

Governance & Proxy Review

Volume 1: Issue #35

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Edited by Francis H. Byrd

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Beginning with this week's issue, Governance & Proxy Review (G&PR) will be published on a bi-weekly basis, an acknowledgment of just how busy the 2010 proxy season will be for all of us. We will continue to bring you the best in governance (and proxy) information, thoughtful commentary and insights. The next issue of G&PR will be released on February 19, 2010. We welcome your comments and questions. Thank you for your continued support and interest.

As We See It - Commentary from The Altman Group

Editor's Note: Last week I attended the Society of Corporate Secretaries & Governance Professionals' (SCS&GP) Essentials Conference, at Disney's Grand Floridian Hotel, in Orlando, FL. Aside from getting away from the cold grayness that is New York in January, I had an opportunity to serve as a member of a distinguished panel of conference faculty discussing the key issues facing governance professionals this proxy season. In the spirit of this Essentials conference, we offer this week's The Altman Interview with noted governance expert and director, Charles Elson, and our first guest commentary, from the distinguished Robert B. Lamm, Assistant General Counsel and Assistant Secretary of Pfizer.

The Altman Interview – Charles Elson, Director, HealthSouth Corporation and the Edgar S. Woolard, Jr., Chair in Corporate Governance, and Director of the John L. Weinberg Center for Corporate Governance at the University of Delaware.

Charles M. Elson is the Edgar S. Woolard, Jr., Chair in Corporate Governance and the Director of the John L. Weinberg Center for Corporate Governance at the University of Delaware. His fields of expertise include corporations, securities regulation and corporate governance. He is a graduate of Harvard College and the University of Virginia Law School. Professor Elson has written extensively on the subject of boards of director, and is a frequent contributor on corporate governance issues to various scholarly and popular publications.

Governance News & Views from across the spectrum

>>Executive Compensation

TIMESONLINE

February 2nd, Goldman Sachs Denies a Reported \$100m Pay Deal for Lloyd Blankfein

The newspaper reports on Goldman's denial of a \$100 million dollar payday for CEO Lloyd Blankfein.

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February 2nd, BofA to Spread Bonuses Over Three Years

Gregg Farrell reports on changes to BofA bonus program.

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Telegraph.co.uk

February 2nd, Marc Bolland's M&S Pay Package is Too Rich to Swallow

Damian Reece comments on the pay package for the new CEO of Marks & Spencer.

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THE WALL STREET JOURNAL

February 2nd, Morgan Stanley

1)**F. H. Byrd:** What led you to conclude that adoption of a reimbursement bylaw by companies would be beneficial to both corporations and their shareholders?

Charles Elson: HealthSouth believes there is a close correlation between good governance and good performance. By reimbursing shareholders under certain conditions for reasonable expenses relating to director nominations, HealthSouth's Board believes we will further enhance director accountability and permit shareholders to have a greater say in the running of their company.

Given the history of HealthSouth under its prior management team, we believe this Company should be innovative and a leader in corporate governance issues among public companies. In short, we believe the concept of reimbursing meritorious shareholder director nominations is good for shareholders and the Company in that all parties benefit from constructive ideas and suggestions. At the same time, we believe our approach to this issue minimizes the risk and expense associated with frivolous nominations that are not intended to further the interests of our shareholders.

2)**F. H. Byrd:** Why do you believe that the right to proxy contest reimbursement is more advantageous to shareholders than proxy access?

Charles Elson: Given the significant costs associated with waging a public proxy contest, simple access to a corporate proxy does not go far enough to empower responsible shareholder director nominations. The HealthSouth board of directors wanted to signal to our shareholders and to the public at large that meritorious shareholder nominations are encouraged and welcomed by the company. Expense reimbursement is the best practice to accomplish that goal.

3)**F. H. Byrd:** What has been the reaction from directors, corporate executives and legal counsel at other companies?

