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HOW CORPORATE COUNSEL CAN BE PROACTIVE AND REDUCE RISK IN THE MIDDLE OF UNCERTAINTY

Meeting the challenges of new SEC disclosure requirements and managing emerging litigation and SEC enforcement risks

Dailey LLP

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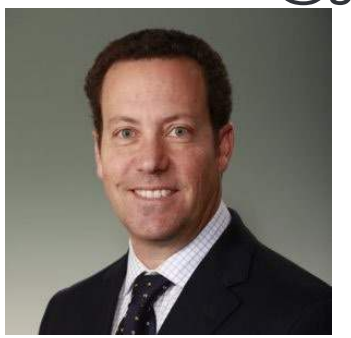
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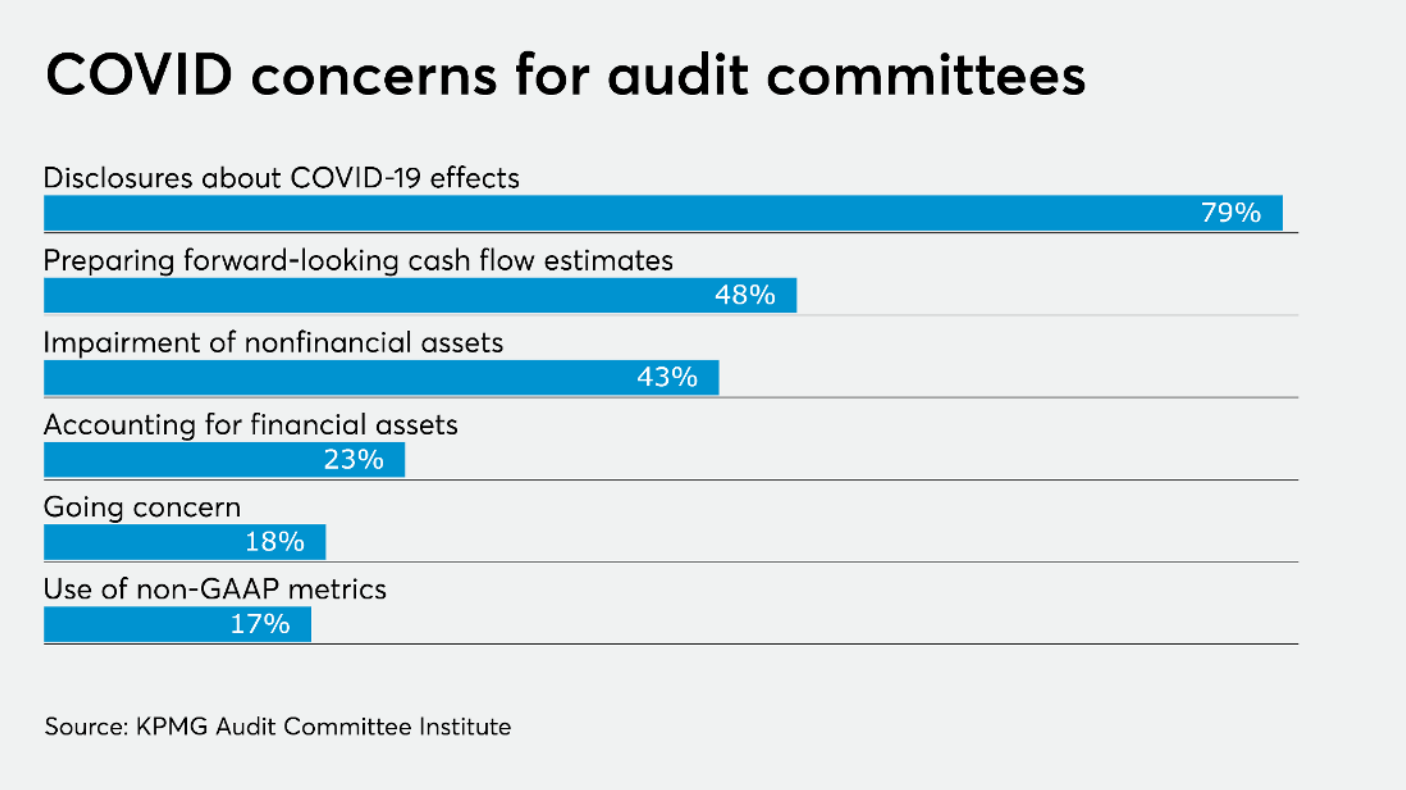
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Overview

