



Governance & Proxy Review

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The Way We See It – Commentary from The Altman Group

The SEC Deputizes Investors I: Preparing for the Age of the Sheriffs – What Color Are Their Hats?

By Francis H. Byrd, Managing Director, Corporate Governance Practice Co-Leader

The SEC announced last week that it would move forward with a version of proxy access, a process that would grant dissident investors the right to have their candidates placed on the same proxy card with management's nominees. This leveling of the playing field on behalf of institutional investors has been cheered by investor advocates (*see the Op-Ed piece by Anne Simpson of CalPERS in the FT above*) and dreaded by American corporations (both the Business Roundtable ("BRT") and the U.S. Chamber of Commerce ("USCC") have roundly attacked the proposal). Assuming the proposal or a modified form of it is eventually enacted - - assuming state law and other challenges fail issuers will be entering a new era. How this new age plays out is not entirely clear, however, one could reasonably expect an increase in the number of proxy contests, vote no campaigns against directors and shareholder pressure on companies.

Both sides have powerful and legitimate concerns behind their arguments, but I'm not going to focus on their specific point and counterpoint at this time. I want to discuss as a practical matter an issue that often gets missed in the usual screaming matches (institutional investors: "we need to stop those greedy executives with their compliant boards" versus large companies: "politicians and unions are out to destroy our American way of life"). I have a somewhat different perspective from the various vantage points or seats at the table I've occupied at during my nearly 20 year career. I've worked for a mutual fund firm, a proxy solicitor/IR firm, a major activist public pension fund and a leading global credit rating agency.

Here's my opinion: The BRT and USCC are overly concerned about what the unions and public funds will and can do; seeing them largely as black hats. Should access become a reality I would advise them to prepare for more activism from the Ichans, Ackmans and Peltzes and hedge fund community generally (sometimes black or gray hats) than from the public pension and union funds. The public funds and unions, even with the much reduced cost of a proxy contest – thanks to proxy access – can not act with the speed or deliberateness of hedge funds or shareholder activists. Also as long-term investors, often in index funds that don't allow for an arbitrage or a "Wall Street walk" mentality, the public pension funds are seeking long-term shareholder value and want to make sure the company will be in a position to provide those earnings to fund the mandatory retirement needs of their

Governance News and Views from across the spectrum



America's governance reform must not be ducked

There's a hard wind blowing for corporate America. That's the take from Anne Simpson, the new director of corporate governance engagement of CalPERS (the largest U.S. public pension fund) in an opinion piece in the FT. Simpson makes the case for accepting SEC's proxy access and 452 rule amendments, recommending that corporate America get prepared for engagement as opposed to simply saying "No Thanks."

[Link to story](#)

Funds move to halt Chrysler restructuring

Speaking of public pension funds flexing their muscle... Bernard Simon in Toronto and Nicole Bullock of the FT have an interesting story on the role played by the Indiana State Teachers' Retirement Fund and Richard Mourdock, the Indiana State Treasurer in fighting the cram-downs forced on Chrysler's creditors.

[Link to story](#)

DealBook

Chrysler Sales Procedure to Go Forward

As a follow-up on the FT's story on Chrysler, NYT DealBook reports, as of the evening of May 26th, on the attempt by Indiana state pension funds to remove Chrysler from

beneficiaries. Union funds may have a more pointed agenda, however, since they rely on the votes of their much larger public fund allies to support their shareholder resolutions and will need to rely heavily on their support for any dissident slates they might propose. I'll raise another important issue in the form of a question: does any one know of any municipal, state or county government agency that can react with speed of hedge fund or asset management firm? I expect the answer will be No! Yes, the public funds and unions will use their new found powers, but critics and observers should expect that those instances will (or would be) relatively rare.

