



# The Altman Group Governance & Proxy Review

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Edited by Francis H. Byrd

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

### **Altman Group Survey On Proxy Access Issues**

**Kenneth L. Altman, President**

In November 2009, The Altman Group published a study of 500+ letters that were submitted to the SEC following the release of the Commission's proposing release on "Facilitating Shareholder Director Nominations." One of our conclusions from that study was that the sample base of letters submitted by companies and investors likely to be affected by the proposed rule was too small to draw effective policy judgments on selected issues, "in particular with regard to eligibility and threshold criteria." When the SEC reopened the comment period in December, The Altman Group stepped up to offer companies, investors, and others an opportunity to participate in a short online survey on selected proxy access issues. Questions selected for the survey included a mix of fundamental choices and topics related to eligibility and threshold criteria. The survey results presented here are based on responses received from December 18, 2009 through January 13, 2010.

The target base for this online survey was reached primarily through e-mailed requests, publicity generated by various newsletters that are widely read by proxy and corporate governance professionals, as well as communications distributed by The NASDAQ OMX Group, Inc. Indeed, the largest segment of survey responses came from directors and executives of NASDAQ-listed companies. Participants came from 22 NASDAQ-listed companies (nearly twice the number of NASDAQ-listed companies that have so far submitted letters to the SEC on "Facilitating Shareholder Director Nominations" [File: S7-10-09]) and 13 NYSE-listed companies.

Nearly the entire base of survey participants was comprised of corporate directors, senior executives of listed companies, corporate governance and proxy specialists at investment management institutions, and other corporate governance experts (from service providers and academia). It is important to note that we took steps to obtain survey responses only from persons disclosing their individual names, titles, and company

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Serena Ng reports on an attempt by AIG to tamp down anger on bonus compensation for executives.

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Stephen Grocer discusses expected bonus compensation for bankers.

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names. Our communications with individuals exploring possible participation in the survey indicate that this requirement for disclosure (to go on the record, as it were) significantly lowered the response rate.

We also screened the original base of responses to remove those in which participants failed to clearly identify themselves. The number of eligible responses was thus narrowed down to a total of 47. Some 70% of the eligible responses came from persons involved with companies/firms that have not submitted letters to the SEC on the proposed rule (File: S7-10-09).

The average market capitalization of public companies from which directors or executives participated in the survey was \$26.1B. While 4 companies represented in the survey had market capitalizations above \$100B, 8 companies had market capitalizations between \$5B and \$100B, and another 8 companies had market capitalizations between \$1B and \$5B. Sixteen small-cap companies (with market capitalizations below \$1B) were also represented in the survey.

### **Overview of Survey Results**

One of the most interesting findings from the survey related to forecasts by participants for the “% of all companies listed on U.S. exchanges” that would be expected to face “a shareholder director nomination under PR 14a-11 in 2011” if the proposed rule is adopted in time for next year’s proxy season. The average forecast was 15.0% (median forecast = 10.0%). The results reflect expectations that the proposed rule will impact hundreds of publicly-traded companies each year and present a far more significant burden on corporate boards than has been suggested by some advocates of proposed rule 14a-11.

While the consensus views of survey participants from public companies were largely consistent with those found in comments from companies submitted to the SEC on the proposed rule, the survey also presented an opportunity to gain greater insight into what companies see as preferred eligibility and threshold criteria. First, it came as little surprise to see that 94.4% of participants from public companies opposed adoption of proposed rule 14a-11. There was also no surprise to find an overwhelming and broad-based consensus (95.7% of all survey responses) supporting elimination of the “first in” rule (in cases of multiple PR14a-11 nominations) in favor of giving priority to nominations by the shareowners (individual or group) holding the largest number of shares. Some 86.1% of survey participants from public companies also indicated that a company should be exempted from Proposed Rule 14a-11 if it has a bylaw governing direct proxy access. And 83.3% of the same segment of survey participants indicated that a company’s nominating committee should retain a power under PR 14a-11 to unilaterally exclude shareholder director nominees that the committee determines to be

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Zhang Shidong and Shiyin Chen discuss the rise of the Shanghai stock market.

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Daniel Thomas reports on stability in the price of high-end real estate in the gulf state of Bahrain.

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### **>>Proxy Contests/Battles for Control**

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Betsy Quick has comments from Warren Buffett on the Kraft-Cadbury deal.

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DealBook discusses the latest turn in the Novartis-Alcon battle.

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unqualified. When presented with a range of alternative limits on the number of shareholder director nominees using PR14a-11 for a single annual/special meeting, the largest number of participants from public companies (47.2%) favored having a limit of one PR14a-11 nominee per annual/special meeting.