- **Recent SEC Guidance and Rule Amendments**
  - Guidance for COVID-19-related disclosures
  - Amendments to Regulation S-K disclosure requirements
- **SEC Enforcement Activity**
  - COVID-19-related enforcement
  - Other enforcement developments
- **Private Securities Litigation Update**
  - COVID-19-related litigation
  - Other litigation developments
- **Practical Tips**

COVID-19 Has Shifted Reporting Concerns



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Recent SEC Guidance for COVID-19 Disclosures

- On April 8, 2020, the SEC's Chairman and the Director of the Division of Corporate Finance issued a public statement discussing at length the importance of disclosures regarding the impacts of COVID-19, particularly forward-looking disclosures, while also encouraging companies to avail themselves of the safe-harbors for forward-looking statements.
  - "Given the uncertainty in our current business environment, we would not expect to second guess good faith attempts to provide investors and other market participants appropriately framed forward-looking information."

Recent SEC Guidance for COVID-19 Disclosures

- On June 23, 2020, the staff of the SEC's Division of Corporation Finance published **CF Disclosure Guidance: Topic No. 9A**, which provides guidance companies should consider when making public disclosures regarding the impacts and risks of COVID-19 on their
  - **Operations**
  - **Liquidity**
  - **Capital resources**

Recent SEC Guidance for COVID-19 Disclosures (cont'd)

- In this Disclosure Guidance, the CF staff acknowledges the diverse range of operational adjustments companies have made and continue to make in response to the effects of COVID-19, including, *e.g.*:
  - Transitions to telework;
  - Supply chain and distribution adjustments; and
  - Suspending or modifying certain operations to comply with health and safety guidelines to protect employees, contractors, and customers, including in connection with a transition back to the workplace.

Recent SEC Guidance for COVID-19 Disclosures (cont'd)

- The CF staff notes that "[t]hese types of adjustments may have an effect on a company that would be material to an investment or voting decision, and affected companies should carefully consider their obligations to disclose this information to investors."

- In addition, "[i]t is important that companies provide robust and transparent disclosures about how they are dealing with short- and long-term liquidity and funding risks in the current economic environment, particularly to the extent efforts present new risks or uncertainties to their businesses."

Recent SEC Guidance for COVID-19 Disclosures (cont'd)

- Accordingly, the Guidance contains a broad range of questions management and boards of directors should consider when making public disclosures during the COVID-19 pandemic, but particularly when preparing the MD&A sections of their companies' Forms 10-K and 10-Q.

- The following slides highlight the most salient of these questions.

Impact of COVID-19 on Operations

- What are the material operational challenges that management and the Board of Directors are monitoring and evaluating?
- How and to what extent have you altered your operations, such as implementing health and safety policies for employees, contractors, and customers, to deal with these challenges, including challenges related to employees returning to the workplace?
- How are the changes impacting or reasonably likely to impact your financial condition and short- and long-term liquidity?

Impact of COVID-19 on Liquidity

- How is your overall liquidity position and outlook evolving?
- To the extent COVID-19 is adversely impacting your revenues, consider whether such impacts are material to your sources and uses of funds, as well as the materiality of any assumptions you make about the magnitude and duration of COVID-19's impact on your revenues.
- Are any decreases in cash flow from operations having a material impact on your liquidity position and outlook?

Impact of COVID-19 on Capital Resources

- Have you accessed revolving lines of credit or raised capital in the public or private markets to address your liquidity needs?

- Are your disclosures regarding these actions and any unused liquidity sources providing investors with a complete discussion of your financial condition and liquidity?

Impact of COVID-19 on Capital Resources (cont'd)

- Have COVID-19-related impacts affected your ability to access your traditional funding sources on the same or reasonably similar terms as were available to you in recent periods?

- Have you provided additional collateral, guarantees, or equity to obtain funding?

- Have there been material changes in your cost of capital?