Charles Elson: Our concept for proxy reimbursement has been favorably received by governance experts, scholars, the media and other companies. Our concept has been commended as a step in

Compensation Ratio to Decline this Year

Aaron Lucchetti reports on changes to the pay mix at the investment bank.

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February 1st, Walgreen Expands Option Plan With Retention In Mind

Katie Wagner discusses the expansion of the Walgreen stock option plan.

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January 28th, Pay Tracker: Compensation on Wall Street Stands at \$120 Billion So Far

Stephen Grocer follows the compensation issue among the banks.

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January 28th, Banks See Ways Past Pay Limits

David Enrich, Sara Schaefer Muñoz and Aaron Lucchetti discuss the efforts of the big banks to cushion the blow to executive compensation.

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THE WALL STREET JOURNAL

January 27th, Wall Street Toughens Rules on Clawbacks

Robin Sidel reports on the trend among banks and brokerage firms to place clawback clauses in executive compensation contracts.

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[>>Global Dispatches](#)

Bloomberg.com

the right direction to align the interests of an individual company and its shareholders in this area.

4)F. H. Byrd: Will the combination of reimbursement and proxy access, if enacted, provide shareholders with too much power changing the relationship between boards, management and shareholders?

Charles Elson: Having directors of public companies accountable to shareholders is clearly appropriate. That said, there is a delicate balance that must be found to allow a company to benefit from constructive shareholder input without encouraging frivolous nominations or other types of proposals that do not have the best interests of shareholders at heart. We believe our reimbursement Bylaw achieves that balance. It is our hope that the various governmental initiatives currently considering proxy access requirements will likewise consider, and make allowances for, flexibility on the part of public companies to tailor the access terms to their unique circumstances. A one-size-fits-all approach to proxy access is not in the best interests of either shareholders or corporations.

5)F. H. Byrd: Could widespread adoption of proxy reimbursement lead to unnecessary short slate contests and result in diminished management and board focus on strategic planning and execution?

Charles Elson: We don't believe so. If adopted with appropriate terms and conditions such as found in HealthSouth's reimbursement Bylaw, the encouragement of greater input from and accountability to shareholders is a win/win for shareholders and corporations.

Our example shows that publicly-traded companies are able put in place appropriate proxy mechanisms that allow shareholder involvement without encouraging unwarranted expense, furthering interests contrary to those of the long-term investor or adding to the burdensome regulatory requirements already placed on companies.

February 2nd, China Regulator Said to Seek to Curb Third Mortgages

Philip Lagerkranser reports on the efforts of Chinese bank regulators to limit property speculation.

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February 1st, Damas Saga Puts Spotlight on Governance

Simeon Kerr discusses governance weaknesses at Gulf's leading gems retailer.

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February 1st, Dubai Bailout Rally Evaporates on Standstill Silence

Michael Patterson and Haris Anwar discuss investor frustration at the failure of the Dubai debt restructuring plan and its effect on the Dubai market.

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February 1st, A Conversation with Indra Nooyi, CEO of PepsiCo, at the World Economic Forum

John Grapper discusses Nooyi's view on the role of global institutions and the prospects for PepsiCo's share price.

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January 31st, PwC Chief: 'Avoid

Back to the Future: A Not-so-Sneak Preview of 2010 - Guest Commentator, Robert B. Lamm, Assistant General Counsel and Assistant Secretary, Pfizer

Robert B. Lamm is Assistant General Counsel and Assistant Secretary at Pfizer Inc., where his responsibilities include securities compliance and corporate governance matters. Previously, he has served in a similar capacity at FGIC Corporation and Financial Guaranty Insurance Company, and at CA (from 2002 to 2005) as Senior Vice President – Corporate Governance, and Secretary. Mr. Lamm is an active member of the Society of Corporate Secretaries and Governance Professionals; he serves on the Society’s Securities Law Committee and its 2010 National Conference Committee, and has served on its Corporate Practices and Finance Committee, as a director of the Society and as Chair of its National Conference Committee. Mr. Lamm was the 2009 recipient of the Society’s Bracebridge H. Young Distinguished Service Award.

