



# 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**

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

### **Dodd-Frank Act Ushers In A New Era**

By the time you read this commentary, we will be in a new era of corporate governance and board accountability. With Senate passage last week and a Wednesday, July 21st, signing ceremony by President Obama, the Dodd-Frank Act is now law.

### **Signed, Sealed, Delivered and Now Ours**

Now comes, from the standpoint of issuers, investors and the SEC, the hard part – implementation.

Certainly discussion and preparation of the corporate governance changes outlined in Dodd-Frank have been uppermost in the minds of IR Directors, Corporate Secretaries, outside Counsel, and governance advisors for the last few weeks. At this year's annual conference of the Corporate Secretaries & Governance Professionals, in Chicago, Dodd-Frank and the SEC's 2009 disclosure requirements were the primary topic of panels and workshops.

### **Open Questions on Dodd-Frank: Say-on-Pay Implementation (SOP) and Proxy Access**

Two major questions remain unanswered. The first, and most pressing, is implementation of the mandatory Say on Pay requirement for an advisory vote on executive compensation. Amendments made to the bill allow for flexibility in the frequency of advisory votes. Companies will be able to poll their shareholders as to whether an advisory vote should be held annually, bi-annually or on a triennial basis. Dodd-Frank calls for at least two advisory votes over a six-year period with the first taking place in 2011. The big question for issuers is how best to poll their shareholders. Once that hurdle is overcome, boards must offer a recommendation to investors on the frequency, and face the recommendations of the proxy advisory firms both on the 2011 advisory vote and the frequency of future votes.

Very early indications are that many companies may view triennial as the best option for the executive compensation advisory vote, in part because many pay plans are crafted around three periods, allowing investors to better judge the value of compensation plans.

Investors will also face a choice here. The great unspoken fear regarding an annual advisory vote was that investors (especially those with large equity portfolios) would be swamped by SOP votes. Dodd-Frank, in this instance at

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### **July 18th, City Banks Squirrel Away £5bn to Pay for Staff Bonuses**

Jill Treanor reports on a large bonus pool for UK bankers.

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## **AGENDA**

### **July 12th, Triennial Vote Plans Favored in Say on Pay**

Josh Martin discusses the options for board, management and shareholders in the approaching "Say on Pay" era.

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### **July 8th, Blockbuster CEO Keeps Pay Package**

Maxwell Murphy discusses the circumstances behind James Keyes' compensation package.

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### **July 8th, Europe to Limit Banker Bonuses**

Alessandro Torello reports on the European Parliament's approval of a plan to restrict bonuses for bankers.

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FINANCIAL TIMES

### **July 19th, Feud Gives L'Oréal a New Look**

least, provides investors with an avenue to escape that potential burden for the vast majority of their portfolio companies by simply voting for bi-annual or triennial advisory votes. We would also expect that activist institutional investors will spend the summer and early fall identifying those companies where they believe an annual SOP vote is needed. Outreach and communication between investors and companies will play a critical role in helping determine the frequency of executive compensation advisory votes in 2011.

The second major issue needing resolution is the parameters of proxy access. Dodd-Frank has provided the SEC with the authority to enact proxy access. While no vote of the Commission has taken place, the issuer and investor communities are pressing on key points such as the aggregate percentage of a company's shares an investor or investors would need to own in order to utilize proxy access (3% is the rumored number), as well as the amount of time those shares would need to have been held. Mary Schapiro, Chairman of the U.S. Securities and Exchange Commission, has said publicly that the Commission's goal is to have proxy access in place for the 2011 proxy season. This leaves a terribly short time for SEC rule-making, not only for proxy access, but for any potential rules concerning Say on Pay as well.

As if the summer of 2010 was not busy enough for governance professionals, the Commission finally issued its Concept Release examining the need for reform of the U.S. Proxy System.

### **In Earnest, the Reformation Begins**

Last Wednesday, with a unanimous 5-0 vote of the Commissioners, the U.S. Securities Exchange Commission issued a Concept Release on prospective reforms to the U.S. proxy voting system. This signals the first step of a long reform process for the proxy voting and shareholder communications system. The Commission has provided a 90-day period for comments from market participants.

