

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

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Governance Advisory Practice Co-Leader**

The Forever War: Issuers and Institutional Investors – The Battle Continues!

As this commentary is being written it is impossible to determine the final fate and form of the financial regulatory reform bill in conference committee. Suffice it to say, the last three weeks have been a roller-coaster ride for both issuers and institutional investors experiencing the pleasant feeling of an anticipated victory or downcast at the prospects of defeat.

The pervasive sense is that the “war” between public companies and their institutional shareholders is coming to a climax, with a decisive victory for one side or the other that will resolve the conflict and set the stage for a new re-ordering. We, however, from our vantage point, do not view it quite that way. Let us discuss this in the context of a couple of the conferences we have had an opportunity to attend.

The first of these was sponsored by the Kaplan Fox law firm, a member of the plaintiffs’ bar. Kaplan Fox’s [“Recovery Risk & Returns: A Summit on Corporate Governance for Institutional Investors”](#), was held June 3rd and 4th, and included leading institutional activists from the AFL-CIO, TIAA-CREF, CTW Investment Group (an arm of the union Change-To-Win), AFSCME, Amalgamated Bank, Long View Funds, and top hedge fund activists Bill Ackman (Pershing Square Capital Management), Jared Landow (Barrington Capital Group) and Brian L. Schorr, Chief Legal Officer at Triun Fund Management. Also in attendance were a number of other state funds who have not been as active or visible but who view their losses during the financial crisis as a wake-up call for shareholder activism.

The tone, while not celebratory, was optimistically looking forward as panelists discussed how they, as investors, would utilize expected new powers from the reform bill to become better change agents and protectors of shareholder value. None of the institutional investors

Governance News & Views from across the spectrum

>> Executive Compensation

THE WALL STREET JOURNAL

June 23rd, Shinsei Bank Management Shake-Up Pares Non-Japanese Execs

Atsuko Fukase discusses executive changes at Shinsei Bank Ltd in the context of compensation.

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THE WALL STREET JOURNAL

June 22nd, SABMiller CEO Pay Rose By a Third in Last Financial Year

Michael Carolan of Dow Jones Newswires reports on an increase in compensation for Graham Mackay, the CEO of SABMiller.

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AGENDA

June 21st, Best Buy's Comp Chair: Why We Adopted Comp Principles

Frank Trestman, a member of Best Buy’s board of directors, and chairman of the compensation and human resources committee, discusses the use of compensation principles. Mr. Trestman is affiliated with the Independent Directors Executive Compensation project (IDEC, www.IDECproject.org).

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at the Kaplan Fox summit backed away from the prospect of hard company-by-company fighting over majority vote (they would like to see it expand to mid-size and small-cap issuers) or “Say on Pay” proposals, believing instead that if by some mischance those reforms were left out by the conference committee, it would not be the end of the crusade. Also, proxy access, in some usable form, was almost within reach. Access, according to the institutions present, would be utilized sparingly and only as a last resort – the nuclear weapon of corporate governance activism.

The most pointed issue among the activist institutions was the outcome of the Massey Energy vote, and the failure of the activist funds to oust the targeted members of the board. Finding ways to ensure that the institutions vote as a block on director withhold vote campaigns looks to be a focus of “off-season” work for these institutional shareholders.

On June 17th and 18th, at the annual Yale Governance conference of the Millstein Center for Corporate Governance and Performance the atmosphere had a decidedly different tone, as word filtered through the Thursday morning sessions that the majority vote provision had been dropped from the reform bill, and proxy access – the holy grail of institutional investor activism – would have stricter ownership requirements. The SEC’s had originally proposed a sliding scale of ownership percentages of from 1%, 3% and 5% (depending on a company’s market capitalization) for investors to seeking to use proxy access to propose a short slate. The investor would also need to have held the stock for one year. The conference committee proposal, as reported in the business media, would call for a mandatory 5% or greater ownership threshold for a shareholder looking to utilize proxy access – irrespective of a company’s market capitalization – and would call for a two year holding period. If these changes survive into the final bill, and become law, they would preclude the SEC of using rule-making authority to designate an ownership percentage below the 5% threshold or stock holding period of less than two years. Passage of these changes to proxy access ownership requirements, in the financial reform package, would effectively lock out the public pension and union funds that the access proposal appeared designed to empower.

