FINANCE & MARCHES

indices

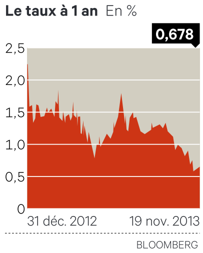
+ 7,09 %

EN HAUSSE
EASYJET
Le bénéfice net annuel de la compagnie aérienne britannique a augmenté de 56 %. Elle a décidé de verser à ses actionnaires 308 millions de livres en dividendes.

– 3,3 %

EN BAISSE
K+S
L'allemand K+S a été chahuté. Selon un analyste, l'acquisition d'une participation majoritaire dans Uralkali par Prokhorov ne garantit pas une remontée du cours de la potasse.

L'ESPAGNE EMPRUNTE À UN TAUX HISTORIQUEMENT BAS
Signe de l'amélioration du sentiment de marché envers l'Espagne, le Trésor espagnol a émis de la dette à 12 mois au taux le plus bas depuis au moins 2004, soit bien avant le début de la crise. Le taux pour cette levée de dette est ressorti à 0,678 %. L'Espagne a placé pour 3,7 milliards d'euros de titres. Sorti de la récession, le pays bénéficie d'un regain d'intérêt des investisseurs étrangers.



Euronext prépare sa venue en Bourse, sans exclure un prochain rapprochement

● Dans un entretien aux « Echos », Dominique Cerutti, directeur général d'Euronext, précise le périmètre de l'opérateur de marché qui sera introduit en Bourse. Il n'exclut pas un rapprochement avec un autre acteur dans le long terme.

BOURSE

Marina Alcaraz
malcaraz@lesechos.fr

Le coup d'envoi de l'introduction en Bourse d'Euronext va être donné demain. Le groupe tiendra la première réunion rassemblant toutes les banques et conseils de l'opération. La cotation de l'opérateur boursier paneuropéen est prévue à la fin du premier semestre 2014. Elle fait suite au rachat de Nyse Euronext par l'américain ICE, finalisé la semaine dernière, soit presque un an après l'annonce de cette opération d'environ 11 milliards de dollars. Euronext est en train de travailler à la séparation des activités, entre celles qui rentreront en Bourse et celles qui resteront dans les mains de l'américain. Une phase qui devrait durer jusqu'à fin février.

Le nouvel Euronext « *comprendra environ 800 personnes* », indique Dominique Cerutti, directeur général du groupe, dans un entretien aux « Echos ». Nyse Euronext comptait environ 3.000 collaborateurs. « *Ce chiffre inclut 25 nouvelles embauches immédiates, liées aux quelques personnes qui travaillaient à la fois pour Euronext et le Liffe* [le marché des dérivés, NDLR], *désormais au service d'ICE* ». Le nouvel ensemble gardera certains dérivés, comme les contrats sur les matières premières, tel le blé. Ces derniers « *représentent environ 15 % à 20 % des dérivés de l'actuel Nyse Euronext* », précise-t-il. Le centre informatique près de Londres sera conservé, lui, chez ICE, qui en assurera la gestion.

La capitalisation d'Euronext à l'entrée en Bourse devrait être de plus de 1 milliard d'euros, selon plusieurs estimations. Voire avoisiner les 2 milliards, sur la base d'un Ebitda (excédent brut d'exploitation) de près de 200 millions d'euros et d'un revenu autour de 400 millions d'euros, hors activité de compensation.

La gouvernance de la nouvelle structure a été définie, un point qui semblait être sensible pour le gouvernement néerlandais, en particulier. Le directoire sera composé de 7 membres, dont Dominique Cerutti, qui devrait en assurer la présidence. Il y aura 5 directeurs, 1 pour chaque place européenne – Paris, Amsterdam, Bruxelles, Lisbonne mais aussi Londres, même si celle-ci est encore peu développée. Le nom des dirigeants doit être annoncé durant la première quinzaine de décembre.

Pas d'offre formelle

A priori, l'introduction en Bourse reste la voie privilégiée, malgré les spéculations d'une vente possible à un autre opérateur. Des groupes, dont LSE et Nasdaq OMX ont en effet, fait part d'un certain intérêt pour Euronext. Mais, le patron de la Bourse de Paris assure ne pas avoir reçu d'offre formelle. « *Nous n'examinons pas un scénario de cession ou à ce stade des partenariats capitalistiques* », assure-t-il. *En revanche, si à l'avenir il y a des offres, ICE les étudiera certainement, ensemble leurs obligations vis-à-vis de leurs actionnaires le justifie. Mais il faudrait que celles-ci soient, en termes de valeur, de calendrier, et de risques d'exécution, comparables ou meilleures pour les actionnaires et les communautés économiques et financières à une introduction en Bourse* ». Une hypothèse compliquée lorsqu'on sait que les régulateurs et les autorités de concurrence devraient réexaminer le dossier, ce qui prend du temps.

En outre, ICE s'est engagé à rechercher la mise en place d'un noyau dur pour stabiliser l'actionnariat de Nyse-Euronext : il doit garder 25 % du capital avec d'autres acteurs, tels des banques, des assureurs ou d'autres acteurs tels le FSI (fonds stratégique d'investissement), pendant trois ans, dans le cadre de l'entrée en Bourse.

A plus long terme, tout est possible. « *La zone euro s'est fédérée dans plusieurs domaines depuis la crise. Il semble logique qu'il y ait, dans le futur, un ensemble cohérent d'infrastructures de marché qui joue un rôle accru de financement de l'économie en zone euro. Une consolidation des Bourses qui opèrent en zone euro n'est donc pas à exclure à l'avenir* », souligne-t-il, évoquant la prochaine « *décennie* ».

Dominique Cerutti est confiant dans l'attrait que peut exercer Euronext auprès de potentiels investisseurs. « *Nos fondamentaux sont bien meilleurs que ce que certains semblent penser. Nous avons signé un contrat avec LCH.Clearnet pour la compensation de nos activités au comptant et dérivés en Europe continentale.* » Euronext a un « *plan de développement en cours de préparation, notamment dans les dérivés* ». Parallèlement, les tendances de marché sont « *très positives* », précise-t-il citant entre autres la reprise des introductions en Bourse et la progression des volumes sur les marchés.

Il est également optimiste sur la recherche d'investisseurs stratégiques pour constituer un noyau dur dès l'introduction en Bourse, malgré les réticences affichées par les banques pour venir au capital de l'opérateur, il y a encore quelques mois. Le « *nuage noir* » lié à la taxe sur les transactions financières – la pierre d'achoppement des premières négociations entre les banques et Bercy – « *s'est dissipé alors que le gouvernement a envoyé des signaux pour dire que cette dernière serait recalibrée par l'Europe. Nous espérons qu'elle ne devrait pas avoir beaucoup plus d'effets que la taxe française actuelle* », assure-t-il.

Enfin, le rapport avec les dirigeants a évolué. « *Nous sentons depuis deux ans une prise de conscience des gouvernements et des acteurs économiques influents que les infrastructures de marché doivent financer l'économie réelle. Il y a vraiment un avant et un après crise : avant, la priorité était donnée à la compétition, maintenant, la priorité est de financer l'économie, d'autant plus dans un contexte où le crédit bancaire se raréfie. Tous sont persuadés de la nécessité d'avoir un grand acteur européen dans notre industrie* », conclut-il.


Levy Bruno/Sipa

« La zone euro s'est fédérée dans plusieurs domaines depuis la crise. Une consolidation des Bourses qui opèrent en zone euro n'est donc pas à exclure à l'avenir. »
DOMINIQUE CERUTTI, directeur général d'Euronext.

À NOTER
ICE a signé un accord pour racheter le Singapore Mercantile Exchange (SMX).

L'interview complète sur lesechos.fr

Les grands patrons français gagnent moins que leurs homologues européens

GOUVERNANCE

En France, les dirigeants des grands groupes sont parmi les moins payés en Europe.

En 2013, leur rémunération globale va augmenter.

Laurence Boisseau
lboisseau@lesechos.fr

Pour gagner plus d'argent, un patron d'une grande entreprise doit être suisse, espagnol, allemand ou, anglais. Voire italien, belge mais pas français en tout cas. Et pour cause : entre un directeur général suisse et un français, il y a en moyenne un écart de 50 %. Quand le premier va gagner au total (fixes et variables compris) 7,6 millions d'euros, le second ne touchera « que » 3,8 millions, selon des chiffres publiés par Towers Watson, cabinet de conseil en ressources humaines.

« Say on pay »

Cette différence s'explique par un salaire fixe plus bas dans l'Hexagone, de 1 million d'euros, tandis que celui des allemands ou des anglais est compris entre 1,2 et 1,3 million. Et aussi par une structure de rémunération très différente. En Allemagne, la partie variable est très forte. Elle représente 76 % de la rémunération globale. « *Outre-Rhin, ils ont une pratique de bonus annuels très élevés. Au Royaume-Uni, ils privilégient l'intéressement long terme, soit les stock-options ou les actions gratuites qui comptent pour 50 % du total. En France, c'est plus équilibré : le fixe compte pour un tiers, le bonus versé pour 36 % et l'intéressement pour 31 %* », notent Emmanuel Girard et Laurent Nguyen, coleaders de l'activité en France de conseil en rémunération des dirigeants chez Towers Watson. A l'inverse, dans les pays nordiques, le salaire de base représente 70 % de la rémunération.