The Commission's Concept Release represents the most in-depth examination of proxy mechanics in 30 years. Since the 1980s the U.S. (and global) equity markets have made dramatic leaps in size, volume of transactions, financial instruments traded, and in the nature of which investors dominate the market. One factoid, quoted by the Commission from Broadridge, brings this to mind perhaps more than any other – in 2009 there were more than 600 billion shares voted at more than 13,000 shareholder meetings.

This examination by the Commission, covering 32 individual topics germane to the proxy voting and communication system, is both long overdue and comes on the heels of wide-spread changes in financial

Scheherazade Daneshkhu discusses the effect of a growing political scandal on shares of the French personal goods company.

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### **July 19th, How Mercadona Fixes Retail's 'Last 10 Yards' Problem**

Julia Hanna interviews HBS professor Zeynep Ton on her exploration of the traits and managerial leadership that make the Spanish supermarket chain Mercadona successful.

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### **July 18th, Global Sentiment Bears Down on Saudi Shares**

A discussion of the global markets view of Saudi companies.

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### **July 16th, Stress Tests Won't Force Share Sales at Big Banks, Goldman Says**

Oliver Suss reports on an analysis of Europe's big banks.

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### **July 16th, Dana Steps Up Oil Exploration Promotion**

Miles Johnson reports on analyst speculation that the FTSE 250 oil and gas exploration firm is seeking to entice a higher offer from KNOC, South Korea's national oil company.

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regulation that will have an immediate impact on corporate governance. It would not be an overstatement to say that the totality of changes, those discussed above regarding the Dodd-Frank Act and those contemplated by the proxy mechanics Concept Release, are monumental when considered separately. However, for corporate issuers and institutional investors these are not separate subjects but have a high level of interaction. This is especially so given the approval mandate given the Commission by the Dodd-Frank Act regarding proxy access, and the advisory votes on executive compensation and change-in-control agreements (golden parachutes). The Commission states in several instances throughout the Concept Release that market participant concerns about efficiency, accuracy and integrity of the proxy voting system need to be addressed in order to insure confidence in the system of corporate elections.

As stated above, the Concept Release puts forward questions regarding numerous areas in the sphere of proxy voting and shareholder communication. We have produced, as a primer, an [Executive Summary discussing the Concept Release](#) in detail, that can be used for focusing internal briefings for senior management and the board on the importance of the issues involved in the examination.

The ten key points where the Commission is seeking comment from market participants are as follows:

- Over-voting and under-voting of shares
- Vote Confirmations
- Proxy voting by institutional securities lenders
- Proxy distribution fees paid by corporate issuers
- Issuers' ability to communicate with beneficial owners of securities (NOBO, OBO and ABO)
- Potential means to facilitate (and increase) retail investor voting participation
- Data-tagging proxy-related materials
- Role of proxy advisory firms
- Dual record dates
- "Empty voting"

We are pleased to note that the SEC has sought comments on our [proposed ABO plan](#), which Commission staff renamed as an "annual NOBO system", since in their view all shareholders would become NOBOs annually at least one time a year for the purposes of soliciting votes at shareholder meetings. The above list is all-inclusive and indicates that the Commission intends to review, if not reform, the U.S. proxy system in its entirety.

This leads to an important question being asked by issuers and investors alike: *"Given the enormity of the tasks – on proxy plumbing alone, not taking into account the need to settle outstanding issues regarding proxy access and the prospect of the need for rule-making around the advisory votes on compensation and golden parachutes – how can the Commission promulgate and approve all of these rules in time for the 2011 proxy season?"*



### **July 13th, Business-as-Usual Stance Keeps Swatch Ticking Over**

Haig Simonian discusses succession at the Swatch Group after the death of the founder Nicolas Hayek.

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### **July 12th, Concern Over Stress Test Failures On the Rise**

Spiegel reports on fears among German bankers that 10-15 of tested banks will fail stress tests.

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### **July 9th, 3 Chinese Firms Break Fortune 500 Top 10**

Yu Hongyan reports on the rise of three Chinese companies into the top ranks of the Fortune 500.

