banks, in order to permit individual banking customers quicker access to their own money, reducing demand for expensive and, at times, predatory payday loans, as well as overdrafts and the fines associated with overdrafts.

U.S. Department of the Treasury

As the vehicle that sets tax policy and issues government debt, the Treasury Department will execute Biden's financial platform and play a leading role in any economic response to COVID-19.

A Biden Treasury Department may also choose to roll back Trump Administration modifications that made it harder for the Treasury panel to designate financial firms as "systematically important." This is significant as only financial firms deemed "systematically important" are subject to heightened supervision by the Treasury.

The CFTC

The CFTC, which regulates the U.S. derivatives markets, including futures, swaps, and certain kinds of options, has been increasingly active in enforcement activity during the Trump Administration and that trend is expected to continue under Biden. The Biden CFTC may well strengthen or re-write the cross-border rule (cross-border application of certain swap dealers registration thresholds), the swap dealer capital rule (new capital and financial reporting requirements for swap dealers), and the position limits rule (amended regulations on speculative position limits to conform to Dodd Frank amendments to CEA). We may also see heightened enforcement of Title VII rules by the CFTC, which would mean more robust disclosure and reporting requirements, in addition to a continued focus on market manipulation, especially spoofing.

Conclusion

Bear in mind that not every development after the inauguration will represent a new initiative. Notwithstanding the much-noted lack of collaboration between old and new administrations, some of which has been happening beneath the radar under Trump will continue under Biden. This includes agencies' enforcement or litigation activity in the early period of a new administration, which builds on years of previous investigative work that ripens into public view under new leadership. Discerning new or merely continuing regulatory activity will require keen observation.

LOOKING BACK, AND LOOKING AHEAD, AT CORPORATE GOVERNANCE

Earlier this year, John Wilcox retired as Executive Chairman of Morrow Sodali (he is now Chairman Emeritus), a role that he held from 2006 to 2020. From 2003 to 2008 he was Senior Vice President and Head of Corporate Governance at TIAA-CREF and earlier he served as Chairman of Georgeson & Company. He is also a member of ***Wall Street Lawyer****'s editorial board. In the week before Thanksgiving,* ***Wall Street Lawyer*** *spoke to Mr. Wilcox about the many changes he's witnessed over the decades in corporate governance.*

Wall Street Lawyer*: You've just released a collection of your articles over the past 25 years,* ***The Evolution of Corporate Governance****. What themes did you discover upon reviewing and compiling your older pieces, in terms of how governance has evolved?*

John Wilcox*:* It was a very interesting exercise for me because I could see certain consistent themes emerge, those that had been my polar stars in terms of corporate governance and the role of boards of directors. Those themes have been remarkably consistent over the years, even though each time I was writing a new article I was dealing with the particular issues of that moment in time. My goal was always to look ahead, to warn companies about future challenges so that they could take action before they're in a crisis. One of the things we at Morrow Sodali have tried to do over the years is to prevent problems from happening, as opposed to reacting to them. We always tried to help our clients deal with the issues of the day. In the 1980s it was hostile takeovers, then green mail, then activism and now corporate purpose and ESG—each decade has brought its own set of challenges.

As a general theme, what I witnessed over the early years of the governance arena was an unfortunate trend for governance reforms to be initiated not by corporations but by outsiders—by shareholders seeking more rights, by activists aggressively pushing for change at a company, or by regulators responding to malfeasance or to shareholder demands. The response of the corporations in most cases was to say no. Then there would be a dust-up, a fight, and in virtually every instance, the companies would lose.

That pattern has changed. Today we see business leaders and companies taking the lead on the issues of the day—corporate purpose, the environment, societal concerns, sustainability. This is a welcome change.

"A Struggle for the Soul of the Board," one of the earliest pieces in the collection, is about what I think the governance movement has accomplished during the past three to four decades: it has redefined the "job" of corporate directors. Boards originally were a collection of senior level people, "advisors" to the CEO, who didn't need to get active until there was a crisis. But as a result of all these governance changes, we've seen that the board of directors has a real day-to-day job, one that is distinct from that of the CEO and the management of the company. The board's work is defined nowadays by a collection of issues—ESG, stakeholder rights, corporate purpose sustainability and so on—the critical policy issues which define how the corporation relates to all the parties affected by its business and operations. Those policies are the responsibility of the board of directors, whereas the implementation of these policies is the job of the CEO and executive team running the company.

So we're seeing the coming together of financial issues—the traditional metrics for companies—with intangibles and the long-term sustainability mandates that are beginning to be linked and addressed holistically.

We could describe the governance landscape today as a kind of "perfect storm" for companies. Not one that's going to destroy them, but one that's going to profoundly change the way in which they operate and the way they relate to their stakeholders and investors. I believe this moment is an inflection point in the evolution of free-market capitalism.

WSL*: What makes it so?*

Wilcox*:* It started with reconsideration of the Milton Friedman shareholder primacy doctrine. During the past three to four years people have questioned the implications of the Friedman Doctrine, as it was distorted over time into the oversimplified idea that the only thing a corporation should be held responsible for is producing a profit for shareholders. At about the same time, and I'm not sure exactly why it happened, there was a simultaneous recognition on the part of both corporations and institutional investors that these ESG issues represent material risks and value-creation opportunities for corporations, ones that have a direct impact on their financial performance.

For decades these intangible factors had been characterized as "soft" issues. The joke was that CEOs shouldn't worry about corporate governance because it wasn't directly related to competition and profit. Suddenly, everyone woke up to the fallacy of that macho posture. Maybe it was because of the financial crisis and some of the calamities that hit the corporate world—such as BP, Wells Fargo, Volkswagen, Boeing—that involved governance failures. These events woke people up to the fact that if a company didn't pay attention to these issues, its very life could be threatened.