Impact of COVID-19 on Capital Resources (cont'd)

- How has a change, or a potential change, to your credit rating impacted your ability to access funding?
- Do your financing arrangements contain terms that limit your ability to obtain additional funding?
- If so, is the uncertainty of additional funding reasonably likely to result in your liquidity decreasing in a way that would result in you being unable to maintain current operations?

Recent Amendments to Regulation S-K

- On August 26, 2020, the SEC announced that, for the first time in over 30 years, it had adopted amendments to three items (101, 103, 105) of Regulation S-K's periodic disclosure requirements applicable to a company's annual and quarterly reports and registration statements.

- The SEC's stated purpose of the amendments is to make disclosure more relevant to investors while reducing the burden on issuers.

- Published in the Federal Register on October 8, 2020, these rules are effective beginning November 9, 2020.

Recent Amendments to Regulation S-K (cont'd)

- **Amend Description of Business Item 101(a) by:**
  - Making it largely **principles-based**, requiring disclosure of information material to an understanding of the general development of the business;
  - Replacing the previously prescribed five-year timeframe with a materiality framework; and
  - Permitting a registrant, in filings made after its initial filing, to provide only an update of the general development of the business focused on material developments that have occurred since its most recent full discussion of the development of its business, which will be incorporated by reference.

Recent Amendments to Regulation S-K (cont'd)

- **Amend Description of Business Item 101(c) by:**
  - Clarifying and expanding its principles-based approach, with a non-exclusive list of disclosure topic examples drawn in part from topics currently contained in Item 101(c);
  - Including, as a disclosure topic, a description of the registrant's human capital resources to the extent such disclosures would be material to an understanding of the registrant's business; and
  - Refocusing the regulatory compliance disclosure requirement by including as a topic all material government regulations, not just environmental laws.

Recent Amendments to Regulation S-K (cont'd)

- **Amend Legal Proceedings Item 103 by:**
  - Expressly stating that the required information may be provided by hyperlink or cross-reference to legal proceedings disclosure located elsewhere in the document to avoid duplicative disclosure; and
  - Modifying the disclosure threshold for governmental environmental proceedings.

Recent Amendments to Regulation S-K (cont'd)

- **Amend Risk Factor Disclosures Item 105 by:**
  - Requiring summary risk factor disclosure of no more than two pages if the risk factor section exceeds 15 pages;
  - Refining the principles-based approach of Item 105 by requiring disclosure of "material" risk factors; and
  - Requiring risk factors to be organized under relevant headings in addition to the subcaptions currently required, with any risk factors that may generally apply to an investment in securities disclosed at the end of the risk factor section under a separate caption.

Practical Tips

- **In their next periodic report (annual or quarterly), companies should update, if necessary:**
  - The **MD&A** of their last report, particularly with respect to any new information regarding the impacts and risks of COVID-19 on its financial condition.
  - The **risk factors** pertaining to COVID-19 with any new information/developments that may have come to light since the last report.

Practical Tips (cont'd)

- **In their next periodic report (annual or quarterly), companies should update, if necessary:**
  - The "important factors" identified in meaningful cautionary statements that could cause actual results to differ materially from those in the company's **forward-looking statements**.
  - Assure that all safe harbor criteria have been met with respect to each forward-looking statement.

Practical Tips (cont'd)

- **Under the SEC's new amendments to Regulation S-K, companies will need to:**
  - Substantially modify the disclosures in their next periodic report by, *e.g.,* revising the descriptions of their business, human capital, regulatory compliance, and risk factors.
  - Build in sufficient time for any scheduled review by their board's audit committee and disclosure control committee as well as outside advisors, including their independent accounting sub captions firm and outside securities counsel.

Enforcement Landscape - Generally

- Focus on Main Street Investor
  - Cases against financial institutions and intermediaries.
    - Accounting fraud.
    - Sales of unsuitable products.
    - Pursuit of unsuitable trading strategies.
    - Pump and dump frauds.
    - Ponzi schemes

- Individual Accountability
  - Since Chairman Clayton took office, one or more individuals have been charged in more than 80 percent of standalone enforcement actions.

