies that have not adopted such policies to disclose why they have not done so (which may foreshadow the direction in which U.S. regulation will move) 	<ul style="list-style-type: none"> ▪ long-serving directors often possess invaluable experience and industry and organizational knowledge (as new directors may require several years to obtain comparable experience and knowledge) ▪ such a policy is unnecessary because board processes relating to board evaluations, director nominations and director succession adequately consider tenure ▪ such a policy is unnecessary because corporate performance and long-term shareholder value are considerably more influenced by other factors, including the company’s management and corporate strategy ▪ establishing a specific term limit would be arbitrary (should directors be limited to 8, 10, 15 or 20 years on the board and, if so, why?) ▪ longer-tenured directors may be more likely to criticize and challenge management (compared to newer, more deferential board members), as long-tenured directors may have a better ability to evaluate management ▪ such a policy may be an excuse for the board to avoid conducting meaningful director evaluations ▪ there is conflicting empirical evidence as to whether director tenure truly affects corporate performance and long-term shareholder value⁹

Positions of Certain Institutional Investors, Proxy Advisory Firms, Corporate Governance Advocates and Foreign Jurisdictions on Director Tenure

Although boards and management need to implement corporate governance practices that are best for their company and that will generate long-term value for their shareholders, it is important that they stay abreast of developments in connection with the director tenure-related policies of (1) their company's largest institutional investors, (2) proxy advisory firms (given their influence on the proxy voting process) and (3) other corporate governance advocates. A summary of certain of those policies follows:

Institutional Investors – Asset Managers. The current director tenure position of each of the country's top five asset managers is as follows:¹⁰

- BlackRock, Inc. (“BlackRock”):
 - encourages boards to routinely refresh their membership to ensure that new viewpoints are included in the boardroom
 - typically votes “against” shareholder proposals imposing arbitrary limits on the pool of directors from which shareholders can choose their representatives
 - will, however, generally defer to the board's determination that age limits or term limits are the most efficient mechanism for ensuring routine board refreshment¹¹
- State Street Global Advisors (“SSgA”):
 - may vote “against” certain directors when overall average board tenure is excessive and/or individual director tenure is excessive (through this policy, it is expected that long-tenured directors will refrain from serving on the audit, compensation and nominating and governance committees)¹²
 - may vote “against” (a) the chair of the nominating and governance committee for failing to adequately address board refreshment and director succession, (b) long-tenured directors who serve on key committees or (c) both the members of the nominating and governance committee and long-tenured directors at companies with classified boards¹³

- The Vanguard Group, Inc. (“Vanguard”):
 - has no formal policy
 - in a recent speech, however, Vanguard's Chairman and CEO noted that if a board has a director with tenure that is considered excessive by SSgA, it is conceivable that Vanguard might have similar questions as to why a particular board member is still serving and whether he or she is sufficiently independent of management¹⁴
- Allianz Asset Management AG (“Allianz”):
 - generally does not support minimum or maximum director age or tenure limits¹⁵
- FMR LLC (“Fidelity Investments”):
 - has no formal policy

Institutional Investors – Public Pension Funds. The current director tenure position of several of the country's largest public pension funds is as follows:¹⁶

- California Public Employees' Retirement System (“CalPERS”):
 - maintains that boards should (a) consider all relevant facts and circumstances to determine whether a director should be considered independent, including the director's years of service on the board (as extended periods of service may adversely impact a director's ability to bring an objective perspective to the boardroom), (b) have routine discussions surrounding director refreshment to ensure they maintain the necessary mix of skills and experience to meet strategic objectives and (c) develop and disclose a policy on director tenure¹⁷
- California State Teachers' Retirement System (“CalSTRS”):
 - does not support limiting director tenure, although boards should review each director's tenure as part of their comprehensive review of the board (and as part of that review, boards should have a mechanism to ensure there is a periodic refreshment of the board)¹⁸

