

# Governance & Proxy Review

Volume 1: Issue #30

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Edited by Francis H. Byrd

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## As We See It - Commentary from The Altman Group

**This will be our final issue for 2009 we will be taking a two week break for the holidays. The Governance & Proxy Review will resume publication on January 8, 2010.**

**We Wish You A Happy and Safe Holiday Season and Happy New Year!**

### Looking Ahead at 2010 By Looking Back at 2009

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

“Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning”. – Sir Winston Spencer Churchill

“Don’t look back. Something might be gaining on you”. – Leroy (Satchel) Paige

As 2009 comes to a close and we prepare for the 2010 proxy season, it is time to contemplate the changes that have occurred, and what they might portend for 2010. The two quotes above seem to best encapsulate both the mood and the reality of those involved in corporate governance.

As 2009 started, advisors and observers hunkered down to weather all of the dramatic changes that appeared to be certainties: Proxy Access, ‘Say on Pay’ (SOP), and separation of the role of Chairman from that of Chief Executive would altered by legislative fiat or regulatory order. Yet despite all of the motion and noise, only one major governance change took place in 2009, that of the Securities and Exchange Commission amending the broker discretionary vote, NYSE Rule 452, relating to director elections. 2009 might have been an even more dramatic year for corporate governance had it not been for the Obama administration focus on health care. This shift in attention on the part of the White House has been cited by numerous commentators as a key reason for the decrease in momentum of financial and governance-related regulation and legislation.

Looking ahead to 2010, the table is mostly set, but surprises are still possible. The Securities and Exchange

## Governance News & Views from across the spectrum

>> **Executive Compensation**

### AGENDA

#### **December 14th, Boards: Ignorance, ‘Bad Apples’ Harmful to Comp Planning**

Josh Martin discusses directors’ concerns regarding obstacles to better compensation planning.

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### THE WALL STREET JOURNAL

#### **December 14th, Pay Worries Slow BofA Search**

Dan Fitzpatrick and Joann S. Lublin report on the BofA’s CEO recruitment problems.

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### guardian.co.uk

#### **December 13th, Financial Services Authority Vets Banks' Pay Policies**

Jill Treanor reports on a renewed effort by the FSA to review bankers pay and bonuses.

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### Bloomberg.com

#### **December 12th, Ackermann Sees German ‘Advantage’ Without Bonus Tax**

Commission surprised many observers earlier this week by reopening the comment period on the Proxy Access issue (please see our note below regarding our survey on proxy access, a follow-up to our analysis of the 500 plus comment letters to the SEC on this question) after a review of research provided by the Business Roundtable and the Council of Institutional Investors. This past Wednesday the Commission also approved additional disclosure requirements on compensation, risk, board diversity and director nominee qualifications (see stories and links under Investor Action). The action on disclosure was not unexpected and the Commission expects to have specific rules in place for the 2010 proxy season.

### **The Issues “Gaining” on Us**

At the end of 2008, a number of commentators predicted an SEC tilted toward activists and institutional investors, with the enactment of proxy access and ‘Say on Pay’ slotted for the 2011 proxy season. However, public anger over TARP, the financial bailout, and the continuing credit crunch left the impression that investor agenda items would move to the forefront and be codified as rules for the 2010 season. Those expectations were clearly, in retrospect, overstated.

At the risk of being redundant, proxy access and ‘Say on Pay’ are likely to either become law or SEC mandates by the end of 2010. However, the future for these two investor agenda items do not look quite the way many expected at the end of 2008, or for much of 2009.

### **‘Say on Pay’**

The House of Representatives last week passed H.R. 4173 – The Wall Street Reform and Consumer Protection Act of 2009. This bill includes a number governance-related reforms, notably provisions for ‘Say on Pay’ and legal authorization for the SEC to propose proxy access. The question now is how will the Senate view the House bill, and which of the bills (among them Senator Schumer’s Shareholder Bill of Rights), will pass the Senate and reach the conference committee reconciliation process with H.R. 4173.

Hearings on the Schumer and other Senate bills, including ‘Say on Pay’, are likely to take place sometime in the first quarter of 2010 – depending of course on the fate of health care. This means that there remain opportunities for interested parties to shape ‘Say on Pay’ from the annual vote favored by some activist institutions to a bi-annual or tri-annual referendum on executive compensation as proposed by the United Brotherhood of Carpenters (UBC). While many companies are adopting an advisory vote on pay in advance, it is not entirely clear what form ‘Say on Pay’ will take, and investor advocates remain concerned this issue may slip from their grasp.

### **Proxy Access Looms**

The most contentious issue, Proxy Access, remains unfinished as 2009 comes to an end. For most of the year

Aaron Kirchfeld discusses comments from Deutsche Bank AG Chief Executive Officer Josef Ackermann on the comparative advantage the UK/France bonus tax creates for Germany.