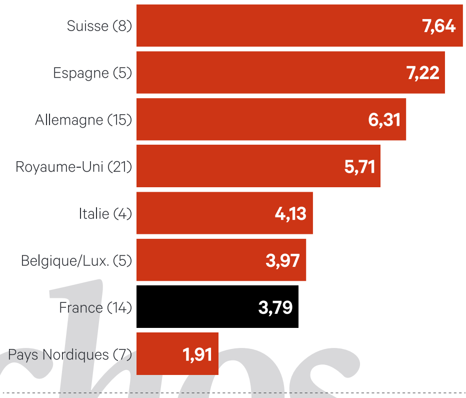
La donne va-t-elle changer avec l'introduction du « say on pay » en France, ce vote consultatif par les actionnaires qui sera mis en place lors des assemblées générales de 2014 ? Ce n'est pas certain. Le « say on pay » à la française n'offre qu'un contrôle a posteriori (même s'il permet malgré tout de sanctionner la rémunération de l'échec). Mais « *il pourrait en modifier la structure*, commentent Emmanuel Girard et Laurent Nguyen. *D'abord, parce que les actionnaires et les gestionnaires de fonds veulent que les rémunérations soient alignées sur les performances des entreprises. Ensuite, parce que plus de transparence et plus d'explication vont permettre, à terme, plus de comparaison avec d'autres entreprises du même secteur* ».

Pour autant, « *pour justifier une modification de la répartition entre fixe et variable, voire un bonus significatif rémunérant une très bonne performance, le conseil ne pourra plus s'exonérer de donner plus de précisions sur les critères retenus pour fixer les bonus. Il devra aussi expliquer davantage dans quelle mesure les objectifs ont été atteints. Autrement, les actionnaires auront des difficultés à soutenir une société qui fait preuve de résistance à révéler certains indicateurs* », commente Louis Barbier, représentant de la France chez Sodali, société de conseil en gouvernance.

Des bonus plus profitables

Quoi qu'il en soit, sur 2013, les dirigeants français devraient gagner plus qu'en 2012. Après un léger repli, les rémunérations retrouveront, selon Towers Watson, leur niveau de 2011. Car, si les salaires de base resteront stables, les bonus versés au titre de 2012, année plutôt profitable, augmenteront de 9 %. Quant aux stock-options et actions de performance, stables en volume, leur valeur estimée à l'attribution est en hausse du fait de l'évolution de la Bourse. ■

La rémunération médiane des grands dirigeants de l'Eurotop 100
En millions d'euros (nombre de sociétés)



« LES ECHOS » / IDÉ / SOURCE : TOWERS WATSON

Investment & Pensions Europe
The art of engagement

The financial crisis saw institutional investors accused of taking their stewardship responsibilities too lightly or behaving like absentee landlords.

In the UK, this influenced the development of the Stewardship Code, which gave investors an explicit responsibility to express their views to company management directly where necessary, and not just through their general meeting voting choices.

At the same time, membership of the Principles for Responsible Investment, whose framework is encouraging investors to behave as active owners, has continued to grow.

“These trends were reflected in the so-called Shareholder Spring of 2012, where UK investors voted down management proposals at general meetings in unprecedented numbers, setting the mood for increased direct engagement,” says Stephen Cohen, CEO of activist investor Governance for Owners.

“Investors are increasingly realising that stewardship and engagement need to be part and parcel of their investment process and companies, recognising that investors are becoming more active, will want to pre-empt any issues of concern prior to an AGM, for example,” adds Daniel Summerfield, co-head of responsible investment at the UK’s Universities Superannuation Scheme (USS).

As USS’ portfolio has become increasingly diverse and global in nature, the number of overseas companies it engages with has increased. But most pension funds, unlike USS, outsource investment management to external service providers, although they may retain oversight of their stewardship activities such as voting and engagement.

In its integrated ESG approach, the responsible investment team at USS works closely with its portfolio managers and uses a number of models to identify companies where engagement could be beneficial. But Summerfield says that companies also increasingly approach the pension fund because they want the perspective of a long-term asset owner.

The various steps of engagement depend on the issue concerning the company and its sector. “Normally we would seek high level access, ideally board level access, with executives, non-executives and outside directors at the top of the company,” says Colin Melvin, chief executive at Hermes Equity Ownership Services (EOS). “If you seek contact at a lower level, it might be rather futile. At Hermes, we track these engagements relative to formal milestones, where we raise the issue with a company, the company acknowledges the problem and brings in a plan to deal with the problem so that we can assess our progress and report upon it.”

Investors start an engagement process by writing a letter to company trying to engage it in a dialogue. If that does not work, they may take direct action by submitting a shareholder Resolution. This is more common in the US because shareholder proposals are permitted in federal law. State laws also permit them.

“The shareholder resolution and process in Europe is mainly one that only permits shareholders to submit resolutions that are specifically in opposition to matters that are on the agenda for a shareholder meeting,” says John Wilcox, chairman at the corporate governance advisory firm Sodali, which works for companies only. “It is a different process from the US where a shareholder resolution gets submitted well before the agenda for an AGM is published.”

Alternatively, shareholders, including some Californian pension funds, may fund value investors or put money into hedge funds that are activists or other change agents.

“It is rarer for institutions to try to get a seat on the board of directors of a company or to oppose director elections but it is becoming more frequent,” adds Wilcox. “Increasingly they also withhold votes for directors on policy grounds and that is in part what proxy advisory firms are doing as well. As a final step they might take a company to court. The use of media has also become an important tool for activists, even for more conservative shareholder groups that want to effect change.”

Limited resources mean that even large institutional investors must focus engagement efforts – for example, by prioritising their largest holdings or companies or sectors with environmental or social issues of particular concern or markets where minority shareholder rights need specific attention or by selecting companies with the greatest scope to add value through activism.

For Summerfield, quality is more important than quantity. “If we are going to carry out engagement effectively with a company, we obviously have to be very informed about its performance, its strategy and everything connected to the company’s sector,” he says. “We would much rather do fewer engagements but do them well and in an informed manner.”

Summerfield says for engagements to be effective, they ought to be confidential and undertaken behind closed doors.

“This is a fundamental difference between the UK and, for example, the US where it seems to be much more in the public domain,” Summerfield continues. “For us, if an engagement appears on the front page of a newspaper it has failed.”

Sometimes USS undertakes engagements collaboratively with other investors. Summerfield says this amplifies the voice of investors and ensures that their concerns will be taken more seriously. “Where we have a specific governance concern, collaboration with like-minded investors can work well,” he says. “If an issue is more bespoke or activist in nature and specific to a particular company, engagements tend to take place on a one-on-one basis.”

The mistakes investors commonly make are waiting until it is late in the game to start engaging or adopting a compliance mentality, which looks only at whether companies have the right structures in place.

Says Wilcox: “In general, companies do not want to see engagement that is looking for short-term gain or some immediate profit at the expense of long-term value creation or any kind of change that puts the company’s long-term strategy at risk. At the same time, company management want to eliminate any misperceptions about the company.

“Another goal of management is to simply avoid activism. Engagement with shareholders is likely to prevent activism from occurring. Ultimately companies should think about bringing shareholders into the corporate family but that will take time, as there is a long history of adversarial relations between companies and shareholders, particularly in the US.”

The UK Investor Stewardship Working Party published its 20:20 Stewardship report in 2012. The report aimed to provide a framework to help achieve better investor stewardship and identified some common shortcomings in the approach of investors to meetings with companies, at least in the eyes of company managers and officers. These included an insufficient depth of knowledge of the company, a lack of continuity in relationships, a lack of a clear agenda or purpose for meetings with companies, a lack of feedback following meetings and a lack of internal consistency between the approach of portfolio managers and ESG specialists.

But can an engagement process actually translate into financial gains? Academic views on whether activism increases value are split. According to Wilcox, this is because it is difficult to come up with a methodology than can isolate the variables and do a definitive study.

“For a basic stewardship type of engagement looking at governance change or concerns it is sometimes very difficult to identify causal effect with the share price,” says Summerfield. “In some aspects it is more like a pre-emptive risk management approach, ensuring that good governance is in place to oversee management and their decision-making effectively. But in the more active, event-driven type of engagement with the aim, for example, of changing management or strategy, a clearer link to share price and the company’s performance can sometimes be identified.”

Occasionally companies may not respond to minority shareholders’ attempt at dialogue, says Cohen, particularly if the company has a large and dispersed shareholder base or one or more large shareholders dominate the company’s ownership structure.

USS has occasionally sold its holding in companies due to lack of access to boards of directors or failing to see any progress in engagement. “If the company’s board is reluctant to engage with investors it may be an indication that the board is not overseeing the company and the management in the interests of its investors,” says Summerfield. “It does raise a very real red

Correspondence Address:
London, W1K 5JH - 53, Davies Street - Tel. +44.207.15.26.425 - Telefax +44.207.15.26.426
Registered office: Royalty House, 32 Sackville Street, London, W1S 3EA
Registered in England and Wales no. 6437243
Other Offices:
Milan, 20121 - 22, Foro Buonaparte - Tel. +39.02.72.02.35.35 - Telefax +39.02.89.00.519
Rome, 00186 - 52, Via della Colonna Antonina - Tel. +39.06.679.29.29 - Telefax +39.06.679.29.10
Genoa, 16125 - 4, Passo Barsanti - Tel. +39.010.272.50.48 - Telefax +39.010.21.79.42
Berlin, D 10117 - 125, Friedrichstraße - Tel. +49.30.66.40.40.60 - Telefax +49.30.66.40.40.620
Brussels, B - 1000 - 38-40, Square de Meeûs - Tel. +32.2.401.61.14 - Telefax + 32.2.401.61.15
New York, NY 10022 - 595 Madison Avenue, 14th Floor - Tel. +1.212.308.8710 - Telefax +1.212.308.8997

www.barabino.it - www.barabino.co.uk

flag if engagement fails to take place between the owners of the company and those appointed to represent their interests on the board."