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### **June 2010, The China–Africa Business Connection: An Interview with the CEO of Standard Bank**

Michael Kloss and Vikas Sagar interview Jacko Maree, CEO of Standard Bank.

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



### **July 21st, Some Overlooked News About Two Deals**

Steven Davidoff discusses two deals forgotten by

While we cannot answer this question, we can take note of the size and complexity of the agenda set forth for SEC Chair Mary Schapiro, the other Commissioners, and the staff. If proxy plumbing is the Aegean stables of U.S. corporate governance, then the Commission's task is the equivalent of Hercules cleaning the stables while meeting all the other challenges simultaneously.

As priorities are set and reset by the Commission, it might be advisable to move discussion and decisions about proxy mechanics/plumbing ahead of (or at least on equal timing with) final deliberations on proxy access. Throughout the Concept Release and the debate on Dodd-Frank the need to restore market confidence is often mentioned. For all the concerns expressed about proxy access and its relationship to proxy plumbing, confidence in U.S. capital markets would suffer a serious loss of confidence if in 2011 the result of a proxy access related board election were contested by either side pointing out current flaws in the proxy system that went uncorrected.

One key issue raised by our President Ken Altman, at the Society of Corporate Secretaries & Governance Professionals annual conference, was the need for public companies (especially mid- and small-cap firms) to respond with comments to the Commission and make your voices heard. From The Altman Group's perspective, we are pleased that we were named, along with the Business Roundtable, as being authorities on the proxy system through our submissions and discussions with the Commission. However, a broad-based response from corporate issuers (and other market participants) would be highly beneficial to the proxy plumbing examination and create a greater consensus for Commission action on reforming the system's mechanics.

In the coming weeks, as we continue to study the Concept Release, we will issue a more detailed analysis and prior to the end of the comment period we will provide a full response to the Commission and make it available on our website.

#### **Upcoming Webinar**

Reid Pearson and Francis Byrd, co-leaders of The Altman Group's corporate governance advisory practice, are participating on a webcast discussing Say-on-Pay, organized by Sutherland Asbill & Brennan LLP. You may register for the webcast, which is scheduled for Tuesday, July 27th at 1:00 p.m. at [events.SignUp4.com/ProxyIssues\\_SayOnPay](http://events.SignUp4.com/ProxyIssues_SayOnPay)

The Webinar will address:

- Recent legislative and regulatory developments in executive compensation as they relate to Say on Pay
- Ways in which companies can position themselves to prepare for shareholder input into executive compensation
- How a company can best prepare for this new and uncharted environment

the business media.

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#### **July 20th, Icahn Launches New Offer for Lions Gate**

Nat Worden reports on the latest round in the Icahn versus Lions Gate battle.

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#### **July 19th, Onex, Canada Pension Plan Investment Board (CPPIB), Eye \$4.5 Billion Bid for Britain's Tomkins**

Sarah Young and Cameron French report on a takeover offer for Tomkins PLC, a U.K. engineering and manufacturing company, from the Canadian private-equity firm Onex Corp. and the Canada Pension Plan Investment Board.

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#### **July 17th, Telefónica Walks Away from Vivo Deal**

Peter Wise and Mark Mulligan discuss the breakdown in talks between Telefónica and Portugal Telecom over control of Vivo, their Brazilian mobile phone joint venture, after the Portuguese government voted down the deal.

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**DealBook**

#### **July 15th, FriendFinder Makes \$210 Million Offer for Playboy**

DealBook reports on an offer for Playboy Enterprises from the owner of Penthouse, FriendFinder Networks.

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# Los Angeles Times

## **July 13th, Lions Gate Makes Merger Presentation to MGM Creditors**

Claudia Eller and Ben Fritz report on Lions Gate revisiting a business combination with the financially troubled studio.

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## **July 12th, Penthouse to Launch Bid for Playboy**

Kenneth Li discusses an offer for Playboy Enterprises from FriendFinder Network, owner of Penthouse.

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## **July 19th, SEC Examines Role of Proxy Advisors in Concept Release**

Kristin Gribben reports on the SEC's questions concerning the role of proxy advisory firms in the recently issued Concept Release on proxy mechanics.