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SEC Enforcement Activity

- From the beginning of the COVID-19 outbreak, the SEC has made clear that it would be actively monitoring companies' disclosures regarding the impact of COVID-19 on their operations and finances.

- On April 24, 2020, the SEC announced the formation of an internal, cross-divisional COVID-19 Market Monitoring Group to assist the agency in its actions and analyses of the effects of COVID-19 on markets, issuers, and investors.

SEC Enforcement Activity (cont'd)

- Between February 7 and August 20, 2020, the SEC suspended trading in the stocks of 35 companies where there were issues regarding the adequacy and accuracy of their disclosures regarding COVID-19.

Specific SEC Enforcement Actions

- Between April 28 and June 9, 2020, the SEC filed enforcement actions against six companies and their officers for alleged fraud:

  - ***SEC v. Praxsyn Corporation et al.*** (4/28/2020) – Company and its CEO charged with alleged false claims the company was able to acquire and supply large quantities of N95 or similar masks to protect wearers from the COVID-19 virus.

Specific SEC Enforcement Actions (cont'd)

- ***SEC v. Turbo Global et al.*** (5/14/2020) – Company and its CEO charged with alleged false and misleading press releases about a purported "multi-national public-private-partnership" to sell thermal scanning equipment to detect individuals with fevers.

- ***SEC v. Applied Bioscience*** (5/14/220) – Company charged with alleged false claims that it had begun offering and shipping supposed finger-prick COVID-19 tests.

Specific SEC Enforcement Actions (cont'd)

- ***SEC v. Nielson*** (6/9/2020) – Penny stock trader charged with conducting an alleged fraudulent pump-and-dump scheme in the stock of biotechnology company Arrayit Corporation by making hundreds of misleading statements in an online investment forum, including an alleged false assertion that the company had developed an "approved" COVID-19 blood test.

Specific SEC Enforcement Actions (cont'd)

- ***SEC v. Gomes, et al.*** (6/9/2020) – Emergency action against five individuals and six offshore entities for an alleged fraudulent scheme that generated more than $25 million from illegal sales of multiple microcap companies' stock, including four companies that were the subject of recent SEC trading suspension orders.

Specific SEC Enforcement Actions (cont'd)

- ***SEC v. Schena*** (9/25/20) – The President and Chief Science Officer of Arrayit Corporation charged with, *e.g.*, allegedly making false claims that Arrayit had developed a COVID-19 blood test when it had not yet purchased materials to make a test, and also falsely asserting that the test had been submitted to the FDA for emergency approval.

Liu v. Securities and Exchange Commission, 591 U.S. __, No. 18-1501, slip op. (June 22, 2020)

- **Issue:** Whether the SEC can obtain an equitable remedy of disgorgement in addition to remedies available under specific statutory provisions for penalties and injunctive relief.