In the US, lawyers and other advisers will routinely warn companies not to get into the dialogue or have extra disclosure and explanations about their decisions because these may exceed disclosure requirements and involve insider information or selective disclosure. "But the attitude to treat shareholders as the enemy rather than as owners of the company and capital providers is changing," says Wilcox.

Correspondence Address:
London, W1K 5JH - 53, Davies Street - Tel. +44.207.15.26.425 - Telefax +44.207.15.26.426
Registered office: Royalty House, 32 Sackville Street, London, W1S 3EA
Registered in England and Wales no. 6437243
Other Offices:
Milan, 20121 - 22, Foro Buonaparte - Tel. +39.02.72.02.35.35 - Telefax +39.02.89.00.519
Rome, 00186 - 52, Via della Colonna Antonina - Tel. +39.06.679.29.29 - Telefax +39.06.679.29.10
Genoa, 16125 - 4, Passo Barsanti - Tel. +39.010.272.50.48 - Telefax +39.010.21.79.42
Berlin, D 10117 - 125, Friedrichstraße - Tel. +49.30.66.40.40.60 - Telefax +49.30.66.40.40.620
Brussels, B - 1000 - 38-40, Square de Meeûs - Tel. +32.2.401.61.14 - Telefax + 32.2.401.61.15
New York, NY 10022 - 595 Madison Avenue, 14th Floor - Tel. +1.212.308.8710 - Telefax +1.212.308.8997

www.barabino.it - www.barabino.co.uk

06/11/2013 - 13:50

NOVEDADES UNIÓN BANCARIA

"Un tercio de la deuda soberana española está en manos de los bancos"

Enrique Pérez Hernández, profesor del Instituto de Estudios Bursátiles

Hoy el Instituto de Estudios Bursátiles ha organizado un encuentro sobre la "Unión bancaria y reforma del sistema financiero: novedades e implicaciones del mapa bancario español". Hablamos con Enrique Pérez Hernández. Profesor del IEB.

El exceso de endeudamiento privado obligó a los estados a tomar mucha deuda y hoy, la banca europea, tiene un porcentaje muy significativo de deuda soberana. En el caso español, 1/3 del saldo vivo de la deuda soberana en circulación está en manos de los bancos. **El estado español se están encontrando con un mercado donde cada vez hay más inversores extranjeros que pueden ir sustituyendo a los españoles, especialmente a los bancos. Activo de ponderación cero.** En el proceso de unión bancaria se intenta romper ese círculo vicioso deuda soberana-deuda bancaria para hacer unas reglas de juego uniformes para todos los bancos, cualquiera que sea. Dejando que el juicio de valor sobre el riesgo descanse en la solvencia intrínseca de cada entidad y no en el estado miembro al que pertenece.

Entiendo que lo que se persigue es acelerar la corrección de esta última ley. La prima de riesgo ha bajado a 230 puntos y lo normal y razonable es que baje por debajo de 200 pb.

Creo que no porque al final el BCE, que se ha dicho que no ejercerá funciones de supervisor hasta que no haya examinado de verdad a la banca – **activo, pasivo y además simulación de una situación muy adversa a ver si aguantan** – no se producirá un nuevo escenario de crash. Estamos en un proceso irreversible.

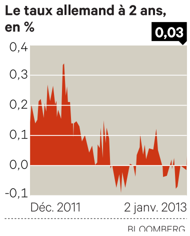
España ha sido el único país del área euro que ha recibido una línea de asistencia financiera, todo lo que ha ocurrido aquí se puede replicar en aquellos países con dificultades que va desde inyecciones públicas de capital – si los bancos no pueden ir al mercado privado- hasta organismos de intervención tipo FROB e incluso creación de un banco malo, tipo la Sareb.

Es verdad que lo resultados han crecido mucho porque se ha reducido el saldo en inversión crediticia. En la medida en que las entidades estabilicen este desapalanamiento.

La política de dividendos es una decisión totalmente soberana, del consejo de administración y junta general de accionista. Creo que el BdE pedirá moderación en los dividendos pues cuanto antes termine el proceso de fortalecimiento de capital – retención de beneficios para que vaya a fondos propios- mejor. **En cuanto a las participadas de los bancos, con los datos que están apareciendo no veo que ningún sector plantee problemas de reparto normal de dividendos.**

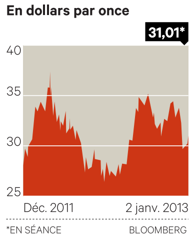
L'ALLEMAGNE ÉMET À 2 ANS À TAUX POSITIF POUR LA PREMIÈRE FOIS DEPUIS 4 MOIS

L'Allemagne a procédé à sa première émission de l'année, en plaçant 4,15 milliards d'euros de titres à 2 ans. Le rendement exigé par les acheteurs est ressorti à 0,03 %, alors qu'il était de – 0,001 % en décembre et négatif depuis octobre. Les investisseurs étaient alors prêts à perdre de l'argent pour détenir une valeur sûre. Ce n'était pas le cas hier.



L'ARGENT RASSURÉ PAR L'ABSENCE DE MUR FISCAL

Le marché des métaux précieux a aussi salué l'accord aux Etats-Unis pour éviter le « fiscal cliff ». L'argent, mais aussi l'or (1.690 dollars l'once en fin d'après-midi) ont fortement progressé. Les opérateurs parient sur un affaiblissement du dollar dans les prochains jours, ce qui est souvent favorable à l'argent. Les cours ont déjà rebondi de plus de 4,5 % depuis le 20 décembre.



Les agences de conseil en vote sous étroite surveillance

GOUVERNANCE

Encadrer l'activité des « proxy advisors » fait partie du plan d'action 2013 de Bruxelles.

Laurence Boisseau
lboisseau@lesechos.fr

« Un mal nécessaire. » C'est ainsi que les entreprises parlent des agences en conseil de vote. Ces prestataires, qui sont aussi appelés « proxy advisors », aident les investisseurs institutionnels à apprécier certaines résolutions lors des assemblées générales. Ces services sont aujourd'hui sous surveillance. L'autorité des marchés financiers européenne, l'Esma, le Trésor public – lorsqu'il lança une consultation sur la gouvernance –, la Commission européenne, tous se sont demandé s'il fallait encadrer cette activité qui n'est pas réglementée.

Le sujet est d'autant plus débattu que le principe du « say on pay », le vote par les actionnaires sur la politique de rémunération des dirigeants, devrait être adopté en France et en Europe en 2013. Et le contre-pouvoir que représentent ces agences en conseil de vote inquiète certains. *« Voter le "say on pay", c'est donner les clefs de la rémunération des dirigeants français à l'américain ISS »*, le plus influent des « proxy advisors », s'insurge ainsi un grand patron.

Vote d'actionnaires par boîtiers électroniques lors d'une assemblée générale. *Photo Hamilton/RÉA*

Dans la ligne de mire des instances réglementaires, le manque de transparence des méthodes utilisées par les conseillers pour préparer leur avis ; les conflits d'intérêts (quand ils fournissent aussi aux sociétés détenues des conseils en matière de gouvernance). *« Enfin, le manque de concurrence dans le secteur amène à s'interroger sur la qualité de leurs conseils et leur adéquation aux besoins des investisseurs »*, indique la Commission européenne dans son plan d'action 2013. D'autant que, derrière, *« la dérive, c'est le suivisme. Il y a un risque que les investisseurs suivent aveuglément ces analyses sans fournir les leurs »*, note un détracteur.

Autant de critiques que les « proxy advisors » balaient. *« La politique de vote d'ISS diffère selon qu'elle s'applique au marché américain, au Canada, à l'Europe, à la Grande-Bretagne, etc. »*, explique Catherine Salmon, responsable recherche gouvernance pour le marché français au sein du bureau MSCI, maison mère d'ISS, à Paris. Selon elle, les analystes d'ISS ont des formations variées et des compétences dans le domaine de la gouvernance, avec pour l'équipe du marché français une expérience variant de trois à quinze ans. Enfin, les actionnaires sont responsables de leur vote. *« Nos rapports de recherche et de recommandation constituent une source parmi d'autres pour nos clients. La décision finale de vote pour chaque résolution leur appartient. »*

Dans sa réponse à la consultation publique du Trésor, Proxinvest, une agence de conseil française, s'est ému de voir que *« les régulateurs, sous la pression d'organisations patronales, se préoccupent de réglementer les rapports des investisseurs privés avec certains de leurs prestataires de conseil »*. Quant aux conflits d'intérêts, l'agence estime qu'il y a deux poids, deux mesures. *« Rien n'est entrepris pour réglementer ceux des gestionnaires d'actifs associés à des groupes financiers multi-métiers »*, déplore Proxinvest.

Code de bonne conduite

En mars 2011, l'AMF a émis une recommandation sur les agences de conseil en vote. Mais le dispositif, qualifié par certains d'ambitieux, ne semble pas convaincre. L'Esma devrait rendre ses conclusions début janvier. Il n'est pas certain qu'elle aille beaucoup plus loin. *« Au départ, certains ont beaucoup crié au loup. Et puis, au fur et à mesure, l'autorité a constaté qu'il n'y avait pas de manquement avéré. Du coup, les contraintes qui pourraient leur être imposées ne devraient pas être trop dures. Cela pourrait consister en un code de bonne conduite qui demanderait des efforts de transparence et de prévention des conflits d'intérêts »*, résume un observateur de marché. En juillet, Benoît de Juvigny, depuis peu secrétaire général de l'AMF, indiquait : *« Il ne faut pas vilipender les "proxy advisors"* [...]. *La préoccupation de l'AMF n'est pas de critiquer leur rôle et leur manière de travailler, mais davantage de les encourager à la transparence dans leur démarche et de les pousser à éclairer les différents publics sur ce qui guide leurs choix. »* ■

Un poids considérable auprès des institutionnels

Les groupes craignent les agences de conseil en vote, très influentes auprès des investisseurs institutionnels.