The 2010 proxy season is here. If any of us have been hoping that things would calm down this year, it’s time to get real and to act on issues with which we will have to contend in this proxy season and beyond. What follows is a high-level overview of some key issues and a few suggestions on how to deal with them.

New Proxy Disclosure Requirements

The SEC gave us an early holiday gift – a set of new proxy disclosure rules, adopted on December 16, 2009. The SEC may have recognized how late in the season it was, because the adopting release was posted on the same day. For the most part, the new rules are similar to those proposed in July 2009. Thus, companies have had some time to consider how to address most of these new disclosure requirements before their adoption.

However, the SEC’s gift basket included at least one surprise package – a requirement to disclose whether and how the nominating committee (or the board) considers diversity in selecting nominees and, if the company has a policy on diversity, how the committee or the board evaluates its success in achieving diversity. While the proposing release indicated that the SEC was thinking about board diversity, it did not contain any specific rule proposals on the topic (and therefore provided no opportunity for public comment on any proposals). Companies will therefore have to consider how best to respond to the new requirement. Further, the requirement may be more challenging than first appears; for example, in order to disclose how the board evaluates success in achieving diversity, a company may be required to discuss what “diversity” means. This may be challenging if the existing policy and other documentation and past practice do not provide insights as to what “diversity” means at a particular company.

Overregulation, Protectionism, to Ensure Recovery’

The Chinese news agency interviews Dennis McNally, Global Chairman of Pricewaterhouse Coopers.

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January 31st, China: Hard to Extinguish Speculators’ Animal Spirits

Edward Chancellor, a member of GMO’s asset allocation team, commentary on speculation in China’s real estate market.

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>>Proxy Contests/Battles for Control



February 2nd, Burkle Targets Barnes & Noble

Kathy Shwiff and Jeffrey A. Trachtenberg report on activist Ron Burkle’s latest target.

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February 1st, Burkle challenges Barnes & Noble

Jonathan Birchall discusses a potential proxy contest against Barnes & Noble.

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January 29th, Invesco Victory in Omega Battle

Paul J. Davies discusses what the victory of Invesco fund manager Neil Woodford means for

Of course, board diversity is not the only issue raised by the new rules. Companies will need to prepare new disclosures in the following areas, among others: the relationship between compensation policies and practices and risk; directors' skill sets; board leadership; and the board's role in risk oversight. In some of these areas, companies will need to develop and/or implement processes and policies to support the required disclosures.

Anticipated SEC Action – Proxy Access and Proxy “Plumbing”

The New Year is expected to bring further SEC actions on proxy access and proxy “plumbing”. While these actions will not affect the 2010 proxy season, they could radically change the future proxy landscape, and companies and their constituencies will need to keep abreast of developments in both areas – and to consider acting where appropriate.

On December 14, the SEC announced that it was re-opening the comment period on the proxy access rules. These rules were initially proposed in June 2009, with comments due by mid-August. While it had subsequently become clear that the rules would not be in place for the 2010 proxy season, the re-opening of the comment period came as a surprise to many. In its release announcing the re-opening, the SEC stated that the comment period was re-opened “to permit interested persons to comment on additional data and related analyses that have been included in the public comment file” – but these data and analyses do not shed much light on the ultimate outcome of the comment process. There has been speculation that the re-opening signals a shift in the SEC's thinking about proxy access (i.e., to permit companies to opt out of the new rules, presumably subject to shareholder approval), or that the delay is merely part of the process to assure that any final proxy access rules can withstand litigation and/or to give Congress time to enact legislation that would give the SEC express authority to implement proxy access. However, for the time being, all one can do is watch and wait. Of course, if and when the SEC adopts proxy access rules, companies will need to consider a variety of actions, including whether to adopt by-law amendments to implement proxy access and whether to seek shareholder approval to opt out of the new rules, if that is permitted.