- New York State Common Retirement Fund (“NYSCRF”):
 - will not support proposals that ask a company to provide for director age or term limits (as arbitrary limits on director tenure will not necessarily ensure that a director will be more qualified to serve shareholders’ best interests)¹⁹
- Florida State Board of Administration (“SBA”):
 - votes “against” proposals to limit the tenure of outside directors
 - agrees that new outside directors often bring in fresh ideas that benefit shareholders, but does not believe that term limits are an appropriate way to achieve that goal (as it is an artificial and arbitrary imposition on the board and could conceivably harm shareholders’ interests by prohibiting some experienced and knowledgeable directors from serving on the board)
 - maintains that boards should evaluate director tenure as part of their analysis of a director’s independence and overall performance²⁰
- new for the 2015 proxy season, generally recommends a vote “for” independent chair shareholder proposals taking into consideration a number of factors, including director tenure and its relationship to CEO tenure²²
- Glass, Lewis & Co., LLC (“Glass Lewis”):
 - asserts that director age and term limits typically are not in shareholders’ best interests and that boards should evaluate the need for changes to board composition based on an analysis of skills and experience necessary for the company, as well as the results of an independent board evaluation, instead of relying on arbitrary age or tenure limits (as shareholders can address concerns regarding proper board composition through director elections)
 - states that if a board adopts term or age limits, it should follow through and not waive such limits (if such limits are waived, will consider recommending that shareholders vote “against” members of the nominating and governance committee, unless the limit was waived with sufficient explanation)
 - includes board tenure as one of several diversity factors that a nominating and governance committee should consider when making director nominations²³

Proxy Advisory Firms. The current director tenure position of the two prominent proxy advisory firms is as follows:

- ISS:
 - limiting director tenure allows new directors to bring fresh perspectives; a tenure of more than nine years potentially compromises a director’s independence
 - in calculating a company’s corporate governance QuickScore, will consider the number of non-management directors whose tenure is greater than nine years²¹
 - generally recommends a vote “against” proposals to limit the tenure of outside directors through mandatory retirement ages or term limits
 - will, however, scrutinize boards where the average tenure of all directors exceeds 15 years for independence from management and for sufficient turnover to ensure that new perspectives are being added to the board

Corporate Governance Advocates. The current director tenure position of each of the following corporate governance advocates is as follows:

- Council of Institutional Investors (“CII”) (advocating on behalf of shareholders):
 - boards have an obligation to consider all relevant facts and circumstances to determine whether a director should be considered independent, including the director’s years of service on the board (as extended periods of service may adversely impact a director’s ability to bring an objective perspective to the boardroom)²⁴
- The Business Roundtable (“BRT”) (advocating on behalf of management):
 - as part of the ongoing assessment of board composition and succession planning, boards

should (a) plan ahead for director departures and consider whether it is appropriate to establish or maintain procedures for the retirement or replacement of board members, such as a mandatory retirement age or term limits and (b) consider whether other practices, such as the assessment of director candidates in connection with the re-nomination process, annual board evaluations and individual director evaluations, may make a retirement age or term limit unnecessary²⁵

Foreign Perspectives. In the United States, there are currently no Securities and Exchange Commission (“SEC”) or listing standard requirements which limit director tenure on U.S. public company boards. Many large U.S. institutional investors, however, are significant investors in foreign corporations and vote proxies internationally. In addition, foreign investors own a substantial and increasing percentage of U.S. companies.²⁶ Therefore, the experience of those investors may impact their priorities and views on director tenure matters when voting U.S. proxies.

An increasing number of foreign countries have adopted director tenure-related rules or limitations for “independent” directors. Certain foreign laws, regulatory disclosure rules and recommendations have helped lower average board tenure and encouraged boards to focus on director skills and ideas refreshment and better plan for director succession, which in turn has also contributed to greater board diversity.²⁷ Similarly, certain gender diversity mandates have increased female board representation while lowering average director tenure.²⁸ The following chart depicts the average tenure of boards in 2013 for each of the following indices or foreign jurisdictions, as the case may be, in comparison to S&P 500 companies:²⁹

Index/Foreign Jurisdiction	Years
S&P 500 Companies (U.S.)	8.6
S&P/TSX Composite Index Companies (Canada)	8.6
France	7.4
Italy	5.6
Germany	5.0
FTSE 350 Companies (U.K.)	4.8

A sampling of how various foreign jurisdictions are addressing the issue of director tenure, certain of which

may foreshadow the direction in which U.S. regulation will move on this issue, follows:

- Canadian Securities Administrators (“CSA”):
 - requires disclosure in a company’s annual proxy statement whether or not the company has adopted director term limits or other mechanisms of board renewal and, if so, include a description of those limits or other mechanisms; if the company has not adopted such limits or other mechanisms of board renewal, disclose why it has not done so³⁰
- The U.K. Corporate Governance Code:
 - presumes that board service of more than nine years compromises independence and therefore, notes that a board should disclose in its company’s annual report the reasons it determines that a director is independent notwithstanding such long tenure; further, maintains that a non-management director who has served longer than nine years should be subject to annual re-election³¹
- The European Commission:
 - as a factor in determining non-management director independence, recommends that European Union-based companies limit director tenure to 12 years, or three terms³²
- Hong Kong Exchanges and Clearing Limited (“HKEx”):
 - requires that listed companies appointing an independent non-management director beyond a recommended nine-year limit hold a separate vote for the director using a special resolution for shareholder approval (the resolution should include the reasons why the board believes the director is still independent and should be re-elected)³³

Considerations for Companies

To facilitate director tenure-related discussion in boardrooms and C-suites, companies may consider the following:

- **Elements of a Director Tenure Policy.** If a board concludes that it is in the best interests of the company and its shareholders to adopt a director

tenure policy as part of its corporate governance practices, elements for the board to consider as part of such policy include, but are not limited to:

- the board's rationale for adopting the policy
- whether the policy should provide for a specific tenure limit applicable to all directors or an average director tenure for the entire board³⁴ or whether the policy should not expressly place a limit on director tenure (if the board believes it is not prudent to place such limits on directors' service)
- how the board will address the issue of a number of directors simultaneously reaching the director tenure limit
- whether the board or nominating and governance committee will have discretionary authority to waive director tenure limitations
- **2015 Proxy Season.** During the 2014 proxy season, no shareholder proposal relating to director tenure and term limits was put to shareholder vote.³⁵ Further, our review of proxy statements filed by S&P 500 companies during 2014 revealed that only a small number of companies (approximately 40) voluntarily disclosed information relating to "director tenure" and/or director "term limits" (other than the year each director was initially elected to his or her respective board, as required by SEC disclosure rules).³⁶

The debate surrounding director tenure and term limits is expected to intensify during the upcoming 2015 proxy season. It has been reported that certain shareholder activists are planning to submit shareholder proposals at various companies where more than two-thirds of the directors have served for 10 years or more and the board "shows other signs of stagnation or entrenchment."³⁷ The "Reduce Director Entrenchment" proposal requests that the target company adopt a bylaw that would require at least 67% of the members of the board of directors to individually have less than 15 years' total director tenure at the company.³⁸

As with many hot-button corporate governance topics, it may benefit companies to act proactively and disclose in their 2015 proxy statements information relating to director tenure, director succession planning (including methods boards are

using to refresh themselves) and term limits and, if a company does not have a policy relating thereto, disclose why it feels it is unnecessary at this time (e.g., the nominating and governance committee takes director tenure into consideration during the board evaluation and director nomination process). Investors are increasingly expecting enhanced transparency with respect to corporate governance issues.

- **Corporate Governance Best Practices and/or Proxy Voting Guidelines of Largest Institutional Shareholders.** Companies should identify their largest institutional shareholders and determine whether such shareholders have publicly disclosed their own corporate governance best practices and/or proxy voting guidelines (or whether they have an allegiance to a particular proxy advisory firm). Such best practices and/or guidelines may assist companies with evaluating whether their boards' director tenure might be considered potentially problematic to their largest shareholders. If board tenure may be problematic, companies should proactively engage the shareholders.
- **Engagement, Engagement, Engagement.** Proactive engagement on corporate governance practices identified as important by a company's large shareholders, including potentially director tenure, is becoming increasingly important.³⁹ Constructive proactive engagement on potential director tenure concerns, for example, may stave off shareholder proposals relating to director tenure (or other corporate governance practices of the company) or shield against "withhold" or "against" votes for company directors or nominating and governance committee members.
- **Peer and Industry Reviews.** Companies should determine and continue to monitor whether their director tenure-related practices (e.g., the average non-management director tenure and whether a director tenure policy has been adopted) are aligned with peer companies and the industry in which they operate (as outliers may become the target of activist shareholder campaigns, be identified by institutional investors as an entity with potential problematic corporate governance practices and/or be susceptible to director "withhold" or "against" vote recommendations by proxy advisory firms).

Although director tenure (including the related issues of director independence and board diversity) is an important corporate governance topic that merits serious consideration, boards should not succumb to proxy advisory firms and short-term focused shareholder activists with particular agendas, as directors owe a duty to the company and its shareholders to implement director tenure-related policies and practices that they believe, given a company's unique characteristics and circumstances, are in the best interests of the company and its shareholders and that will create long-term shareholder value. Corporate governance is not a one-size-fits-all approach. Regardless of whether you support or oppose limiting director tenure, the time is now for companies to consider this issue and disclose the process undertaken and their plans to address this issue going forward.