Survey participants from public companies also strongly favored the following (showing % of responses from this segment in favor):

- Requiring all shareholder director nominees under Proposed Rule 14a-11 to meet the same independence and other standards as are required, by company bylaws and regulatory requirements, of all other directors at a company (100.0%);
- Allowing companies to have the flexibility to design “user friendly” proxy cards and notices, including a single vote option for the company’s nominees as a group (100.0%);
- Prohibiting the simultaneous use of PR14a-11 nominations by any shareholder (or group of shareholders) conducting a traditional proxy contest at the same annual or special meeting (94.4%); and,
- Excluding all shareholder director nominations advanced under Proposed Rule 14a-11 in the event of a traditional proxy contest at the same annual or special meeting (80.5%).

There were some surprises regarding opinions on eligibility and threshold criteria. Where our analysis of letters from companies to the SEC found that the most commonly recommended requirement for length of ownership for shareholders to be eligible to nominate directors was 2 years (48.9% of all survey responses favored 2 years), survey participants from public companies narrowly favored a period of 3 years (41.7% vs. 38.9% in favor of a 2 year period). Decision-makers at small-cap companies (those with market capitalizations of under \$1B) also showed a slight bias (vs. participants from larger-cap companies) in favor of higher ownership thresholds for shareholders to be eligible to nominate a director under Proposed Rule 14a-11. While 50% of all participants from public companies favored an ownership threshold of 5% of shares outstanding (O/S) for a shareholder to be eligible to nominate a director under PR14a-11, some 38.9% favored a 10% threshold. In contrast, some 44% of participants from companies having market capitalizations of under \$1B favored an ownership threshold of 10% of O/S.

Survey participants from public companies supported resubmission standards both for shareholders (if a director nominated by the shareholder under PR14a-11 fails to get elected [77.8% in favor] or all nominees of the shareholder fail to meet a minimum threshold of total votes cast [88.9% in favor]) and nominees (who fail to

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Dana Cimilluca, Jeffrey McCracken, and Ilan Brat report on Cadbury’s acceptance of Kraft’s bid.

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Jenny Wiggins discusses the Kraft deal with Cadbury Chairman Roger Carr.

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Jenny Wiggins and Lina Saigol report on the deal between Cadbury and Kraft.

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Business Editor Dan Roberts discusses the reaction of British Prime Minister Brown to the announcement of the deal.

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The Observer columnist Ruth Sunderland comments on the need for action by the Business Secretary, Lord Mandelson to protect British business from foreign ownership.

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get a % threshold of votes [83.3% in favor]). Opinion among participants from companies was divided over how long a potential exclusion from submitting future PR14a-11 nominations should last for the shareholder if a nominated director fails to get elected (exclusion of 1 year [16.7% in favor], 2 years [22.2% in favor], 3 years [22.2% in favor], and 5 years [16.7% in favor]). Participants from companies favored an exclusion from future nominations for shareholders who see all director nominations under PR14a-11 fail to secure a minimum % of total votes (where the most common responses favored minimum thresholds of 25% of total votes cast [38.9%] or 35% of total votes cast [27.8%]). As for PR14a-11 shareholder director nominees (question 16), the most commonly supported periods of ineligibility for resubmission were 2 years [by 25.0% of participants from public companies] and 3 years [by 27.8% of participants from public companies]. The most commonly supported thresholds of % of total votes cast - below which shareholder director nominees would become ineligible for resubmission - were 35% [by 38.89% of survey participants from public companies] and 25% of total votes cast [supported by 25.0% of survey participants from public companies].

The survey also asked participants for their views on the potential inclusion of “triggering events” that would have to occur before shareholders could nominate directors under proposed rule 14a-11. Some 27.7% of respondents opposed the inclusion of triggering events (with opposition coming primarily from survey participants who were not from listed companies). Some 46.8% of all survey participants supported the following potential triggering events: a “company does not act on a shareholder proposal that receives a majority of votes cast”; and “at least one director failed at a prior meeting to secure support from at least 50% of votes cast” (note: another participant wrote in favoring a triggering event based on “at least 2 directors failing to receive 50% of votes cast”). Few participants (only 17.0%) supported the concept of a triggering event based on withhold votes for a director of at least 35% of total votes cast. A write-in suggestion raised the concept of a triggering event based on a nominee failing to get a majority vote, but who “remains in office.” Curiously, two of the write-in responses on this topic focused on a triggering event standard based on declining firm value and stock prices over the preceding 3-5 years.

[To see the full survey, please follow this link](#)

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Marc Hogan discusses the prospects for passage of governance reform legislation promoted by retiring Senator Chris Dodd.

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David Enrich reports on efforts by the AFL-CIO and American Federation for State, County and Municipal Employees to secure the resignation of Citigroup director Michael Armstrong.

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Kristin Gribben discusses the approaches companies look to take in response to the new SEC disclosure requirement on director experience.

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Tony Chapelle examines the role of technology in assisting directors with their risk oversight responsibilities.

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DealBook reports on former lead director Peter J. Tobin's appointment as interim CEO of the troubled financial firm.

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John D. McKinnon reports on the first session of the Financial Crisis Inquiry Commission.

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Gary Hamel comments on what he sees as missing from corporate management.

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