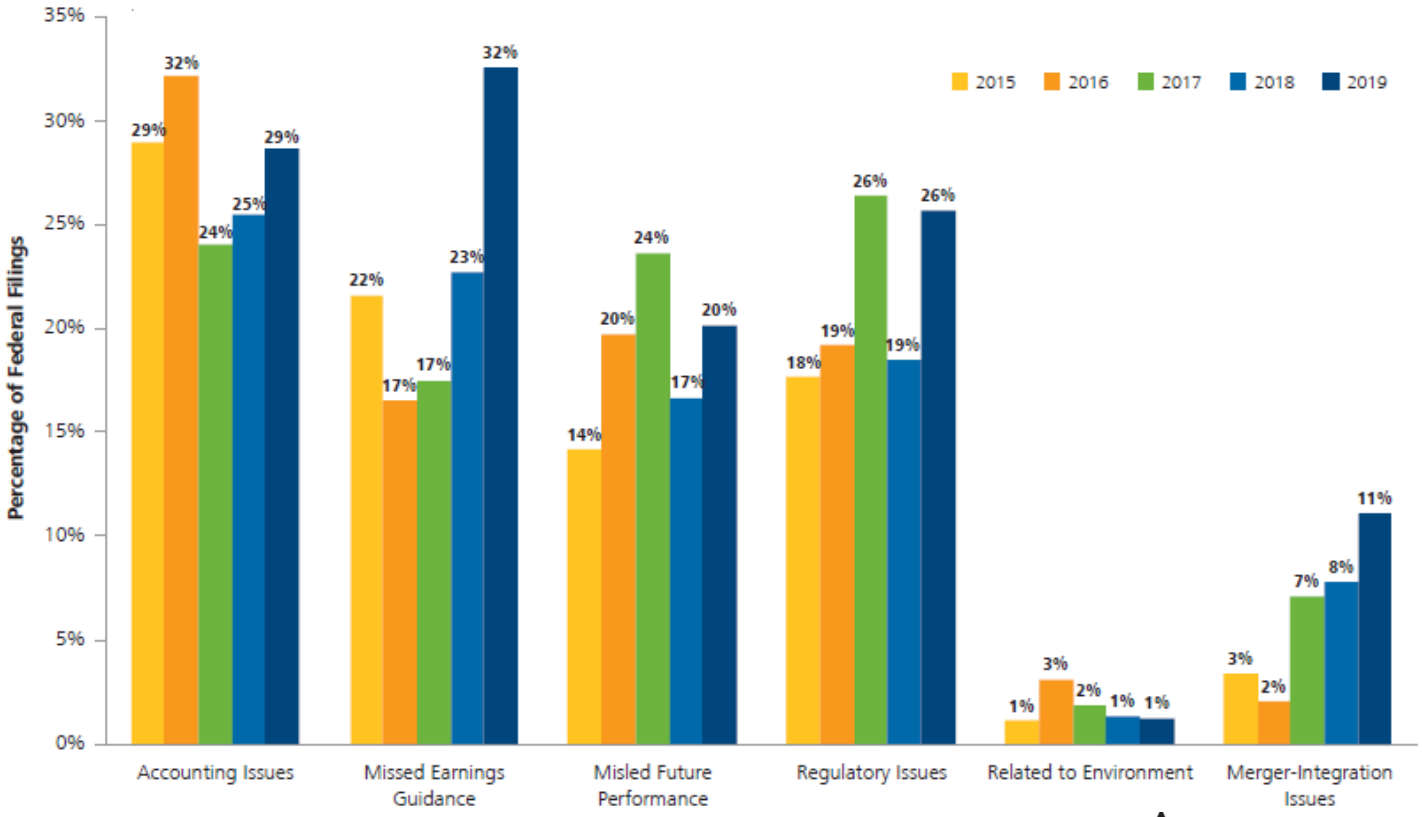
- **Holding:** Disgorgement awards sought by the SEC in federal courts are an equitable remedy permitted by the federal securities laws ***if*** capped to the wrongdoer's net profits and awarded for the benefit of wronged investors.

Liu v. Securities and Exchange Commission, 591 U.S. __, No. 18-1501, slip op. (June 22, 2020)

- **Implications:**
  - *Liu* leaves open the question of whether the SEC can continue to pursue a disgorgement remedy when funds cannot be distributed to investors.
  - And in cases where no net profit was made on the illegal activity, a defendant may now have a strong argument for lowering the disgorgement amount the SEC can recover.
  - Moreover, the Court indicated that the SEC might exceed its authority to seek disgorgement if it imposes joint-and-several liability or declines to deduct legitimate business expenses from the award.

Private Securities Litigation - Common Allegations

Figure 5. **Allegations**
Shareholder Class Actions with Alleged Violations of Rule 10b-5, Section 11, and/or Section 12
January 2015–December 2019



* Recent Trends in Securities Class Action Litigation: 2019 Full-Year Review, Nera Consulting, www.nera.com

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Private Securities Litigation Trends

- **Filing Trends in First Half of 2020**
  - 175 new federal securities class action filings, **more than 15% lower** than in the first half of each of the last three years.
  - 23% of these new cases were filed against companies in the Electronic Technology and Technology Services, the largest proportion of any sector.
  - The decline in number of filings likely reflects the pandemic's disruptive impact on court closures and stay-at-home orders during this period.