How Chapman Can Help

Chapman and Cutler attorneys provide corporate and business counseling to a wide range of clients, both publicly and privately held entities, with a focus on financial services institutions, utilities, investment advisors, insurance companies, manufacturers,

distributors, wholesalers, retailers, contractors, transportation companies, professional service providers, pension funds and not-for-profit entities. Chapman and Cutler maintains a dedicated Corporate Counseling Practice Group with the necessary skills and experience to counsel on the issues presented in this corporate governance update. If you would like to discuss any of the issues contained in this update or other legal, regulatory, compliance or corporate governance-related issues facing your institution, please contact an attorney in our Corporate Counseling Practice Group.

This document has been prepared by Chapman and Cutler LLP attorneys for informational purposes only. It is general in nature and based on authorities that are subject to change. It is not intended as legal advice. Accordingly, readers should consult with, and seek the advice of, their own counsel with respect to any individual situation that involves the material contained in this document, the application of such material to their specific circumstances, or any questions relating to their own affairs that may be raised by such material.

To the extent that any part of this summary is interpreted to provide tax advice, (i) no taxpayer may rely upon this summary for the purposes of avoiding penalties, (ii) this summary may be interpreted for tax purposes as being prepared in connection with the promotion of the transactions described, and (iii) taxpayers should consult independent tax advisors.

© 2014 Chapman and Cutler LLP. All rights reserved.

Attorney Advertising Material.

- 1 The National Association of Corporate Directors ("NACD"), for example, lists "director tenure" as one of several board leadership issues for directors to focus on in 2015. *Critical Issues for Board Focus in 2015*, NACD (November 2014).
- 2 Of the approximately 100 board diversity shareholder proposals submitted since 2008, 16 have been voted upon receiving average shareholder support of 27%. The increase in the number of board diversity shareholder proposals is reportedly primarily attributable to the Thirty Percent Coalition, an organization comprised of institutional investors, senior business executives, board members, women's organizations and corporate governance experts whose stated goal is to attain at least 30% female representation across U.S.-based publicly listed company boards by the end of 2015. *Gender Diversity on Boards: A Review of Global Trends*, Institutional Shareholder Services, Inc., Edward Kamonjoh (September 25, 2014).
- 3 *What Directors Think*, A Corporate Board Member/Spencer Stuart Survey, NYSE Euronext (First Quarter 2014).
- 4 In contrast, only 17% of surveyed companies indicated that long director tenure is problematic. *2013-2014 Policy Survey Summary of Results*, ISS (October 2013).
- 5 In addition, 18% of the boards at S&P 500 companies have an average director tenure of five years or less, 66% have an average director tenure between six and 10 years and 16% have an average tenure of 11 or more years. *Spencer Stuart Board Index 2014*, Spencer Stuart (November 2014). During the five years between 2007 and 2012, the average director tenure at Russell 3000 companies increased from 8.2 to 8.7 years. *Governance Trends and Practices at U.S. Companies: A Review of Small- and Mid-Sized Companies*, The Society of Corporate Secretaries & Governance Professionals and the Ernst & Young Corporate Governance Center (May 2013).
- 6 Of the 16 boards with director term limits, the most frequent limit is 15 years (five boards) followed by 10 years (four boards). *Spencer Stuart Board Index 2014*, Spencer Stuart, *supra* note 5.
- 7 *Trends Shaping Governance and the Board of the Future*, PwC's 2014 Annual Corporate Directors Survey, PricewaterhouseCoopers LLP (October 7, 2014).
- 8 A reported 73% of all S&P 500 boards currently have established a mandatory retirement age for their directors, with 92% of those boards specifying a retirement age of 72 years or older (an increase from 75% in 2009) and 30% setting mandatory retirement at 75 years or older (an increase from 15% in 2009). Notably, a decade ago, only 5% of S&P 500 boards had a retirement age of 75 years or higher. *Spencer Stuart Board Index 2014*, Spencer Stuart, *supra* note 5.
- 9 See *Board of Director Composition and Financial Performance in a Sarbanes-Oxley World*, ACADEMY OF BUSINESS AND ECONOMICS JOURNAL, Raymond K. Van Ness, Paul Miesing and Jaeyoung Kang (2010) (finding a positive correlation between boards of directors with high average tenure and return on assets). But see *Director Busyness, Director Tenure and the Likelihood of Encountering Corporate Governance Problems*, Greg Berberich and Flora Niu (January 2011) (finding a positive association between director tenure and the probability of a company experiencing governance problems, indicating that long board service has negative governance consequences and that "problem directors" had an average tenure of 10.4 years versus "non-problem directors" who averaged 8.5 years). See also *Zombie Boards: Board Tenure and Firm Performance*, Sterling Huang (July 29, 2013) (concluding that company value rises as the average tenure of outside board members increases to nine years, after which the effects of director entrenchment outweigh the knowledge of long-tenured directors; provided, however, the author acknowledged that such relationship varies across industries and firms and, accordingly, he did not advocate regulating director tenure by imposing a mandatory term limit).
- 10 *BlackRock Is America's Top Money Manager of 2014*, INSTITUTIONAL INVESTOR (July 8, 2014).