Les agences de conseil en vote, les « proxy advisors », ont de plus en plus d'influence lors des assemblées générales des sociétés cotées. Cette année, aux Etats-Unis, selon une étude réalisée par le cabinet de conseil Semler Brossy, une recommandation d'ISS, l'un de ces « proxys », pouvait ainsi faire varier les résultats des votes d'une résolution de 30 %. Un total de 14 % des « say on pay » soumis au vote ont reçu une recommandation négative de cet organisme. Le groupe d'agroalimentaire Chiquita Brands, le constructeur immobilier Kilroy Realty, ou la chaîne de vêtements American Eagle Outfitters en ont fait les frais. Les émetteurs redoutent un avis défavorable à une résolution proposée.

Pouvoir de nuissance

« En France, avoir le soutien d'ISS pour faire passer une résolution n'est pas suffisant. En revanche, s'ils votent contre, la résolution peut être enterrée. Leur pouvoir de nuisance est fort », note un conseiller en gouvernance. Il y a des exceptions. Chez Total, ISS a voté contre le renouvellement du PDG, en raison de son cumul de mandats. La résolution a pourtant été adoptée à 80 %.

Les agences doivent cette influence considérable aux investisseurs institutionnels. Dans de nombreux pays, en France depuis 2003, ils sont dans l'obligation d'exercer les droits de vote attachés aux titres détenus par les OPCVM qu'ils gèrent. Faute de temps et de moyens, ou par souci de confronter leurs opinions, ils recourent aux services des « proxy advisors ». *« Nous avons plus de 200 actions dans nos portefeuilles, réparties dans le monde entier. Il nous est impossible d'éplucher, juste avant la saison des AG, en quelques semaines, la totalité des résolutions. Nous avons besoin que quelqu'un nous alerte »*, explique un gérant actions. Même constat pour Valentine Bonnet, responsable du gouvernement d'entreprise et de la déontologie à l'Association française de gestion : *« Les agences de conseil en vote sont une source d'information utile. »*

2007 a marqué un autre tournant, aussi, pour les « proxy ». *« Parce qu'il n'a plus été obligatoire d'immobiliser ses titres plusieurs jours à l'avance pour pouvoir voter à une AG, les investisseurs étrangers ont véritablement exercé leur droit ; le quorum moyen est passé de 48,8 % à 56,1 % dans le CAC 40 »*, explique Hélène Solignac, expert en gouvernance, conseil auprès de Sodali. *« Pour la première fois, 14 résolutions au sein du CAC 40 ont été rejetées »*, ajoute-t-elle. — **L. Boi.**

À NOTER
En France, les « proxy advisors » s'attaquent au cumul des mandats, aux augmentations de capital sans droit préférentiel de souscription, aux attributions de stock-options ou d'actions gratuites.

Le CAC 40 revigoré par l'accord américain

MARCHÉS

La Bourse a salué le compromis évitant le mur budgétaire aux Etats-Unis.

Après un rebond de 15,23 % en 2012, la Bourse de Paris a démarré 2013 dans l'euphorie, avec un gain de 2,55 %, sa plus forte progression depuis le 19 novembre. L'indice CAC 40 a clôturé à 3.733 points, dans des volumes supérieurs à 2 milliards d'euros. Un niveau plus haut depuis fin juillet 2011.

Les marchés ont été rassurés après l'accord intervenu au Congrès américain entre républicains et démocrates pour éviter le « mur budgétaire » (« fiscal cliff »). Les opérateurs pariaient certes, ces derniers jours, sur un accord de dernière minute, mais *« le soulagement est immense »*, rapporte un analyste de ETX Capital, qui rappelle que le « fiscal cliff » aurait entraîné *« une hausse automatique des impôts et une baisse drastique des dépenses publiques qui auraient plombé l'économie américaine encore convalescente »*.

Du côté des valeurs, les banques se sont distinguées : **Société Générale** a pris 5,33 %, **BNP Paribas** 4,4 % et **Crédit Agricole SA** 4,37 %. Les valeurs cycliques ont aussi connu une belle journée, **Eiffage** gagnant 4,6 %, **STMicroelectronics** 4,1 % et **Saint-Gobain** 3,97 %. Gain de 4,45 % pour **ArcelorMittal** qui a annoncé la cession de 15 % de ses mines de fer au Canada pour 1,1 milliard de dollars. Il n'y a eu qu'une seule valeur en baisse sur le CAC 40 : **Renault** (–0,29 %), miné par les chiffres du marché automobile français. **Peugeot SA** n'a crû que de 0,46 %. Sur le SBF 120, seules une poignée de valeurs a reculé dont **SAFT** (–0,68 %) et **Eutelsat** (–0,60 %). ■

carnet

EN PARTENARIAT AVEC nomination
nomination.fr

ENTREPRISES

INFINITI
Gilles Gautherot
est nommé communications manager d'Infiniti pour la France. Il succède à Jean-Eric Perrot.

Gilles Gautherot, trente-huit ans, diplômé de l'ESC de Reims, commence sa carrière en 1999 comme analyste à la direction du développement réseau de Renault, en Grande-Bretagne. Il rejoint Nissan Europe en 2002 au poste de responsable de la communication corporate. En 2010, il intègre la direction de la communication de l'Alliance Renault-Nissan, au siège de Renault à Boulogne-Billancourt.

AGROGENERATION
Alain de Woillemont
est nommé directeur administratif et financier du groupe.

Alain de Woillemont, trente-neuf ans, diplômé de l'Ecole polytechnique et de Sup'aéro, a suivi une spécialisation en finance d'entreprise et des marchés à l'Insead. Il a débuté dans le conseil et exercé notamment chez AT Kearney, avant de rejoindre Nestlé, puis 3I Group en tant que directeur capital-développement. En 2007, il est devenu directeur administratif et financier de l'ETI industrielle Soflog-Telis.

FONCTION PUBLIQUE

MINISTÈRE DES AFFAIRES ÉTRANGÈRES
François Barry Martin-Delongchamps
est nommé conseiller diplomatique du gouvernement au Quai d'Orsay.

François Barry Martin-Delongchamps, soixante-trois ans, ancien élève de l'ENA (promotion Pierre Mendès France) et de l'IEP de Paris, est ministre plénipotentiaire hors classe. Nommé ambassadeur extraordinaire et plénipotentiaire de la République française à Singapour en 1995, puis ministre conseiller à Washington en 1999, il est devenu en 2002 directeur des Français à l'étranger et des étrangers en France au ministère des Affaires étrangères. Depuis 2007, il était ambassadeur extraordinaire et plénipotentiaire de la République française en Pologne.

MINISTÈRE DE LA JUSTICE
Régis Fraisse
a été nommé conseiller d'Etat au ministère de la Justice.

Régis Fraisse, soixante ans, est titulaire d'une maîtrise en droit public et diplômé de l'IRA de Lyon. Premier conseiller à la cour administrative d'appel de Lyon en 2000 et 2001, il a rejoint ensuite le Conseil constitutionnel pour y occuper le poste de chargé de mission, puis celui de chef du service juridique (2003-2012).

ANGDM
Marie Bonnet
est nommée directrice générale de l'Agence nationale pour la garantie des droits des mineurs.

Marie Bonnet, cinquante-quatre ans, ancienne élève de l'ENA (promotion Victor Schœlcher), diplômée de l'IEP de Paris, titulaire d'une maîtrise en droit social, est administratrice civile hors classe. Sous-directrice de la régulation européenne à la direction des affaires européennes et internationales du secrétariat général du Meeddat de 2008 à 2010, elle a rejoint ensuite le cabinet de François Fillon à Matignon en tant que conseillère. Elle a parallèlement dirigé son cabinet au MEDDTL, de février à mai 2012.

CENTRE DE RECHERCHE

CETIM
Emmanuel Vielliard
a été élu président du Centre technique des industries mécaniques.

Emmanuel Vielliard, soixante-quatre ans, diplômé de l'Essca, titulaire d'un master of science (option finance) de l'université de Sherbrooke au Canada, est actuellement directeur du développement international du groupe Le Bronze Industriel et vice-président de l'Association française de forge. Il a débuté comme contrôleur de gestion au sein du groupe Thomson, avant de devenir successivement DGA de RebichonSignode, PDG du groupe AMCC et DG d'Inforges, société aujourd'hui intégrée au groupe Le Bronze Industriel.

ASSOCIATION PROFESSIONNELLE

ANFH
Fernand Brun
a été élu président de l'Association nationale pour la formation permanente du personnel hospitalier. Il succède à Nicolas Estienne.

Fernand Brun, soixante ans, infirmier de formation, a suivi les cycles préparatoires de l'Ecole nationale de la santé publique et de l'ENA puis obtenu un DU de gestion des services de santé. Représentant du syndicat Force ouvrière, dont il a notamment été secrétaire fédéral, il a rejoint en 2001 le conseil d'administration et le bureau national de l'ANFH, dont il est devenu vice-président en 2010. Il a été parallèlement cadre supérieur de santé au CHI de Toulon-La Seyne.

