

March 21, 2012

Harvard's Shareholder Rights Project is Wrong

The Harvard Law School Shareholders Rights Project (SRP) recently issued joint press releases with five institutional investors, principally state and municipal pension funds, trumpeting SRP's representation of and advice to these investors during the 2012 proxy season in submitting proposals to more than 80 S&P 500 companies with staggered boards, urging that their boards be declassified. The SRP's "News Alert" issued concurrently reported that 42 of the companies targeted had agreed to include management proposals in their proxy statements to declassify their boards – which reportedly represented one-third of all S&P 500 companies with staggered boards. The SRP statement "commended" those companies for what it called "their responsiveness to shareholder concerns."

This is wrong. According to the Harvard Law School online catalog, the SRP is "a newly established clinical program" that "will provide students with the opportunity to obtain hands-on experience with shareholder rights work by assisting public pension funds in improving governance arrangements at publicly traded firms." Students receive law school credits for involvement in the SRP. The SRP's instructors are two members of the Law School faculty, one of whom (Professor Lucian Bebchuk) has been outspoken in pressing one point of view in the larger corporate governance debate. The SRP's "Template Board Declassification Proposal" cites two of Professor Bebchuk's writings, among others, in making the claim that staggered boards "could be associated with lower firm valuation and/or worse corporate decision-making."

There is no persuasive evidence that declassifying boards enhance stockholder value over the long-term, and it is our experience that the absence of a staggered board makes it significantly harder for a public company to fend off an inadequate, opportunistic takeover bid, and is harmful to companies that focus on long-term value creation. It is surprising that a major legal institution would countenance the formation of a clinical program to advance a narrow agenda that would exacerbate the short-term pressures under which American companies are forced to operate. This is, obviously, a far cry from clinical programs designed to provide educational opportunities while benefiting impoverished or underprivileged segments of society for which legal services are not readily available. Furthermore, the portrayal of such activity as furthering "good governance" is unworthy of the robust debate one would expect from a major legal institution and its affiliated programs. The SRP's success in promoting board declassification is a testament to the enormous pressures from short-term oriented activists and governance advisors that march under the misguided banner that anything that encourages takeover activity is good and anything that facilitates long-term corporate planning and investment is bad.

Staggered boards have been part of the corporate landscape since the beginning of the modern corporation. They remain an important feature to allow American corporations to invest in the future and remain competitive in the global economy. The Harvard Law School SRP efforts to dismantle staggered boards is unwise and unwarranted, and – given its source – inappropriate. As Delaware Chancellor Leo Strine noted in a [2010 article](#): "stockholders who propose long-lasting corporate governance changes should have a substantial, long-term interest that gives them a motive to want the corporation to prosper."

Martin Lipton
Theodore N. Mirvis
Daniel A. Neff
David A. Katz

*If your address changes or if you do not wish to continue receiving these memos,
please send an e-mail to Publications@wlrk.com or call 212-403-1443.*