- 11 *Proxy Voting Guidelines for U.S. Securities*, BlackRock (April 2014).
- 12 In assessing excessive tenure, SSgA has developed a framework for board tenure which considers factors such as the preponderance of long-tenured directors, board refreshment practices and classified board structures. Companies are considered to have excessive average board tenures if they exceed one standard deviation above the average market-level board tenure. Directors are considered to have long tenures if their tenure is in excess of two standard deviations above the average market-level board tenure. Initially, companies are screened on their average board tenure. Companies with long-average board tenures are then further screened for a preponderance of non-management directors that have long tenures and classified board structures. *Proxy Voting and Engagement Guidelines—U.S.*, SSgA (March 2014). See also *Addressing the Need for Board Refreshment and Director Succession in Investee Companies*, IQ INSIGHTS, Rakhi Kumar, SSgA (March 31, 2014).
- 13 *Id.* Companies with classified boards are held to a “higher standard” since SSgA believes such structure may further limit the ability to refresh the board.
- 14 *Getting to Know You: Sharing Practical Governance Viewpoints*, F. William McNabb III, Vanguard Chairman and CEO, University of Delaware, John Weinberg Center for Corporate Governance (October 30, 2014).
- 15 *Corporate Governance Guidelines and Proxy Voting Policy*, Allianz Global Investors (2014).
- 16 *Pensions & Investments/Towers Watson 300 Analysis Year End 2013*, Towers Watson (September 2014).
- 17 *Global Principles of Accountable Corporate Governance*, CalPERS (May 19, 2014).
- 18 *Corporate Governance Principles*, CalSTRS (November 2, 2011).
- 19 *Proxy Voting Guidelines*, NYSCRF (January 2011).
- 20 *2015 Corporate Governance Principles & Proxy Voting Guidelines*, SBA (December 2014).
- 21 *ISS Governance QuickScore 3.0: Overview and Updates*, ISS (October 2014).
- 22 *United States Summary Proxy Voting Guidelines: 2015 Benchmark Policy Recommendations (Effective for Meetings on or after February 1, 2015)*, ISS (December 18, 2014).
- 23 *Proxy Paper Guidelines 2015 Proxy Season: An Overview of the Glass Lewis Approach to Proxy Advice (United States)*, Glass Lewis (November 6, 2014).
- 24 *Corporate Governance Policies*, CII (October 1, 2014).
- 25 *Principles of Corporate Governance 2012*, BRT (March 27, 2012).
- 26 The value of foreign-owned U.S. long-term equity securities has more than doubled in recent years, increasing from \$2.4 trillion in 2006 to \$5.1 trillion in 2013 and as a share of total U.S. long-term equity securities outstanding, from approximately 9% to 14%. *Foreign Portfolio Holdings of U.S. Securities as of June 30, 2013*, Department of the Treasury, Federal Reserve Bank of New York, Board of Governors of the Federal Reserve System (April 2014).
- 27 *Addressing the Need for Board Refreshment and Director Succession in Investee Companies*, Rakhi Kumar, *supra* note 12.
- 28 See *The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation*, THE QUARTERLY JOURNAL OF ECONOMICS, Kenneth R. Ahern and Amy K. Dittmar (2012) (noting that enactment in 2003 of Section 6-11a of the Norwegian Public Limited Liability Companies Act, requiring that a minimum of 40% of Norwegian public limited liability companies’ directors be women, increased female board representation from 11% to 43% between 2003 and 2009 while average director tenure fell from 2.5 years in 2003 to a low of 2.1 years in 2007 before rebounding to 2.6 years in 2009 as companies achieved the desired level of female board members and director turnover slowed).
- 29 *2012 S&P/TSX Composite Index Director Tenure*, Clarkson Centre for Board Effectiveness, Antonio Spizzirri (December 2013). *Governance Steps Up a Gear: Corporate Governance Review 2013*, Grant Thornton UK LLP (2013). *Addressing the Need for Board Refreshment and Director Succession in Investee Companies*, Rakhi Kumar, *supra* note 12.
- 30 Provided all necessary ministerial approvals are obtained, this disclosure requirement will become effective December 31, 2014 (in time for the 2015 proxy season) and will be applicable to specified public companies located in Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Quebec and Saskatchewan (and not Alberta, British Columbia and Prince Edward Island). *Multilateral CSA Notice of Amendments to National Instrument 58-101: Disclosure of Corporate Governance Practices*, CSA (October 15, 2014).
- 31 *The UK Corporate Governance Code*, Financial Reporting Council (September 2014).
- 32 *Commission Recommendation on the Role of Non-Executive or Supervisory Directors of Listed Companies and on the Committees of the (Supervisory) Board*, OFFICE JOURNAL OF THE EUROPEAN UNION, 2005/162/EC (February 15, 2005).
- 33 *Main Board Listing Rules, Appendix 14: Corporate Governance Code and Corporate Governance Report*, HKEx (July 11, 2014).
- 34 Companies should be prepared to provide their rationale as to how and why the director tenure length determination was made (since shareholders, proxy advisory firms and other third parties may inquire as to such determination).
- 35 *Proxy Voting Analytics (2010-2014)*, The Conference Board (November 2014). Based on findings revealed in the *Proxy Voting Analytics (2010-2014)* report, only one shareholder proposal relating to director tenure (term limits) was received by S&P 500 and Russell 3000 companies during the reported period (a 2013 proposal at General Electric Company submitted by a retail investor that received 6% shareholder support).
- 36 Such voluntary proxy statement disclosure typically related to the average director tenure of board members, whether or not the company had adopted a director tenure policy or the fact that director tenure is taken into consideration by the nominating and governance committee during the director nominee evaluation process.
- 37 See *Fall Season Offers Glimpses into 2015*, THE ADVISOR, Alliance Advisors, Shirley Westcott (October 2014).
- 38 See Costco Wholesale Corporation’s Schedule 14A (Definitive Proxy Statement) filed with the SEC on December 19, 2014. See also the discussion herein indicating that based on current proxy voting guidelines, each of ISS and Glass Lewis will typically recommend a vote “against” such shareholder proposals.
- 39 See *Getting to Know You: Sharing Practical Governance Viewpoints*, F. William McNabb III, *supra* note 14 (emphasizing, among other points, that (1) engagement “serves as a touch point” for all of Vanguard’s other five core corporate governance principles, (2) engagement can simply mean being “crystal clear and transparent” about the company’s and board’s expectations and how they “think through certain issues” and (3) boards should consider establishing a standing Shareholder Relations Committee as an effective way for boards to gather shareholders’ perspectives on various company corporate governance practices).