The [2019] Business Roundtable Statement on

Corporate Purpose reflects these new ideas. I take the words of the BRT Statement literally. They represent an important adjustment in terms of what a corporation ought to be trying to achieve. A clear understanding of purpose can help a company pull together all the elements that contribute to an effective business enterprise. At the time the Statement was published, I was less interested in whether the CEO signatories would follow through on it. I thought the statement should stand on its own. I think it has and will continue to do so.

***WSL**: Has COVID contributed to the "perfect storm" conditions?*

Wilcox: What COVID has done to our economy and to corporations is help us recognize that human capital management is about much more than what goes on in the HR department. Human capital embraces all the people who are the company, which is defined as a human enterprise. We kind of forgot about the human element of business organizations. The pandemic reminded us that businesses of all sizes are collections of people working together and that the health of an enterprise depends on everyone contributing and no one being left out. So I think the pandemic, by pushing human capital management to the forefront, has had a very big impact. This is true also of the #MeToo movement and Black Lives Matter, environmental concerns and the debate over wealth inequality. These issues have begun to put the spotlight onto corporations and the private sector, illuminating their role in dealing with these national challenges. These are issues that corporations had shied away from traditionally, but today they find themselves in the hot seat.

***WSL**: What do you see changing, at least in terms of financial regulations, in the Biden Administration?*

***Wilcox**:* It's been an unusual time under the Trump Administration and SEC Chair Jay Clayton. The SEC has professed to be looking out for the interests of individual retail shareholders. They made that kind of a keynote of what they tried to accomplish. But as some critics have pointed out, a lot of what they've done has not greatly advanced the interests of small shareholders. Also, regulation of proxy advisory firms been one of their showcase issues. And that's something that has been characterized by shareholders as a solution in need of a problem.

[In a Biden-era SEC] it will be interesting to see whether the SEC pulls back a bit on that regulatory initiative or shifts its focus to these organizations' perceived conflicts of interest.

***WSL**: One thing that you mention in your introduction is that proxy system reform has been talked about for decades but yet it never seems to result in anything tangible.*

Wilcox: Reform of the proxy voting system is an issue that goes back more than 20 years. The inefficiencies, complexity, cost and lack of transparency of the proxy system are well documented, but the SEC has never achieved a solution. There are many reasons for that. Partly it's because the process is so complicated and involves so many players that it's hard for anyone to understand how it works. Many of the inefficiencies result directly from actions taken by the SEC in early 1980s, when they created the Non-Objecting/Objecting Beneficial Owner system. That structure created all kinds of complexities, including the role of the intermediary, which has become a near-monopoly whose activities oversee the voting results of every publicly-traded company in the U.S. Whether the SEC is going to look at the proxy system, I don't know. There is a host of new technology, there are mobile investment apps for those investors who want to make the investing process completely digital. It will be very interesting to see if the SEC does another review and opens up the proxy system to new technology and greater transparency.

***WSL**: Has COVID helped the push towards rethinking the annual meeting, making companies more comfortable with virtual meetings or hybrid meetings?*

Wilcox: Absolutely. Before COVID there was a lot of resistance to virtual annual meetings. There were some good reasons for that. The physical annual meeting was an event where people in power at the company were brought face to face with their shareholders. The public gathering was seen by shareholders as a media opportunity—a useful way to publicize issues at the company. Shareholders could make speeches and ask questions, and there could even be television coverage. Shareholders' concern was that if we had virtual-only annual meetings, they would lose that showcase opportunity and management would be less accountable. That was the primary concern that led to support for "hybrid" meetings that combined a physical event with expanded virtual access. However COVID has made virtual meetings an absolute necessity, and I think people are going to learn to live with them. They do solve certain problems such as access by shareholders in different time zones. It will be interesting to see what happens in 2021 and 2022, if and when the virus will no longer be a threat. We will see whether companies and shareholders will still press for the hybrid solution, or settle on virtual-only meetings. But virtual is here to stay, it will be part of the annual meeting process going forward.

WSL*: What else to watch out for in the next four years?*

Wilcox*:* I've been interested in some of the speeches given by Alison Herren Lee at the SEC. She's opened the door to something I've been asking for a long time—a more flexible approach to corporate reporting. The U.S. has a rules-based disclosure system where legal considerations play a big role in deciding what companies say to their shareholders and the investing public. Because our disclosure rules are so detailed, it can be difficult for companies to compose a narrative that "tells their story." To tell individual stories with forward-looking implications, corporate reporting has to be more than a compliance exercise. It has to integrate policy, strategy, competitive issues and financial results: the particulars of an individual business at that moment in its history. That "story" is what companies need and want to tell shareholders in order for them to really understand and evaluate the value drivers, the risk profile, the opportunities, the health of the individual company.

It's easier for companies to do this in regions that have principles-based governance systems. But here, our strict disclosure rules can mean that individualized reporting beyond disclosure limits can expose companies to increased liability. Commissioner Lee has encouraged a more principles-based approach to corporate reporting. I find that very encouraging, and I hope maybe the Commission will move in that direction. In one of my recent articles I mentioned the innovative approaches to integrated reporting taken by Intel and Travelers Corp. These are among many outstanding examples of U.S. companies finding ways to achieve the expanded corporate reporting suggested by Commissioner Lee. I am confident this trend will continue.

Wilcox's book, ***The Evolution of Corporate Governance****, is available for download here: https://morrowsodali.com/insights/the-evolution-of-corporate-governance.*