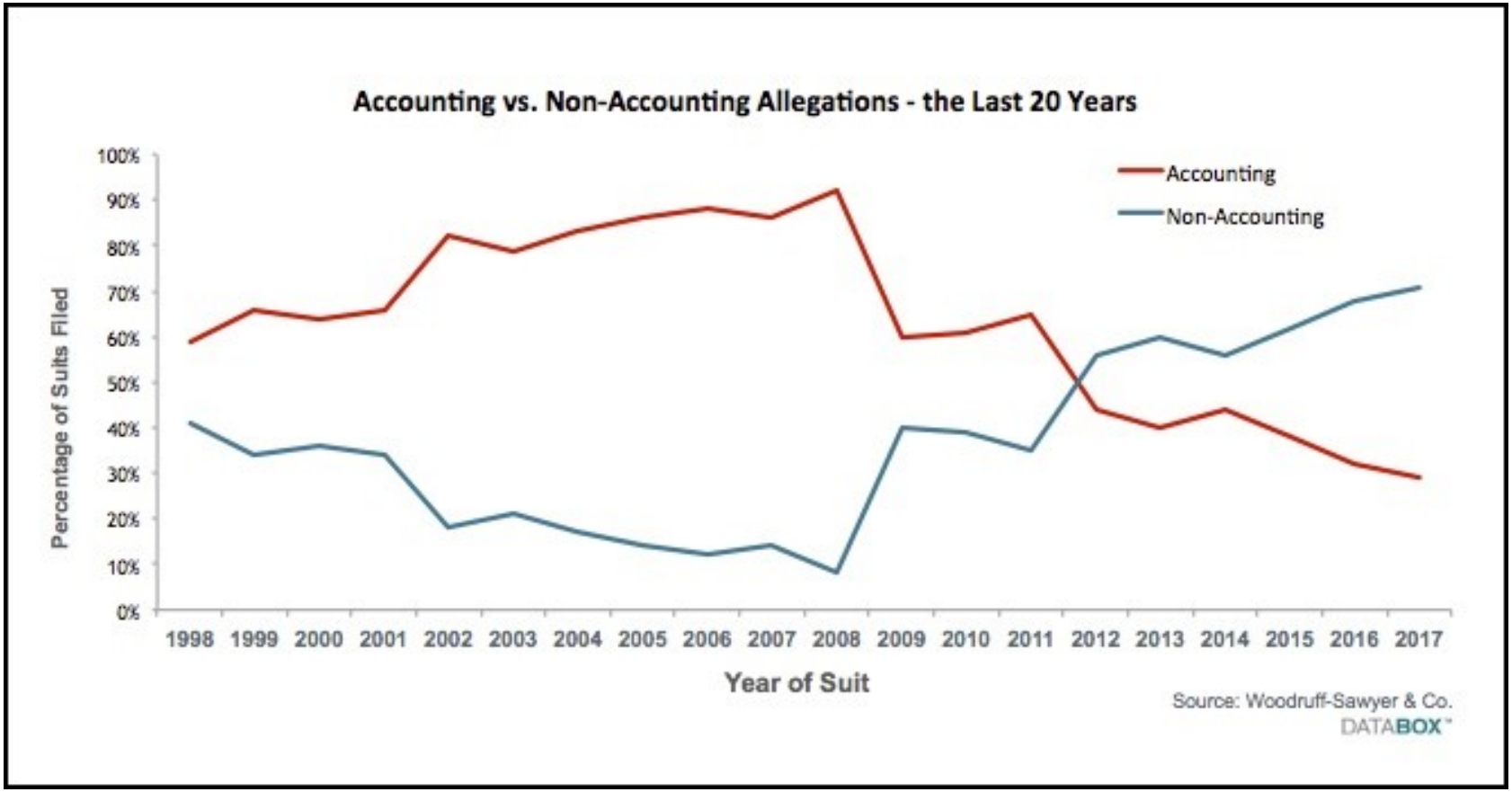
Private Securities Litigation Trends (cont'd)

- **Filing Trends in First Half of 2020**
  - The number of merger-objection cases is on pace to continue the declines of 2018 and 2019, while the number of traditional Rule 10b-5-related cases is on pace to continue the increases seen in 2016-2019.
  - These data relate only to federal court securities class action lawsuit filings as state court filings are difficult to track.