Investor representatives among the attendees were angry and frustrated at the prospect of losing parts of the financial regulatory reform bill they deemed critical to reforming the corporate election system in the U.S. However, as the conference went on, no-one from the institutional investor community publicly or privately threw in the towel or discussed backing away from the goals embodied in majority vote or proxy access.

In fact, a focus of the conference was the discussion of collaborative investor action (again referring to the case of Massey Energy) on identifying prospective directors,



June 21st, Fed Finds Bank Pay Schemes ‘Deficient’

Tom Braithwaite and Francesco Guerrera report on the Federal Reserve’s view of banker compensation and risk.

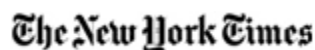
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June 20th, Sony CEO Received \$4.5 Million Compensation

Juro Osawa reports on the pay package of Chief Executive Howard Stringer.

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June 18th, Help Prevent a Sequel. Delay Some Pay.

Robert J. Shiller, professor of economics and finance at Yale, and co-founder and chief economist of MacroMarkets LLC, proffers some ideas on the paradoxes of executive compensation.

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June 10th, Ex-CSK Chief Fails to Get Clawback Suit Thrown Out

Jef Feeley and Emily Heller report on the defeat of Maynard Jenkins, CSK’s former CEO, in his attempt to convince Federal District Judge Murray Snow to dismiss the SEC’s clawback of \$4.1 million in compensation related to accounting fraud and restatements not orchestrated by Jenkins.

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and determining whether a company's board has a handle on risk oversight or the need for a U.S. corporate governance code. This was no less an important point after it became clear that majority vote and proxy access were in legislative jeopardy.

Keep the Champagne on Ice

Should issuers win the day and remove or weaken all (or most) of the provisions of the reform package, causing the greatest concern for publicly-traded companies, the champagne best be kept on ice. While the participants (and their lobbyists) will feel as if they have been through the battle of Gettysburg it would not be wise to cast the institutional investor community in the role of the defeated Army of Northern Virginia.

The institutional activist community is willing to push, through the shareholder resolution process, majority vote, and a short slate reimbursement by-law (as per the Delaware law passed earlier this year), and will re-think proxy access. The activists have recognized that the majority vote protocol in the amended Rule 452 universe can provide them an opportunity to oust directors they perceive as having failed in their duty to shareholders.

And lest we forget, "Say on Pay" (SOP) in some form has survived and is likely to be in the final bill presented to President Obama. Investors and issuers (especially at Occidental, Motorola and KeyCorp) understand the havoc that a negative or failed vote on a management SOP vote can have.

What may have been avoided in the reform package are the broad strokes of federalism painted on corporate America in a "one-size fixes all" manner that would have placed all companies at-risk all at once. However, CalPERS (and the usual suspects – the NYC Retirement Systems & Pension Funds, the NYS Comptroller/Common Fund, the Connecticut State Treasurer, and as well as other public funds who have not been as active historically) plans to increase the number of companies in which proposals will be introduced in 2011. The institutions are preparing to fight this out company by company, and that may or may not produce a poor outcome, but it is certainly not an "ending."

June 9th, More Pay Transparency Might Not Work in Japan

Michiyo Nakamoto discusses the potential effect of new rules requiring disclosure of executive compensation at Japanese companies.

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June 7th, Level 3 Amends Proxy to Award Bonuses

Katie Wagner reports on the decision of the board of Level 3 to pay bonuses after the company had failed to earn 2009 bonus payments under the company's pay for performance plan.

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[>>Global Dispatches](#)



June 22nd, Chinese Car Chief Backs Pay Demands

Tom Mitchell and Jonathan Soble discuss the role of the Chinese government in the resolution of labor disputes between Chinese workers and Japanese car companies.

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June 22nd, Fujitsu Investors Grill Management

Juro Osawa reports on the questioning of Fujitsu executives by investors regarding the dismissal of former President Kuniaki Nozoe.

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June 22nd, Top Execs Face More Transparency/New Rules Have Changed Atmosphere at Annual Shareholder Meetings

Kazuki Nishihara discusses the impact of the Financial Instruments and Exchange Law's new disclosure rules on annual general meetings of Japanese companies.

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June 21st, Hayward Acts to Stem BP Identity Crisis

Carola Hoyos reports on employee morale at the global oil company.

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June 20th, Japan's New Rules Change Face of AGMs

Michiyo Nakamoto discusses how new disclosure requirements are changing Japanese annual general meetings.