About the Authors



William Libit

Chief Operating Partner

Chicago Office

T: 312.845.2981

F: 312.516.3981

libit@chapman.com

Bill Libit is the Chief Operating Partner of Chapman and Cutler and has concentrated his practice in the corporate and securities area since 1985, when he began the practice of law at the firm. Bill's corporate and securities practice includes representation of issuers in connection with private and public offerings of debt and equity securities. He also represents issuers in other aspects of their business involving compliance with federal securities regulation, including preparation and review of required periodic filings including 10-Ks, 10-Qs and proxy statements and press releases and communications with institutional investors and other shareholders as well as corporate governance matters. In addition, he advises corporate clients on matters relating to compliance with NYSE and NASDAQ listing requirements.



Todd Freier

Senior Counsel

Chicago Office

T: 312.845.3810

F: 312.516.1810

freier@chapman.com

Todd Freier is Senior Counsel at Chapman and Cutler. He concentrates in the area of corporate and securities. Todd's corporate and securities practice includes providing counsel to corporate clients involving compliance with federal securities regulation and exchange listing requirements, including preparation and review of required filings under Sections 13 (periodic reports), 14 (proxy statements) and 16(a) (directors, officers and principal stockholders reports) of the Exchange Act, communications with institutional investors and other shareholders, as well as providing counsel on general corporate governance matters, including drafting committee charters and corporate policies.