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### **December 11th, U.S. Pay Tsar Expands Pay Rules**

Tom Braithwaite discusses the imposition of compensation limits by Kenneth Feinberg.

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### **December 10th, Goldman Scraps Cash Bonuses For Leaders**

Justin Baer reports on Goldman’s deal with activist investors on bonuses and ‘Say on Pay.’

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### **December 10th, Goldman Bows to Pressure Over Pay**

Joe Bel Bruno discusses the announcement on changes to the 2009 bonus plan.

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### **December 10th, GE Chief Attacks Executive ‘Greed’**

Francesco Guerrera discusses comments by General Electric CEO Jeffery Immelt on compensation for Chief Executives.

See Guerrera video: “Executive Pay Raises Ire”  
Text of Jeffery Immelt’s speech at West Point,  
[Renewing American Leadership.](#)

commentators from all sides believed ‘access’ was a done deal and were awaiting a 3/2 Commission vote for a race to the courthouse. That, as seen through the SEC’s reopening of the comment period on proxy access, has clearly not been the case. As of now the Commission is seeking additional information and input from all interested parties as it pertains to ‘workability issues.’

As mentioned in previous issues of our newsletter, [The Altman Group published a special report](#) detailing proposals contained in 500+ letters submitted to the SEC on “facilitating shareholder director nominations.”

In the report’s conclusion, we recommended that: “Before proceeding further, the SEC might consider taking the time to do a broader survey of companies and likely users of the proposed rule – in particular with regard to eligibility and threshold criteria.”

### **The Role of Private Ordering**

Private ordering, where boards, companies and their shareholders arrive at consensus on issues such as ‘Say on Pay’, continues to play a role in shaping corporate governance best practice. As we move into 2010, private ordering may play a larger part in helping to determine the nature of ‘Say on Pay’, and perhaps proxy access as well. Often private ordering is the direct result of activist institutions negotiating with companies over issues such as compensation. When looking at ‘Say on Pay’, private ordering can result in companies enacting similar proposals in different ways.

### **Different Dance Partners, Different Music, Similar But Not Identical Results**

With both ‘Say on Pay’ and Proxy Access still open questions, some wonder what role, if any, private ordering will play. How would the Senate (and legislative sponsors Schumer and Dodd) react to several companies agreeing to enact SOP? What if the UBC were to convince another five or six large/mega cap firms to undertake their tri-annual approach, as Microsoft did? Does Goldman’s adoption, as the most prominent post-TARP bank, of an annual SOP vote make an annual referendum more likely to be the standard? Would that change the nature of the discussion and proposals in the Senate? The same questions occur relating to the issue of Proxy Access. Would enactment of the Delaware opt-out provision by a number of companies create a groundswell for Congressional action and a further rethinking by the SEC?

These are open questions because the individual actions of companies and investors can have an impact on the views of regulators and elected officials. What is clear is that these unsettled matters will be coming to a head in 2010 against a backdrop that includes the fallout from the amending of Rule 452 and new rules pertaining to disclosure on compensation, risk, director nominee selection and board diversity. To go out on a limb, it appears that both SOP and Proxy Access will be fully realized by the end of 2010. However, the shape and

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THE WALL STREET JOURNAL

### **December 10th, Only France to Join U.K. in Banker Bonus Tax**

Sara Schaefer Munoz, David Gauthier-Villars and Martin Vaughan report on the effort by the UK and French governments to tax bonuses paid to banking executives.

[> read more](#)



### **December 10th, Belated Preemptive Strike by Goldman**

Neil Hume discusses pay moves by Goldman and why the ‘Say on Pay’ deal may not mean as much as the activist institutions think.

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THE WALL STREET JOURNAL

### **December 10th, Firms Face New Curbs on Pay**

Deborah Solomon, Sara Schaefer Muñoz and Alistair MacDonald discuss U.S. and UK sanctions on pay and bonuses.

[> read more](#)

[>>Global Dispatches](#)



### **December 14th, Abu Dhabi Steps In to Bail Out Dubai**

Simeon Kerr, Robin Wigglesworth, and Andrew England discuss the surprise move by Abu Dhabi.

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scope of these measures still remain to be seen. The only safe prediction to make is that the 2010 proxy season will set the table for 2011.

### **The Altman Group's Opinion Survey Regarding "Facilitating Shareholder Director Nominations" ("Proxy Access")**

The Altman Group is conducting a survey of opinions regarding issues raised by the SEC's latest proposing release on "Facilitating Shareholder Director Nominations" ("Proxy Access"). The SEC indicated in its release of December 14, 2009 (33-9086, File No. S7-10-09) that it is seeking more input on the potential impact of Proposed Rule 14a-11. In particular, the Commission has reopened the period for comments to obtain more input on data and conclusions found in several studies previously submitted to the SEC (and which are available in the public comment file [No. S7-10-09]). As part of a planned response by The Altman Group to the SEC's requests for comments, we are asking that executives and directors of public companies participate in a very short survey (only 20 questions/5-10 minutes), which was designed to provide constructive insights into selected issues concerning the SEC's proposed rule on direct proxy access. To participate, please go to the following link: <http://www.surveymonkey.com/s/98NMLPP>

### **December 13th, Foreigners' Profits Soar on Seoul Bourse**

Yonhap reports on profits for foreign equity investors.