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June 17th, Germany Flip-Flops on European Bank Stress Tests

Spiegel discusses Germany's policy change regarding transparency on the results of bank stress tests, in support of Spain, whose banks have seen volatile trading on debt woes.

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May 28th, JAL Shareholders to Still Get Perks

The Yomiuri Shimbun reports on reduced airfares for shareholders of Japan Airlines being offered even as the company undergoes corporate reorganization.

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>>Proxy Contests/Battles for Control



June 21st, Pershing Square Backs Landry's Restaurants Buyout

Helen Thomas discusses the latest turn in the efforts by Tilman Fertitta, Landry's founder, to take the firm private.

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June 19th, U.S. Fund Lines Up on Stronach's Side

Barbara Shecter and Scott Deveau report on the standoff between Frank Stronach and investors over control at auto parts maker Magna International Inc.

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June 14th, The Fight at Landry's Gets Uglier

Steven M. Davidoff comments on the management buyout of Landry's Restaurants.

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>>Investor Action



June 21st, Investors' Move on Covenants Rebuffed

Jennifer Hughes reports on efforts by Eurozone investors seeking stronger covenants on bond issues and the reaction of corporate treasurers.

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June 21st, It's Time to Go, Investors Tell Pru Boss

Miles Costello reports that Fidelity, the fifth largest investor in Prudential, is seeking the ouster of Harvey McGrath, Chairman, and Tidjane Thiam, CEO of the insurance giant.

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June 21st, Fidelity Meeting Cordial, Says Pru

Paul J Davies and Kate Burgess discuss the ramifications from the Pru/Fidelity meeting.

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DealBook

June 21st, Don't Gut Proxy Access

Lucian A. Bebchuk, a professor of law, economics and finance, and the director of the Program on Corporate Governance at Harvard Law School, argues in favor of proxy access. _

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THE GLOBE AND MAIL

June 18th, Report on Corporate Responsibility

The Globe and Mail, and research group Corporate Knights, provide rankings of Canadian companies. _

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>>[The Boardroom](#)



June 22nd, JPMorgan Shake-up Shapes Race for Top Job

Francesco Guerrera and Justin Baer discuss executive moves in the context of succession

planning at JPMorgan Chase.

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AGENDA

June 21st, Lehman, Goldman Boards Not Structurally Different: Study

Marc Hogan discusses a study by David Larcker and Brian Tayan, professors at Stanford Graduate School of Business, examining the similarities and differences between the structure of the boards of directors of Lehman Brothers and Goldman Sachs, and the effect of those governance structures on the fate of those firms during the financial crisis.

Stanford study: <http://www.gsb.stanford.edu/cldr/cgrp/documents/CGRP03-LehmanBoard.pdf>

> read more

THE GLOBE AND MAIL

June 20th, Cynthia Devine dives into Tim Hortons' role

Gordon Pitts interviews Cynthia Devine, CFO of Tim Hortons.

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THE WALL STREET JOURNAL

June 18th, Calpers Aims Director List at Increasing Board Sway

Gina Chon discusses the plans by the nation's largest public pension fund to develop a "Diverse Director Database."

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June 11th, Tesco Executive Resigns in Wake of Leahy Move

Beth Rigby reports on executive changes at the supermarket chain in the wake of the appointment of Philip Clark as successor to Sir Terry Leahy.

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The New York Times

June 11th, Can the U.S. Punish BP's Shareholders?

Corporate Governance experts and academics debate whether BP should pay out a dividend to shareholders and whether the U.S. Department of Justice should seek an injunction to halt any planned dividend payout.

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June 11th, BP Ready to Suspend Dividend Payouts

Harvey Morris, Ed Crooks and Ed Luce report on a pending decision by BP to suspend its dividend in response to pressure from the Obama Administration.

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June 10th, Surprise Director Resignations and Securities Litigation Risk

Kevin LaCroix of the D&O Diary discusses research on the interplay between director resignations and securities litigation.

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Rüdiger Fahlenbrach, Angie Low, and Rene M. Stulz, The Dark Side of Outside Directors: Do They Quit When They are Most Needed? (March 1, 2010).

Charles A. Dice Center Working Paper No. 2010-7; Swiss Finance Institute Research Paper No. 10-17; ECGI - Finance Working Paper No. 281/2010.

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June 2010, The Reputational Intelligence Reward

William G. Margaritis, senior vice president of global communications and investor relations at FedEx, discusses the strategic imperative of C-suite involvement in monitoring and protecting corporate reputation.

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