Private Securities Litigation Trends (cont'd)

- **Filing Trends in First Half of 2020 (cont'd)**
  - 11 COVID-19-related putative securities class action suits (all but one alleging Rule 10b-5 violations) were filed between March and June.
  - Five additional COVID-19-related securities class actions have been filed since June (most alleging Rule 10b-5 violations), plus a second case against *Chembio Diagnostics, Inc.*
  - Whether the volume of such litigation becomes more significant will depend in large part upon the ultimate impact of this health crisis on publicly-held companies.

Shift From Accounting to Event Driven Cases



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Event Driven Securities Litigation

- Historically, securities class filings were driven by accounting fraud cases, predicated on revenue recognition, asset impairment and allowance estimates.
- New trend is toward cases built on adverse news.
- Examples of “Event Driven” securities litigation include:
  - Cyber Insecurity;
  - Sexual harassment;
  - Emissions disclosures;
  - “Sales Culture”;
  - Products causing cancer;
  - Drug trial failures;
  - COVID-19; and
  - Diversity and inclusion.

COVID-19-Related Litigation

- **False Safety Claims Made By Companies Operating In The Cruise Line Industry**
  - *Douglas v. Norwegian Cruise Lines,* No. 1:20-cv-21107 (S.D. Fla. Mar. 12, 2020)
  - *Service Lamp Corporation Profit Sharing Plan v. Carnival Corporation,* No. 1:20-cv-22202 (S.D. Fla. May 27, 2020)
  - *City of Riviera Beach General Employees Retirement System v. Royal Caribbean Cruises LTD,* No. 20-CV-24111 (S.D. Fla. Oct. 7, 2020)

COVID-19-Related Litigation (cont'd)

- **False Claims About Medical Products Designed To Prevent, Test, Or Cure COVID-19**
  - **<u>Alleged Vaccine</u>:**
  - *McDermid v. Inovio Pharm., Inc.*, No. 20-cv-1402 (E.D. Pa. Mar. 12, 2020)
  - *Himmelberg v. Vaxart, Inc.*, No. 3:20-cv-05949 (N.D. Cal. (Aug. 24, 2020)

COVID-19-Related Litigation (cont'd)

- **False Claims About Medical Products Designed To Prevent, Test, Or Cure COVID-19 (cont'd)**
  - **Alleged Diagnostic Test**:
  - *Yannes v. SCWorx Corp.*, No. 1:20-cv-03349 (S.D.N.Y. Apr. 29, 2020)
  - *Special Situations Fund III QP, L.P., et al. v. Chembio Diagnostics, Inc.*, No. 20-CV-03753 (E.D.N.Y. Aug. 17, 2020); *Sergey Chernysh, et al. v. Chembio Diagnostics, Inc.*, No. 20-CV-02706 (E.D.N.Y. June 16, 2020)
  - *Gelt Trading, et al. v. Co-Diagnostics, Inc.*, No. 20-CV-00368 (D. Utah June 15, 2020)

COVID-19-Related Litigation (cont'd)

- **False Claims About Medical Products Designed To Prevent, Test, Or Cure COVID-19 (cont'd)**
  - **Alleged Cure:**
  - *Wasa Med. Holdings v. Sorrento Therapeutics, Inc.*, No. 20-cv-00966 (S.D. Cal. May 26, 2020)

COVID-19-Related Litigation (cont'd)

- **Failure To Disclose Potential Impact Of COVID-19 On Operations And Finances**
  - *Steve Hartel, et al. v. The GEO Group, Inc.,* No. 20-CV-81063 (S.D. Fla. July 7, 2020)
  - *Luciano Di Scala, et al. v. ProShares Ultra Bloomberg Crude Oil,* No. 20-CV-05865 (S.D.N.Y July 28, 2020)
  - *Edward A. Berg, et al. v. Velocity Financial, Inc.,* No. 20-CV-06780 (C.D. Cal. July 29, 2020)

COVID-19-Related Litigation (cont'd)