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**The New York Times**

### **December 13th, Bond Vigilantes Prowling Europe**

Landon Thomas Jr. discusses the role of global bond investors in pressuring Britain and Greece on debt.

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**Bloomberg.com**

### **December 13th, Nakheel Possible Default to Affect \$5.25 Billion Debt**

Haris Anwar reports on bond documents that show the Dubai state-controlled developer Nakheel PJSC's possible non-payment of its Islamic bond might trigger defaults on two other securities, bringing the total of affected securities to \$5.25 billion.

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**FT.com**  
FINANCIAL TIMES

### **December 11th, ING to Repay €5 Billion to Dutch Government**

Michael Steen discusses the plans for a refocused ING.

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**SPIEGEL ONLINE**

### **December 11th, 'No One Should Rule Out a Greek Bankruptcy'**

Jess Smee comments on the possibility of Greece declaring bankruptcy.

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**December 11th, Bankers Seek Out  
Celebrity Lawyers**

Rachel Sanderson reports on a trend among UK bankers with high bonuses.

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>>[Proxy Contests/Battles for Control](#)

[guardian.co.uk](#)

**December 14th, Cadbury Urges  
Shareholders Not to Let Kraft 'steal  
your company'**

Graeme Wearden, on the Market Forces Live Blog, reports on the Cadbury strategy against Kraft.

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**Cadbury v Kraft: How Do the  
Confectionery Brands Stack Up?**

Zoe Wood compares the two companies for the Guardian's DataSheet Blog.

[View Brand Comparison DataSheet](#)

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**December 14th, Chocolate Deal Puts  
Hershey Risk Under Scrutiny**

Tony Chapelle discusses the role of the risk committee in approving a potential bid for the Cadbury.

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>>[Investor Action](#)

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**December 16th, SEC Approves New  
Compensation, Governance Disclosure  
Rules for 2010**

Kristin Gribben reports on the SEC approval of additional disclosure focused on compensation, risk, board diversity and director nominee qualifications.

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### **December 14th, SEC Reopens Public Comment Period for Shareholder Director Nomination Proposal**

The SEC, in a media release, announced on Monday, December 14th, that it is reopening the public comment period for its shareholder director nomination proposal, in order to seek additional views in light of data and related analyses received by the Commission at or after the close of the original public comment period which ended August 17th.

Proposed Rule Release No. 33-9086

[> read more](#)

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### **>>The Boardroom**



### **December 16th, BofA name Moynihan as new chief executive**

Greg Farrell reports on the selection of Brian Moynihan to be the next chief executive of Bank of America. The story also discusses the reaction from Finger Interests, a dissident shareholder, who had pressed the BofA board to select an outsider for the CEO; and has retained The Altman Group, a proxy solicitation and corporate governance consulting firm, suggesting a battle over the board's selection and other governance issues at next year's annual shareholder meeting.

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### **December 15th, Bank of America Can't Sign New CEO**

Dan Fitzpatrick and Joann S. Lublin report on the

breakdown of negotiations between the BofA board and its top outside CEO candidate Robert Kelly of BNY Mellon.

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### **December 14th, As Boards Become More Accountable, They Also Get Smaller**

Marc Hogan discusses the trend in the decline in the size of corporate boards.

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Joann S. Lubin discusses the trend in seeking directors with high-level human resources expertise.

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### **December 13th, Accor Reaches Demerger Crossroads**

Scheherazade Daneshkhu reports on options for the board of Europe's largest hotel group.

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## Bloomberg.com

### **December 11th, Bonderman Using Socratic Method in GM Boardroom Raises Hackles**

David Welch and Jeff Green report on director activism in the boardroom.

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**December 11th, Board Shake-up  
Continues at Anglo American**

Philip Stafford discusses board changes at Anglo American.

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**McKinsey Quarterly**

**December 2009, Making the Most of  
Corporate Social Responsibility**

Tracey Keys, Thomas W. Malnight, and Kees van der Graaf discuss the challenges and value of Corporate Social Responsibility (CSR) programs. Thomas Malnight is a professor of strategy and general management at the International Institute for Management Development (IMD), in Lausanne, Switzerland, where Tracey Keys is a program manager. Kees van der Graaf is Executive-in-Residence at IMD, following his retirement from the board of Unilever, where he was also president of the European business.

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