Envoyez vos nominations à
carnetlesechos@nomination.fr

ILS SONT NÉS UN 3 JANVIER

Olivier Bohuon, CEO de Smith & Nephew, 54 ans.
Dominique Cerutti, directeur général adjoint de Nyse Euronext, 52 ans.
Elie Cohen, chercheur, 63 ans.
Marie Darrieussecq, romancière française, 44 ans.
Luc Ferry, philosophe, ancien ministre de l'Education nationale, 62 ans.
Mel Gibson, acteur, 57 ans.
Nicolas Hieronimus, directeur général de la division des produits de luxe de L'Oréal, 49 ans.
Michael Schumacher, pilote, ancien champion de formule 1, 44 ans.
Danièle Thompson, réalisatrice de films, 71 ans.

L'IFA veut promouvoir le rôle du secrétaire du conseil d'administration

GOUVERNANCE

Secrétaire du conseil d'administration, un rouage essentiel pour une bonne gouvernance.

Pour une plus grande reconnaissance du secrétaire du conseil d'administration. Telle est l'ambition de l'IFA (Institut français des administrateurs), qui a publié un rapport en fin de semaine dernière. Le groupe de travail présidé par François Basset-Chercot, secrétaire du conseil de L'Oréal, recommande de promouvoir le statut, le rôle et les missions du secrétaire. Il préconise aussi leur insertion dans les codes de gouvernance de référence (Afep-Medef et Middlenext).

« Faire évoluer la fonction »

Méconnu, le secrétaire du conseil est pourtant un rouage essentiel au bon fonctionnement du conseil d'administration et à la dynamique de la gouvernance. « *Auparavant, c'était un cadre dirigeant qui avait également des compétences juridiques et dont la mission principale était de convoquer et de rédiger le procès-verbal. Aujourd'hui, il est au cœur de la gouvernance* », note Hélène Solignac, expert-conseil auprès de Sodali. Le secrétaire du conseil intervient très en amont ; il anticipe les sujets de gouvernance, coordonne les documents mis à disposition des administrations, s'occupe des formations. Il vérifie la conformité des règles en vigueur dans l'entreprise avec les textes législatifs ou les codes qui sont publiés. Et il émet des recommandations. En France, son statut est relativement informel. « *Cette fonction indispensable au bon fonctionnement des travaux du conseil, gagnerait à être clairement identifiée* », relève l'IFA. Son rôle va devenir de plus en plus important avec la mise en œuvre du Say On Pay (consultation des actionnaires sur les rémunérations des dirigeants), ou avec la loi de sécurisation de l'emploi avec l'arrivée des représentants des salariés dans les conseils et avec l'accroissement des interactions entre les conseils et les comités d'entreprise. L'IFA recommande « *de faire évoluer la fonction vers un poste à plein temps, rattaché au président du conseil pour lui donner la disponibilité nécessaire* ».

— **L. Boi.**

La taxe Tobin française rapportera moins que prévu

FISCALITÉ

Bercy a annoncé que le rendement attendu de la TTF sera divisé par deux.

Les volumes sur les actions françaises ont été affectés par cet impôt.

Marina Alcaraz
malcaraz@lesechos.fr

La taxe sur les transactions financières (TTF), mise en place depuis le 1er août 2012, rapportera finalement moitié moins que prévu. Le rendement attendu de ce mécanisme consistant à taxer les échanges sur les valeurs de plus de 1 milliard d'euros de capitalisation boursière ayant leur siège social en France a en effet été revu dans le projet de budget pour 2014 : à environ 700 millions d'euros, contre 1,5 milliard dans la loi de Finances initiale pour 2013. « *Nous étions partis des hypothèses du précédent gouvernement, qui étaient sans doute surévaluées, ce qui peut arriver lorsqu'on met en place un nouvel impôt* », explique-t-on à Bercy. D'ores et déjà, à l'été 2012, le ministère des Finances avait décidé de doubler la taxe (à 0,2 %, contre 0,1 % initialement prévu) avant même son entrée en vigueur, expliquant que les prévisions affichées par le gouvernement Fillon ne pouvaient être atteintes. Puis, en janvier, Bercy avait de nouveau reconnu que les premiers résultats de la TTF n'étaient pas à la hauteur des espoirs. « *Il y a sans doute un effet lié à la baisse des volumes sur les actions,* explique un conseiller du ministère. *Même si nous n'imputons pas ce recul des volumes à cette seule taxe.* »

Bercy prévoit un rendement de 700 millions d'euros pour la TTF, contre 1,5 milliard attendu. *Photo Bertrand Guay/AFP*

Les professionnels des marchés estiment qu'il y a bel et bien un impact direct de la TTF. D'après les données de Nyse Euronext, dès août 2012, les valeurs taxées ont enregistré une baisse moyenne de leurs volumes de 15 % supplémentaires par rapport aux autres valeurs non concernées. Les opérateurs n'étaient pas tous préparés à cette taxe, puisque la documentation a été publiée tardivement et en français, incitant les investisseurs étrangers à rester en retrait du marché hexagonal. Puis la tendance s'est confirmée : depuis début 2013, la contraction atteint 20 %. Certains investisseurs ont décidé de réallouer leurs portefeuilles en sous-pondérant les valeurs françaises au profit de sociétés européennes, non taxées, indique-t-on chez Nyse Euronext. Ils ont ainsi pu préférer des titres étrangers d'un même secteur.

Contournement

Parallèlement, d'autres investisseurs ont pu contourner la taxe en utilisant des produits dérivés non taxés comme les CFD, des produits qui suivent le comportement d'un indice ou d'une action, prisés notamment des particuliers actifs en Bourse. « *On constate en effet une augmentation sur les CFD, mais ce n'est pas uniquement lié à la TTF, comme l'illustre la tendance dans d'autres pays* », nuance Pierre-Antoine Dusoulier, de Saxo Bank.

De son côté, la taxe sur le trading haute fréquence, également lancée en 2012, n'a pas pu compenser le manque à gagner pour l'Etat. « *Son objectif était plus de dissuader ce type de pratique que de générer des recettes. Et il semble que cela ait marché* », indique le conseiller de Bercy. ■

« Say on pay » : Pernod Ricard donne le « la »

GOUVERNANCE

Les éléments de rémunération seront soumis au vote des actionnaires.

Très attendus, ils risquent de faire jurisprudence.

Laurence Boisseau
lboisseau@lesechos.fr

Jamais le document de référence de Pernod Ricard n'aura été aussi attendu. Et pour cause, dans les 268 pages déposées hier à l'Autorité des marchés financiers (AMF) figurent les projets de résolution sur les éléments de rémunération qui seront soumis au vote des actionnaires lors de la prochaine assemblée générale. Le 6 novembre – pour cause d'exercice décalé clos au 30 juin –, le groupe de spiritueux inaugurera donc la fameuse règle du « say on pay ».

Alors que l'Afep-Medef n'a pas encore publié son guide d'application, comment Pernod Ricard va-t-il respecter le code de gouvernance révisé en juin dernier ? Le groupe va soumettre au vote des actionnaires trois résolutions (11, 12 et 13) visant les rémunérations des dirigeants. L'une concerne Pierre Pringuet, directeur général ; l'autre, Alexandre Ricard, directeur général délégué. La dernière porte sur la rémunération de Danièle Ricard. Sur ce point, le groupe va plus loin que le code, car cette dernière, présidente du conseil d'administration, assume des fonctions non exécutives. Sa rémunération n'était donc pas soumise à avis des actionnaires. En outre, le document publie trois tableaux récapitulant tous les éléments de rémunération des trois dirigeants, qui permettent d'apprécier la manière dont ils ont été fixés.

Les rémunérations de trois dirigeants, dont celle du directeur général, Pierre Pringuet, seront soumises à l'avis des actionnaires.
Photo C. Lebedinsky/Challenges-RÉA

Ils incluent également les indemnités de départ, les régimes de retraite supplémentaires qui font l'objet de conventions réglementées.

« Pression sur les autres »

Autre point sur lequel le groupe est le premier à se lancer, l'application de la loi du 14 juin 2013 relative à la sécurisation de l'emploi concernant la présence de deux administrateurs salariés au conseil. La résolution 24 proposera dans ce but un changement des statuts du groupe. Compte tenu de son profil international, Pernod a choisi que l'un des administrateurs salariés soit issu du comité de groupe France et l'autre du comité d'entreprise européen.

Scruté par les investisseurs et par les émetteurs – il l'était d'autant plus que Pierre Pringuet a succédé à Maurice Lévy à la présidence de l'Afep en 2012 –, le document de Pernod Ricard répond-il aux attentes ? Fera-t-il jurisprudence ? « *Pernod a fait de beaux efforts de transparence pour justifier sa politique de rémunération. De plus, le variable de Pierre Pringuet est presque moitié moindre que l'exercice précédent, ce dont on pourrait déduire que les objectifs fixés par le conseil sont exigeants* », note Louis Barbier, représentant de la France chez Sodali, société de conseil en gouvernance. « *Cette transparence met la pression sur les autres groupes qui seront soumis aux mêmes obligations* », indique un autre expert en gouvernance.

Fin mai, lors de son assemblée générale, alors que rien ne l'y obligeait, Publicis avait appliqué le principe du « say on pay ». C'était avant que le code ne fasse ses recommandations. Et c'était sur la rémunération de Maurice Lévy, dont la structure est inhabituelle car elle ne comprenait qu'un variable. ■

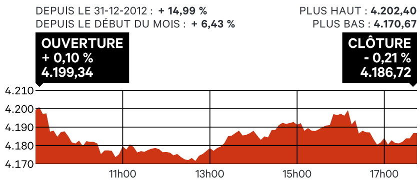
Le « say on pay »

Il n'y a pas eu de loi.
Le « say on pay », **le vote par les actionnaires sur les rémunérations des dirigeants,** a été intégré dans le nouveau code Afep-Medef en juin.
Ce dernier a opté pour un vote **consultatif** sur les rémunérations individuelles des dirigeants mandataires sociaux ex post, et non sur une politique de rémunération ex ante.
Si l'assemblée émet un **avis négatif,** le conseil devra délibérer sur ce sujet lors de sa prochaine séance **et publier aussitôt un communiqué** sur les suites qu'il entend donner.