- **Failure To Disclose Potential Impact Of COVID-19 On Business And Operations, cont'd**
  - *Robert Lucas, et al. v. United States Oil Fund, LP,* No. 20-CV-04740 (S.D.N.Y. June 19, 2020)
  - *The Arbitrage Fund, et al. v. Forescout Technologies, Inc.,* No. 20-CV-03819 (N.D. Cal. June 10, 2020)
  - *Sandra Hunter, et al. v. Elanco Animal Health Incorporated,* No. 20-CV-01460 (S.D. Ind. May 20, 2020)
  - *Katherine Wandel, et al. v. Phoenix Tree Holdings Limited,* No. 20-CV-03259 (S.D.N.Y. April 24, 2020)

Lack of Board Diversity

- (Gap) Lee v. Fischer, et al, (N.D. Cal.) (Filed 9/2/2020)
  - Allegations are that the Gap publicly claims to be dedicated to racial equality while its board of directors is overwhelmingly white, without a single Black or Latino director.
  - Claims that the directors and officers have deceived stockholders and the market about making false statements about the company's commitment to diversity.
  - Allegations focus on low (4%) of African American employees at the company's headquarters, and that when it does hire minorities it does for low paying jobs in its distribution centers.
- Similar cases against NortonLifeLock, Inc., Qualcomm, Oracle, Facebook, and Monster Beverage Corporation.

IPO Risks - Post *Cyan* Litigation

- **Background:**

  - In *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061 (2018), the Supreme Court unanimously held that state courts retain concurrent jurisdiction over lawsuits asserting claims under the Securities Act of 1933.

  - The court reasoned that, although Congress apparently intended that, in enacting the Securities Litigation Uniform Standards Act (SLUSA), it had withdrawn jurisdiction over Securities Act cases from state courts, the terms of SLUSA failed to accomplish that goal.

IPO Risks - Post *Cyan* Litigation (cont'd)

- **Impact of Decision:**
  - Significant increase in the volume of state-filed '33 Act cases, especially cases litigated simultaneously in both state and federal courts.
  - Broker Woodruff Sawyer has calculated that Section 11 suits have risen 178% in the two years since *Cyan*.

IPO Risks - Post *Cyan* Litigation (cont'd)

- **Why problematic:**
  - In general, state courts do not apply either the federal courts' strict pleading standards of *Twombly* and *Iqbal or* the mandatory stay of discovery provided for by the Private Securities Litigation Reform Act (PSLRA).
  - Consequently, plaintiffs' attorneys tend to file weak cases in state court in the hope of pressuring defendants to settle.
  - Moreover, defendants often find themselves having to defend the same claims in both state and federal courts, which gives plaintiffs unfair settlement leverage as well.

Post *Cyan* Litigation: Efficacy of Forum Selection Provisions

- In March 2020, in ***Salzberg v. Sciabacucchi***, the Delaware Supreme Court upheld the facial validity of the following forum selection provision contained in three company charters before the companies went public:

  - "Unless the Company consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933. Any person or entity purchasing or otherwise acquiring any interest in any security of [the Company] shall be deemed to have notice of and consented to [this provision]."

Post *Cyan* Litigation: Efficacy of Forum Selection Provisions (cont'd)

- **Caveats:**
  - The Delaware Supreme Court only upheld the facial validity of the forum selection provision at issue in *Salzberg,* leaving open the possibility that, in a subsequent case, a Delaware court might hold a facially-valid provision invalid as applied.
  - *Sciabacucci* currently applies only to Delaware corporations and it has not yet been applied to any company incorporated in another state.

Post *Cyan* Litigation: Efficacy of Forum Selection Provisions (cont'd)

- **Caveats (cont'd):**
  - The provisions in *Salzberg* were contained in the companies' certificates of incorporation, and the shareholders had approved them before the companies went public.
  - The court's opinion stresses the "contractual setting" of these provisions and, therefore, a provision unilaterally included in a corporation's charter or bylaws by the board of directors after a public offering could be viewed as facially invalid.

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Practical Tips (cont'd)

- **Evaluate company statements about the following issues, among others, to make sure company can demonstrate what it is disclosing:**
  - Cyber security strength and policies;
  - Sexual harassment policies; and
  - Commitment to diversity and inclusion;

Costs and Effective Defense

- Range of defense costs by stage.
  - MTD
  - Class Certification
  - Discovery
  - Experts
  - Summary Judgment
  - Trial
- How to effectively manage outside counsel and motivate internal resources.
- Insurance and other risk management strategies.

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