So who will be the sheriffs of this new age? Hedge funds and shareholder activists, like Phil Goldstein of Bulldog Investors and Nelson Peltz who took on Wendy's and Heinz and there will be many others, especially as the cost of running a dissident slate drops to the cost of a postage stamp (to mail the names of the dissident slate to the company). Some of these investors will be seeking to increase long-term value for all shareholders and others will be promoting strategies designed to create a short-term boost in the value of their own positions, but **all** will have been deputized to police board accountability and director oversight of management. Companies should be mindful of the fact that **all** investors (sheriffs) can and do switch hats frequently. Those switches often depend on the level and quality of engagement between the company and the investor. Sometime the color hat depends on whether you have a seat at the table.

Boards and managements need to spend more time preparing for the age of the sheriffs by identifying who their investors (white, gray or black hats) are and determining which set of sheriffs they should reach out to and how best to engage with them.

The Legal Opinion

AKIN GUMP
STRAUSS HAUER & FELD LLP

LATHAM & WATKINS LLP

This week we have two articles you should take time to review. The first is a discussion on steps boards should take on oversight, strategic planning, takeover defenses, transformative transactions and *liquidity* by Terry M. Schpok, a partner in Akin Gump's Dallas office has an interview with the Metropolitan Corporate Counsel newsletter. ([Link to document](#))

The second, from Latham & Watkins, has a quick review and analysis of the SEC's proxy access proposal and key provisions of Senator Schumer's proposed bill on corporate governance.

([Link to document](#))

Bankruptcy court. Judge Thomas Griesa of the Federal District Court for the Southern District of Manhattan denied a motion by the funds to force the Chrysler case out of the bankruptcy into district court, but admonished lawyers for Chrysler and the federal government to not place "hindrances" to any appeal by the Indiana pension funds. The Indiana funds were represented by White & Case. The story provides a link to the judge's order.

[Link to story](#)

THE WALL STREET JOURNAL

Shell Investors Revolt over Executive Pay Plan

By [GUY CHAZAN](#) and [JOANN S. LUBLIN](#)
Chazan and Lublin of the WSJ discuss UK investors' backlash against executive compensation at Shell.

[Link to story](#)

FORTUNE

Behind the Fortune 500's first female CEO handoff

Patricia Sellers, Fortune Editor-at-Large, has some musings and observations about the CEO succession process and executive interplay underlying the transfer of power from Anne Mulcahy to Ursula Burns at Xerox.

[Link to story](#)

The New York Times

Elect a Dissident, and You May Win a Prize

In her Sunday, May 24th Fair Game column, Gretchen Morgenson focuses on the SEC's proxy access proposal and rebuts claims that proxy access will destroy shareholder value using a just released study by the IRRC Institute and advisory firm Proxy Governance on hedge fund activism and the role of dissident directors on target company boards. We have a link to the study.

(<http://www.irrcinstitute.org/projects.php>)

[Link to story](#)

How will **RISKMETRICS** and **GLASS LEWIS**
evaluate your proposals?

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accumulating shares?

Are you prepared for the
INCREASING NUMBER of
SHAREHOLDER PROPOSALS this year?

Do You Need a "FIGHTER" on
Your Side this **PROXY SEASON**?



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Target says shareholders re-elect directors

Nicole Maestri of Reuters has a story that hit the wires on Thursday afternoon, on the re-election of the Target Board of Directors. The results represent a loss for Bill Ackman and his slate at Target. No details were available on management's margin of victory.



CBS Story: "SEC Attorneys Probed For Insider Trading"

Here is a story pointing out the continued weaknesses at the Securities and Exchange Commission even as the agency prepares to deputize institutional investors to oversee directors and boards, work remains to be done to strengthen its own internal control processes.

[\(Link to story\)](#)

Read the report from the SEC's Inspector General's office

[\(Link to report\)](#)

Bloomberg.com

Goldman Shareholders Suffered as Blankfein Earned \$43 Million Ian Katz of Bloomberg has a story on CEO compensation and company performance discussing a number of companies in the financial services industry.

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