Le variable de Pierre Pringuet presque divisé par deux

860.200 euros, c'est le montant du variable que Pierre Pringuet, le directeur général de Pernod Ricard, touchera au titre de l'exercice 2012-2013, contre 1,6 million l'an dernier. Au titre des critères quantitatifs, cette part variable a représenté seulement 48,2 % de sa rémunération fixe. Pourtant, malgré un environnement moins porteur en Chine et des marchés difficiles en Europe de l'Ouest, le groupe a amélioré sa marge opérationnelle.

LA SÉANCE **DU 26 SEPTEMBRE 2013**



BLOOMBERG

Hésitant, le CAC 40 se maintient sous 4.200 points

● Le CAC 40 a cédé 0,21 %, à 4.186,72 points. Les investisseurs sont restés prudents dans l'attente d'un éventuel accord aux Etats-Unis sur le budget fédéral et le plafond de la dette. Dans ce contexte, ils ont pris note de bons chiffres sur l'emploi, l'immobilier et la croissance aux Etats-Unis. A Paris, le volume d'échanges n'a pas dépassé 2,3 milliards d'euros.

Comme lors de la séance précédente, **Orange** a pris la tête du CAC 40 (+ 3,34 %, à 9,43 euros), bénéficiant de l'effervescence du secteur à l'occasion du déploiement de la 4G.

Les valeurs bancaires ont été délaissées, **Société Générale** perdant 0,71 %, **Crédit Agricole SA** 0,95 %, et **BNP Paribas** 1,05 %.

EADS a clôturé en hausse de 0,88 %, à 47,02 euros, au lendemain de l'annonce de plusieurs commandes fermes en Chine et au Vietnam par sa filiale Airbus.

En dehors du CAC 40, **Alcatel-Lucent** a pris 6,28 %, à 2,69 euros, porté par des rumeurs évoquant une alliance avec le groupe finlandais Nokia.

L'OPÉRATION **DU JOUR**

BHP Billiton lève pour 5 milliards de dollars de dette

● BHP Billiton, le premier groupe minier au monde, a émis pour 5 milliards de dollars d'obligations à maturité de 3, 5, 10 et 30 ans sur le marché américain. Dix-huit milliards de dollars d'ordres ont été recueillis dans le carnet destiné aux investisseurs. Cet emprunt en quatre tranches est la plus importante levée de dette du producteur anglo-australien depuis un an et demi. BHP, dont le plan d'investissement se monte à 16 milliards de dollars sur 2014, suit ainsi d'autres grands acteurs du secteur des matières premières, Glencore Xstrata, Rio Tinto, AngloGold Ashanti ou encore Barrick Gold, qui ont levé de la dette au cours des trois derniers mois.

Le Nasdaq et le Nyse collaborent pour éviter les bugs

ENTREPRISE DE MARCHÉ

Un projet de back-up mutuel des données est à l'étude.

Karl de Meyer
— Bureau de New York

Les deux principales plates-formes de Wall Street, le Nasdaq et le Nyse, d'habitude à couteaux tirés pour attirer les cotations les plus emblématiques, comme celle à venir d'Alibaba, sont en voie de coopérer au niveau technologique contre les bugs informatiques. Selon le « Wall Street Journal », le Nasdaq et le Nyse réfléchissent à la meilleure façon de se couvrir l'un l'autre quand une difficulté technique interrompt le flux de données qui leur permet de tourner et de rester en communication permanente avec les acteurs du marché. Chacune des plates-formes assurerait un back-up des cotations de l'autre.

Réputation à réparer

Ces travaux préparatoires posent de nombreuses questions techniques, dans la mesure où le Nasdaq et le Nyse utilisent, pour communiquer avec leurs interlocuteurs, des langages informatiques différents. Une des pistes consisterait à standardiser et à harmoniser les outils de communication. Mais cela prendrait du temps et coûterait de l'argent. Les surcoûts seraient probablement répercutés, au final, sur les clients. Une autre piste serait de faire jouer un rôle central de sécurisation des échanges à la Depository Trust & Clearing Corporation, qui traite les ordres passés aux Etats-Unis à travers sa chambre de compensation.

Les efforts du Nasdaq et du Nyse visent à réparer leur réputation et regagner la confiance des investisseurs, entamée par plusieurs bugs embarrassants. Au mois d'août, un problème de logiciel du Nasdaq s'est traduit par une suspension de trois heures des cotations, avec des conséquences en boule de neige. La semaine dernière, un incident dans une filiale du Nyse a provoqué une panne de dix minutes de tous les marchés d'options américains. L'an dernier, l'installation mal préparée d'un logiciel chez le courtier Knight a provoqué un bug majeur qui s'est soldé par la vente du courtier en question, qui ne pouvait faire face aux indemnisations réclamées. Enfin, on se souvient du « flash krach » de mai 2010. La sécurisation des échanges est une préoccupation majeure du gendarme de la Bourse américaine. Sa patronne, Mary Jo White, a convoqué le 12 septembre les acteurs du marché pour leur demander de lui soumettre un plan d'amélioration de la situation actuelle dans les soixante jours.

À NOTER
Standard & Poor's estime que les problèmes techniques récurrents des opérateurs boursiers pourraient l'inciter à dégrader ses notes de crédit.

Press Release

London

SEPTEMBER 2013

Cristina Ungureanu joins Sodali as Corporate Governance Advisor

Sodali, the global corporate governance and shareholder services consultancy, announced today that Cristina Ungureanu has joined the firm as Corporate Governance Advisor.

Ms. Ungureanu, who holds a PhD in Finance and a Masters degree in International Affairs, is a well-known expert in corporate governance and investor relations. She brings more than a decade of experience working with global companies on issues of governance, executive remuneration, shareholder activism and investor communications. "Cristina is a senior executive with a combination of skills that are critical to the development of Sodali's global corporate governance services", said Alvise Recchi, Sodali CEO. "She is a thought leader on corporate governance issues globally and has years of experience dealing with the logistics of cross-border investor communications and share voting. Together with the governance team at Sodali, Cristina will further exploit our research and network with the leading associations and decision makers. All of these skills are critically important to serving our clients and giving Sodali additional global reach in the transactional and advisory fields of our business."
Ms. Ungureanu said: "I am delighted to be joining the Sodali team. The firm is at the cutting edge of advisory services for corporates and investors. I look forward to working in an environment that provides innovation and excellence in serving corporate clients."

John Wilcox, Sodali Chairman, added, "We are very fortunate to have Cristina join the Sodali team. With our philosophy of 'aligning interests' and our commitment to provide both global perspective and local expertise to clients around the world, we rely on highly skilled executives like Cristina who share the Sodali philosophy and are well respected by both the corporate and institutional investor communities."
Ms. Ungureanu will provide advice to clients on a range of issues relating to governance, remuneration, communication and board evaluation. She will also oversee the Sodali corporate governance social network.

About Sodali

Sodali is an international consultancy and service provider that has achieved prominence as a leader in corporate governance, the development of institutional investor relations, the management of shareholder meetings and the mechanics of cross-border share voting. The firm's mission of "aligning interests" is based on the conviction that a company's governance and business strategy should work together to serve the long-term economic interests of the enterprise and its stakeholders. In addition to its assignments with some of the world's largest publicly-traded corporations, Sodali also works extensively with developing market companies, family-owned businesses, mutual companies and state-owned enterprises. The firm has offices in Athens, Copenhagen, Geneva, Helsinki, London, Madrid, Milan, New York, Paris, Rome, Sao Paulo, Tokyo and representatives in Lima and Mexico City.

sodali ALIGNING INTERESTS

Press Release

London

SEPTEMBER 2013

Sodali appoints Gonzalo Cardoner as Country Manager for Brazil

Sodali, the global consultancy specializing in corporate governance and shareholder services for General Meetings and M&A transactions, announced today that it has hired Mr. Gonzalo Cardoner as Country Manager for Brazil, to further develop and consolidate the firm's business in the Brazilian market.

Mr. Cardoner brings more than 20 years of experience in financial markets and business development in Brazil and Latin America. His wide-ranging activities include the start-up of a private equity firm, leading the IPO of a consumer and retail company and structuring a number of acquisitions, besides holding other financial executive responsibilities in both private and publicly held companies.

Mr. Cardoner said: "I am very excited about the opportunity that the Brazilian market offers to a firm like Sodali. The recent developments and increasing sophistication of the Brazilian capital markets as well as the more rigorous corporate governance requirements, together with the increasing dispersion of shareholding ownership, all come at the right time for Sodali to enter the market. With the expertise and the team we have in house, and the solutions in our portfolio, we can help our clients deal with the challenges ahead, while growing with them in the process."

Giulio Pediconi, Managing Director of Sodali, stated: "Sodali has been operating in Brazil since 2008, pioneering Proxy Solicitation, Global Information Agent services and assisting companies in aligning their corporate governance structure to their investors' concerns and expectations. Gonzalo has the right skills, experience and commitment to excellence which will help us meet the growing demand for Sodali's services and further develop our business model in Brazil".