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Jason Zweig discusses the merits of proxy plumbing reform for individual investors.

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Eleanor Laise explores the relationship between "Socially Responsible" Investment Funds and BP.

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## THE GLOBE AND MAIL

### **July 16th, [New Conflict-of-Interest Policies Imposed on Credit Raters](#)**

Janet McFarland discusses new roles imposed on the global credit rating agencies by the Canadian Securities Administrators.

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Kara Scannell and Susanne Craig discuss the split decision by the Securities and Exchange Commission on the agency's settlement with Goldman Sachs.

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### **July 15th, [SEC Probes 'Proxy Plumbing'](#)**

Kara Scannell reports on the SEC issuance of a long-awaited Concept Release on reforming the U.S. proxy system.

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### **July 15th, [Failures of the Dodd-Frank Act](#)**

Professor Viral V Acharya offers an opinion on the value of the recently passed financial regulatory reform package. Viral V Acharya is Professor of Finance, Stern School of Business, New York University, and co-editor of NYU Stern's forthcoming book 'Regulating Wall Street'

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**July 13th, British Airways (BA) Board Faces Volley of Attacks at Annual General Meeting**

Pilita Clark reports on the storm of criticism from shareholders, employees and members of the union Unite.

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**July 10th, Concerned CalPERS Set to Meet With BP Officials**

Joann S. Lublin and Guy Chazan report on CalPERS concerns regarding board oversight and leadership at the beleaguered oil giant.

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>>The Boardroom

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**July 21st, Vodafone Investor Group Seeks Board Revamp**

Lilly Vitorovich reports on an effort by the Ontario Teachers' Pension Plan to shake-up the board of the telecom company.

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Daisuke Wakabayashi discusses succession planning at Softbank Corp.

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**July 16th, Goldman and BP Suffer Costly Reputational Hangover**

Chris Hughes, a Reuters Breakingviews columnist, opines on the cost of reputational risk.

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**July 16th, Have Risk-Management Cuts Gone Too Far?**

David M. Katz examines the potential risk in cuts to risk mitigation personnel.

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**July 16th, Battle at AIG Board: You Go, or I Do**

Joann S. Lublin and Serena Ng discuss the departure of board Chairman Harvey Golub.

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**July 16th, Ford Reshuffles Senior Management**

John Reed and Bernard Simon report on the management shake-up at Ford in advance of its pending sale of Volvo, and what it might mean for CEO succession at the company.

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**July 16th, H&R Block Says Bloch Leaving After Split With Breedon**

Laura Keeley explores tensions between directors at H&R Block.

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**July 15th, New AIG Boss Speaks His Mind**

Bernard Simon reports on Steven Miller's appointment as the new Chairman of AIG.

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### **July 12th, CEOs Overhauling Risk Practices Amid Shareholder Concerns**

Marc Hogan reports on how companies are changing risk management practices as investors add risk concerns to their focus.

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### **July 12th, Growing Workloads Push Directors to Resign**

Amanda Gerut discusses a trend in the resignation of directors.

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## SPIEGEL ONLINE

### **July 8th, Norway's Experience Shows Compulsory Quotas Work**

Siobhán Dowling discusses the effectiveness of quotas in driving gender diversity on corporate boards in Norway.

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## McKinsey Quarterly

### **July 2010, The Five Types of Successful Acquisitions**

Marc Goedhart, Tim Koller, and David Wessels discuss the secret to making successful acquisitions. Marc Goedhart is a consultant in McKinsey's Amsterdam office, Tim Koller is a partner in the New York office, and David Wessels, an alumnus of the New York office, is an adjunct professor of finance at the University of Pennsylvania's Wharton School.

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## McKinsey Quarterly

### **April 2010, Equity Analysts: Still Too Bullish**

Marc Goedhart, Rishi Raj, and Abhishek Saxena examine the role and accuracy of equity analysts. Marc Goedhart is a consultant in McKinsey's Amsterdam office; Rishi Raj and Abhishek Saxena are consultants in the Delhi office.

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