It is also worth noting that amendments to the proxy solicitation rules, proposed in July 2009 along with the new disclosure enhancements discussed above, were not adopted when those enhancements were approved in December. The SEC indicated that the solicitation rules were being put on hold pending action on proxy access. In other words, the proxy landscape could change substantially if and when final action is taken on the proxy access and solicitation rules.

In mid-2009, the SEC approved the amendment of New York Stock Exchange Rule 452, effective January 1,

the Bermuda-based insurer.

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[>>Investor Action](#)

guardian.co.uk

February 2nd, CIA Workers Trained Wall Street Firms to Detect Lies

Daniel Nasaw reports on the use of intelligence techniques by hedge funds.

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Telegraph.co.uk

February 2nd, Pension Assets Hit \$23 Trillion Mark

Rachel Cooper reports on a 15 percent increase in global pension fund assets.

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February 1st, U.S. Regulators Learning From Euro, U.K. Counterparts

Josh Martin reports on what U.S. Regulators are learning from Europe and the U.K.

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[>>The Boardroom](#)

BOARDMEMBER.com

February 2nd, RiskMetrics: Big Educational Change

TK Kerstetter discusses the RiskMetrics move to stop accrediting board education programs as of March 1, 2010.

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BusinessWeek

February 2nd, Lehman Board Members Win Dismissal of Suit Over

2010. As a result of this amendment, brokers are no longer able to vote shares held for customer accounts in an uncontested election of directors. Many companies had recommended that the SEC defer action on the amendment of Rule 452 until such time as ongoing deficiencies in proxy voting mechanics – also known as “proxy plumbing” – could be addressed. While the SEC did not accept these recommendations at the time, it announced later in 2009 that it planned to issue a concept release addressing these issues, including so-called “overvoting” and “empty voting”; the ability of companies to communicate directly with their owners; and the role of proxy advisory services. The impact of any SEC rulemaking in these areas could be substantial.

Legislative Activities

Calls for corporate governance reforms have come from our legislators as well as the SEC. During 2009, a number of bills were proposed in both the U.S. Senate and the House of Representatives, and one of these bills (the “Wall Street Reform and Consumer Protection Act of 2009”) was passed by the House in December 2009. While the future of these bills remains uncertain, it is possible – or even likely – that some of their provisions will be enacted. These bills would provide for the following, among other things:

1. annual elections of directors unless otherwise approved by shareholders;
2. majority voting in uncontested elections of directors;
3. proxy access under rules to be enacted by the SEC;
4. annual advisory votes on executive compensation (so-called “say on pay” votes);
5. enhanced independence of compensation committee members, consultants and other advisors;
6. compensation “clawback” provisions; and
7. disclosure of the relationship between performance and pay, including graphic or pictorial comparisons between the two.

Given the profound impact that the enactment of one or more of these provisions could have, it is important that companies and their owners monitor these bills and related developments closely throughout 2010.

Investor Activism

The 2009 proxy season saw unprecedented support for shareholder proposals on a wide variety of governance and other issues, ranging from “say on pay” and shareholders’ ability to call special meetings to a new crop of social and environmental proposals. As a result of this support and ongoing legislative activity, a number of companies have acted to adopt – sometimes in modified form – the actions sought by the proposals. For

Savings Plan

David Glovin reports on the dismissal of a lawsuit brought by the Lehman employee savings plan against the directors of the failed company.

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February 1st, Boards Hungrier for M&A This Year

Tony Chapelle discusses the prospect of increased M&A transactions for 2010.

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February 1st, SEC Adopts New Guidance on Climate Change Disclosure Requirements

Kristin Gribben provides analysis of the SEC’s new climate-change regulation.

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January 29th, Green Issues Have Grown Teeth: Is Your Board Ready?

Commentary by Betsy Atkins, who presently serves as a director on the boards of SunPower, Polycom, Chico’s FAS, Reynolds American and NASDAQ.