About Sodali

Sodali is an international consultancy and service provider that has achieved prominence as a leader in corporate governance, the development of institutional investor relations, the management of shareholder meetings and the mechanics of cross-border share voting. The firm's mission of "aligning interests" is based on the conviction that a company's governance and business strategy should work together to serve the long-term economic interests of the enterprise and its stakeholders. In addition to its assignments with some of the world's largest publicly-traded corporations, Sodali also works extensively with developing market companies, family-owned businesses, mutual companies and state-owned enterprises. The firm has offices in Athens, Copenhagen, Geneva, Helsinki, London, Madrid, Milan, New York, Paris, Rome, Sao Paulo, Tokyo and representatives in Lima and Mexico City.

Press Release

sodali ALIGNING INTERESTS

London

SEPTEMBER 2013

Global Executives Join Sodali

Sodali, the global corporate governance and shareholder services consultancy, announced today that three prominent global executives have joined the firm: Jerome Beaucamps, as Senior Relationship Manager for France; Gonzalo Cardoner, as Country Manager for Brazil; and Cristina Ungureanu, as Director of Governance Advisory.

Alvise Recchi, Sodali CEO, said, "Jerome, Gonzalo and Cristina will help Sodali achieve our global growth plan". Mr. Recchi also noted that Sodali has expanded its capabilities in the Nordic region. Christina Wallgren has recently joined Sodali in Helsinki, while Arent Ronn Christensen oversees business development from Copenhagen. He added "we have spent more than a year searching for professionals with the right skills, experience and commitment to excellence who can help us meet the growing demand for Sodali's services".

Mr. Beaucamps brings more than 25 years of experience in corporate broking, M&A and ECM, institutional and corporate services in Europe, most recently with The Royal Bank of Scotland/ABN AMRO Bank and previously with Banque Paribas in Paris and London. He will work closely with Louis Barbier, Sodali's country manager in France, in business development and providing corporate and board advisory service to French corporate clients.

Mr. Cardoner will oversee Sodali's business development and corporate services in Brazil working from the firm's Sao Paulo office. Mr. Cardoner has more than 20 years of experience in financial market services in Brazil and Latin America. His wide-ranging activities include private equity, M&A, IPOs and CFO experience at private and listed companies in Latin America.

Ms. Ungureanu, who holds a PhD in Finance and a Masters degree in International Affairs, is a well-known expert and thought leader in global corporate governance, investor relations, shareholder services and regulatory issues. She will oversee the firm's global research and analytical services and work with corporate clients on issues relating to corporate governance, executive remuneration, shareholder activism, board evaluation, annual meetings and cross-border communications.

John Wilcox, Sodali Chairman, said, "We are very fortunate to have attracted these outstanding executives to Sodali. With our philosophy of 'aligning interests' and our commitment to provide both global perspective and local expertise to clients around the world, we rely on a team of highly skilled executives who work effectively together and are well respected by the corporate and institutional investor communities. We are happy to welcome Jerome, Gonzalo and Cristina to the Sodali family."

About Sodali

Sodali is an international consultancy and service provider that has achieved prominence as a leader in corporate governance, the development of institutional investor relations, the management of shareholder meetings and the mechanics of cross-border share voting. The firm's mission of "aligning interests" is based on the conviction that a company's governance and business strategy should work together to serve the long-term economic interests of the enterprise and its stakeholders. In addition to its assignments with some of the world's largest publicly-traded corporations, Sodali also works extensively with developing market companies, family-owned businesses, mutual companies and state-owned enterprises. The firm has offices in Athens, Copenhagen, Geneva, Helsinki, London, Madrid, Milan, New York, Paris, Rome, Sao Paulo, Tokyo and representatives in Lima and Mexico City.

Board Evaluation: Notes From Europe

by Cristina Ungureanu

While board evaluation remains an uncertain (and often lax) practice in the United States, it has a solid history in Europe (often with government mandates). The use of outside advisers is common in Europe. What lessons can be learned from Europe's experience with professionalized board assessments?

By law and regulation, the role of the director is to represent the best interests of the corporation. Before the profound economic effects of the financial crisis, the evaluation of board performance was rather trivial. For many boards it used to be a box-ticking exercise, which showcased the limited engagement of the directors and limited consideration for the process.

More recently, board behavior and effectiveness have become increasingly visible to investors and other stakeholders. Board evaluation is often acknowledged as a vital process for improving board performance and dynamics, whatever the size, status or type of organization. If thoroughly conducted, a board evaluation (or review) has the potential to significantly enhance board effectiveness, maximize strengths and tackle weaknesses.

The evaluation provides the board the opportunity to understand its own dynamics and mechanics, and increases awareness of the board members by giving them the opportunity to evaluate themselves. It sets the mechanisms for positive internal changes, reduces personal liability risks or damage to directors' reputation, improves overall productivity, enhances the public perception of the board and defines its culture.

In the past few years, the European Commission has reinforced its focus on corporate governance matters, issuing several rules and guidelines. Most of these raise the issue of increased board responsibility in the corporate governance framework through better functioning and more appropriate structures. Many EU countries have thus reviewed their codes of corporate governance, incorporating relevant requirements for increasing board effectiveness.

In 2003, the UK Combined Code of Corporate Governance recommended that boards "undertake a formal and rigorous annual evaluation of its own performance and that of its committees and individual directors." The latest version of the UK Code (issued in September 2012) recommends that FTSE 350 companies undertake an externally facilitated board evaluation at least every third year. This change to the Code has catalyzed an increased interest in board evaluations in a wide range of companies.

Meantime, the Walker Review of UK banks' corporate governance (2009) reached the conclusion that not all boards had given board evaluations the deserved attention and thoroughness. The review calls for greater use by the banks of *externally* facilitated, rather than internal, board evaluation.

Most European codes of corporate governance incorporate some provisions for board assessment. However the approach varies.

The Italian Corporate Governance Code strengthened its recommendations regarding board evaluation in 2011. In particular, it recommends that the board of directors consider whether it has an adequate representation of the various board constituencies (executive, non-executive, independent directors), and of the different professional and managerial competences, including experience in international markets. The Bank of Italy issued guidelines on internal governance asking banks to conduct periodic evaluations of their boards.

Cristina Ungureanu *is Corporate Governance Advisor at Sodali, a global consulting firm specializing in corporate governance, shareholder transactions and institutional investor relations. [www.sodali.com]*

Most other European codes of corporate governance incorporate some provisions regarding the board assessment process, however the approach varies. Some codes are rather vague (Germany), while others place strong emphasis on the importance of the process (France). A few codes are silent on how to carry out an efficiency check in practice.

As a result of these reforms, an increasing number of European companies are now conducting performance assessments of their boards in order to meet legal, investor and community expectations. Companies have various approaches to board evaluation, in terms of methodology and objectives.

In setting up the framework, a company should ask itself whether the exercise is the result of regulation or a commitment to good governance; thus, merely a compliance exercise, or rather one aimed at sustaining the performance of the board.

In line with general best practice, an *external* evaluation should take place at least every three years. Several companies engage an external consultant more often.

While meeting regulatory requirements may be part of the motivation, the primary driver should be a desire to build a high-performing board, well-suited to anticipate, meet and overcome the challenges ahead. Increasingly, boards are moving away from the "check-the-box" mentality towards using evaluations as a tool to ensure they are aligned with the company's long-term strategy.

Aside from the need for compliance, a firm's approach should be subject to its board's strategy, past or upcoming circumstances and the objectives of the assessment process. In-house processes may have the advantage of causing less concern to boards that are reluctant to conduct evaluation. However, adopting only internal reviews may keep board members from revealing some aspects that could be problematic. This obscures the real picture.

In line with general best practice, an external evaluation should take place at least every three years. Several companies engage an external consultant more often, either annually or once every two years. Generally, companies do not maintain a standard rule for such a schedule.

Specialization and independence of the external evaluator are key. Regular use of an outside consultant can improve board performance assessments by bringing an objective view and "best practice" perspective. Given the potential conflicts, the external facilitator should not engage in other consulting services for the company or management.

According to some emerging regulation (Italy and the UK), companies must publicly disclose whether an outside evaluator has any other connection with the company. The problem in most markets however, is the limited number of specialized board evaluation consultants. As with all market issues, greater demand would likely nurture growth.

The involvement of the external party in the process can have several levels. It could offer independent advice to the board throughout the process, or simply act as impartial facilitator. Companies generally prefer the former approach, which ensures the most effective process, at the same time releasing the board from the pressure of conducting an evaluation internally.

A thorough and accurate board evaluation process can identify issues and enact reforms to improve performance. The board should agree in advance to the following:

☐ *Scope and purpose of the evaluation.* Directors should have a shared commitment to the scope and purpose of the evaluation.

☐ *Designated party.* If done internally, the board should agree on a member or committee to oversee the evaluation. Alternatively, boards can appoint an independent, specialized outside consultant to conduct the evaluation.

☐ *Methodology and subjects included in the process.* This should establish how the evaluation is conducted (questionnaire, individual interviews or both) and whether the evaluation extends from board to committees and to individual directors.

☐ *Areas of evaluation.* The board should agree in advance on the main areas to be examined. These include board agendas, information flow, effectiveness of board meetings, performance of individual committees, relationship between the board and senior management, and the board's approach to strategy and governance.

☐ *A post-evaluation review* may identify issues or threats, and should embrace opportunities and adopt reforms which may be required.

The board evaluation process may include a review of board documentation, governance documents, charters, minutes, agendas and observations of board meetings, particularly if conducted by an external consultant. This assessment is important in preparing the discussions with the board members, enabling a complete assessment. Major board happenings during the previous year should be noted by the outside advisor and brought back for board members' analysis.

A trend towards increasing use of interviews for board evaluation has emerged. Sometimes these are combined with questionnaires.

The methodologies used to determine the evaluation output vary. The primary tool is the questionnaire. However, a trend towards increasing the use of interviews, combined with questionnaires or not, has emerged. While questionnaires address questions related to past performance, interviews allow for more space to approach the future plans and strategy of the board. Interviews also enable open discussions and diversity of opinion, expanding the more closed-end questions that questionnaires are based upon.