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New York Law Journal

January 28th, Dow Case Reaffirms Delaware's Business Judgment Rule

David A. Katz and Laura A. McIntosh discuss *In re the Dow Chemical Company Derivative Litigation*, where the Delaware Chancery Court issued an affirmation of the business judgment rule. David A. Katz is a partner at Wachtell, Lipton, Rosen & Katz, and Laura A. McIntosh is a consulting attorney for the same firm. [Link to decision](#) (Free Registration Required)

example, a number of companies have agreed to submit company-sponsored say on pay proposals in 2010; in some cases, these proposals will be submitted on a biennial or triennial basis, as distinguished from the annual votes sought by the shareholder proposals.

It is too soon to tell whether the 2010 levels of shareholder proposal activity and support for shareholder proposals will prove to be as great as or greater than that experienced in 2009. However, in the absence of any evidence to the contrary, it's probably best to assume that investor activism will at least remain at current levels. Consequently, companies need to anticipate the actions that need to be taken to address shareholder proposals and other forms of activism.

What Can Companies Do?

Aside from engaging in “watchful waiting,” is there anything companies can do to address some of the issues discussed above? It may not be possible to control the SEC or Congress, or to curb investor activism, but companies can be active rather than passive when it comes to all of these areas.

First, when the SEC issues a proposal that affects your company, you should consider commenting on it. The SEC wants input from companies and will often take companies' comments into consideration even where it rejects their specific suggestions. This was certainly true in the case of the recently adopted proxy disclosure enhancements; for example, the proposed disclosure of compensation consultant conflicts of interest was substantially modified in response to comments from companies and others.

The same level of input may not be available when it comes to legislation. However, at a minimum, companies should keep posted on the status of legislation that would affect corporate governance – whether substantively or in terms of disclosure. Companies can also contact Congressman and Senators and work through business and other organizations to assure that legislation is based upon accurate and complete information rather than speculation, political grandstanding and media hype.

Companies should also keep their boards and committees apprised of regulatory, legislative and shareholder initiatives affecting corporate governance matters – if for no reason other than to avoid unpleasant surprises if rules or legislation deemed adverse to your company should be enacted. And bear in mind that your directors are generally on the boards of other companies, which may increase awareness of issues important to the corporate community. You should also consider, in appropriate circumstances, encouraging your directors to participate in the SEC comment process and other activities where their input will be valuable – and appreciated.

Finally, companies should reach out to their investors,

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January 28th, Borders Group CEO Ron Marshall Resigns

Joann S. Lublin and Jeffrey A. Trachtenberg report on executive changes at the nation's second biggest bookseller.

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January 26th, Vasella to Drop CEO Role at Novartis

Haig Simonian reports on the move to split the Chairman and CEO roles at the high-profile European pharmaceutical company.

[> read more](#)



January 25th, Restoring Trust In Corporate Governance: Six Essential Tasks For Boards of Directors and Senior Executives

The CED's Policy Committee outlines steps for improving corporate governance. [Media Release Policy Brief](#)

[> read more](#)



January 20th, Latest CEO Accessory: A Chief of Staff

Beth Kowitt (with Alyssa Abkowitz) report on the use of the 'chief of staff' post to assist busy CEOs.

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discuss issues important to them, and – where warranted – take action in response to their feedback. While a company is not obligated to act on every investor suggestion, some suggestions are likely to be limited in nature and scope and can be implemented without great difficulty. This outreach activity will prove that you are willing to listen to your investors' views and to accept mutually beneficial suggestions.

If your company is not already reaching out to its owners, you should encourage it to do so; if your company already has an outreach program, consider expanding it to cover more shareholders or to broaden the scope of your communications with your owners. In any case, it is important to engage in investor outreach activities throughout the year; if you seek to limit these activities to the proxy season, you may find that your owners have no time to speak with you or will consider you a “foul weather friend” – someone who reaches out only when it is to the company's advantage to do so.