The process of evaluation varies greatly among firms. Most commonly it covers the board as a whole and its committees. In the UK however, in accordance with the code guidelines, many companies extend the scope of the evaluation to the *individual* board members, the chairman and, in some cases, the executive directors.

Evaluation of individual directors helps in weighing each director's contribution, effectiveness and commitment to the board. Individual evaluation covers a wide range of issues, including competency of board members, information flow, board meeting dynamics, relationship with senior management, quality of board supervision and decision making.

While in the past boards used to be primarily internally focused, today they must actively scan the outside environment for things that might impact the company. Within the evaluation exercise, forward-thinking companies place special emphasis on the board's role in making strategic decisions, aside from its monitoring tasks. The independent, specialized evaluator assists boards in answering important questions, such as: What should the board be doing in the critical areas of oversight, strategy and risk? How, and to what extent, can the board be positioned as a strategic partner with the management?

Board assessments are not a sure remedy to boards' problems. Even if an annual assessment is conducted, there is no guarantee that a board will implement needed changes. The board may approach evaluation as a *pro forma* exercise, which can minimize insights. Or, they could take an honest look at whether board practices and composition are optimized to meet the company's long-term goals. Surely, the latter approach enhances the effectiveness of the outcome of the evaluation.

Board evaluation should not be a mere function of compliance with the regulations. Rather, it should be a stimulating process for the board to acknowledge and reflect on its current framework, its strong and weak points, on opportunities to improve its functioning and performance. Boards will effectively address any limits or weaknesses only when they acknowledge what these are. An effective and well-governed board is willing to consider the findings of the evaluation, holding open discussion on them, and identifying issues for improvement. ■

Note: The table on pages 20–21 outlines some European corporate governance guidelines on board evaluation.

The World Of Evaluation

European Rules For Board Assessment

The following table outlines the requirements in some of the European corporate governance guidelines pertaining to board performance evaluations.

United Kingdom
2012 Corporate Governance Code

☐ The board should undertake a formal and rigorous annual evaluation of its own performance and that of its committees and individual directors.

☐ Evaluation of the board should consider the balance of skills, experience, independence and knowledge of the company on the board, its diversity, including gender, how the board works together as a unit, and other factors relevant to its effectiveness.

☐ The chairman should act on the results of the performance evaluation by recognizing the strengths and addressing the weaknesses of the board and, where appropriate, proposing new members be appointed to the board or seeking the resignation of directors. Individual evaluation should aim to show whether each director continues to contribute effectively and to demonstrate commitment to the role (including commitment of time for board and committee meetings and any other duties).

☐ The board should state in the annual report how performance evaluation of the board, its committees and its individual directors has been conducted.

☐ Evaluation of the board of FTSE 350 companies should be externally facilitated at least every three years. The facilitator should be identified in the annual report and a statement made as to whether they have any other connection with the company.

☐ The non-executive directors, led by the senior independent director, should be responsible for performance evaluation of the chairman, taking into account the views of executive directors.

Italy
2011 Corporate Governance Code

The board of directors shall:

☐ Perform at least annually an evaluation of the performance of the board of directors and its committees, as well as their size and composition, taking into account the professional competence, experience (including managerial experience), gender of its members and number of years as director. Where the board avails of consultants for such a self-assessment, the corporate governance report shall provide information on other services, if any, performed by such consultants to the issuer or to companies having a control relationship with the issuer.

☐ Taking into account the outcome of the evaluation mentioned under the previous item, report its view to shareholders on the professional profiles deemed appropriate for the composition of the board, prior to its nomination.

☐ Provide information in the Corporate Governance Report on how the self-assessment procedure has developed.

France
2010 Corporate Covernance Code of Listed Corporations (revised in 2013)

For sound corporate governance, the board of directors should evaluate its ability to meet the expectations of the shareholders having entrusted authority to it to direct the corporation, by reviewing from time to time its membership, organization and operation (which implies a corresponding review of the board's committees).

Accordingly, each board should think about the desirable balance in its membership and that of the committees created from among its members, and consider from time to time the adequacy of its organization and operation for the performance of its tasks.

The evaluation should have three objectives:

☐ Assess the way in which the board operates.

☐ Check that the important issues are suitably prepared and discussed.

☐ Measure the actual contribution of each director to the board's work through his or her competence and involvement in discussions.

The evaluation, which should preferably be conducted on an annual basis, should be performed in the following manner:

☐ Once a year, the board should dedicate one of the points on its agenda to a debate concerning its operation.

☐ There should be a formal evaluation at least once every three years. It could be implemented, possibly under the leadership of an independent director, with help from an external consultant.

☐ Shareholders should be informed each year in the annual report of the evaluations carried out and, if applicable, of any steps taken as a result.

☐ It is recommended that the directors who are external to the company (i.e. are neither executive directors nor employees) meet periodically without the "in-house" directors. The internal rules of operation of the board could provide for such a meeting once a year, at which time the evaluation of the chairman's, chief executive officer's and deputy chief executive's respective performance would be carried out, and the participants could reflect on the future of the company's executive management.

Germany
2010 Corporate Governance Code

The Supervisory Board shall examine the efficiency of its activities on a regular basis.

Norway
2010 Code of Practice for Corporate Governance

The board of directors should evaluate its performance and expertise annually. The board of directors' evaluation of its own performance and expertise should include an evaluation of the composition of the board and the manner in which its members function, both individually and as a group, in relation to the objectives set out for its work. Such a report will be more comprehensive if it is not intended for publication. However such reports should be made available to the nomination committee. The board of directors should consider whether to use an external person to facilitate the evaluation of its own work.

Belgium
2009 Code on Corporate Governance

Under the lead of its chairman, the board should regularly (at least every two to three years) assess its size, composition, performance and those of its committees, as well as its interaction with the executive management. Regular evaluation by the board of its own effectiveness should promote continuous improvement in the governance of the company. The evaluation process should have four objectives:

☐ Assessing how the board or the relevant committee operates.

☐ Checking that the important issues are suitably prepared and discussed.

☐ Evaluating the actual contribution of each director's work, the director's presence at board and committee meetings and his constructive involvement in discussions and decision-making.

☐ Checking the board's or committee's current composition against their desired composition.

Although evaluation is a board responsibility, the board should be assisted in this evaluation by the nomination committee, and possibly also by external experts.

The Netherlands
2008 Corporate Governance Code

The supervisory board shall discuss at least once a year on its own (without the management board being present), its own functioning, the functioning of its committees and its individual members, and the conclusions that must be drawn on the basis thereof. The desired profile, composition and competence of the supervisory board shall also be discussed. Moreover, the supervisory board shall discuss, at least once a year without the management board being present, both the functioning of the management board as an organ of the company and the performance of its individual members, and the conclusions that must be drawn on the basis thereof.

The report of the supervisory board shall state how the evaluation of the functioning of the supervisory board, the separate committees and the individual supervisory board members has been carried out. This provision relates to the annual review by the supervisory board members of their own functioning and that of the management board. The aim of the review is to reflect critically on the functioning of the members of the supervisory board and management board.

Spain
2006 Unified Good Governance Code

The board must be careful not to fall into routine habits and inertia. It is accordingly wise to establish some mechanism to scrutinize its performance and that of its committees with a certain regularity, using its own resources or, if preferred, seeking the help of an external expert.

European Union
2005 Commission Recommendation on the role of non-executive or supervisory directors of listed companies and on the committes of the (supervisory) board

Every year, the (supervisory) board should carry out an evaluation of its performance. This should encompass an assessment of its membership, organization and operation as a group, an evaluation of the competence and effectiveness of each board member and of the board committees, and an assessment of how well the board has performed against any performance objectives which have been set.

Governance book of the year: Lynn Stout's *The Shareholder Value Myth*

Lynn Stout (pictured below) is the Distinguished Professor of Corporate and Business Law, Clarke Business Law Institute, at Cornell Law School. She is not the first to push back against the notion of shareholder value as the primary if not sole driver of management and board action. But her 2012 book, *The Shareholder Value Myth,* inspired renewed examination of this governing theory and sparked important, and some would say much-needed, debate about its true primacy. One prominent challenger was *New York Times'* columnist Joe Nocera, who cited the book in a column titled "Down with Shareholder Value." He wrote: "Over time, 'maximizing shareholder value' became viewed as the primary task of the corporation. And, well, you can see the results all around you. They're not pretty."

Because of the book's role in provoking renewed analysis of the shareholder value mandate and its legacy effects, Directors & Boards has selected *The Shareholder Value Myth* as the Governance Book of the Year. For this spotlight, we asked John C. Wilcox, a longtime Directors & Boards author and colleague, to offer his evaluation of Prof. Stout's book. Throughout his career Wilcox has specialized in corporate governance, investor relations, proxy voting, and capital markets regulations, and now is chairman of Sodali Ltd., which advises listed companies in Europe, Asia, and developing markets on a range of governance matters.

— *James Kristie*

One myth dies and another is stillborn

By John C. Wilcox

Lynn Stout's *The Shareholder Value Myth* is really two books in one. The first (Part I) is a closely argued refutation of the widely endorsed theory of "shareholder primacy." The second (Part II) is an effort to blame shareholders for the misdeeds of the business community that were perpetrated under the guise of shareholder primacy. Part I is successful — Stout effectively demolishes the shareholder value myth. But Part II is not — her reductionist theory of shareholder culpability is unconvincing.

HEATHER AINSWORTH

This useful little (at 134 pages) book has implications far broader than the narrow ideological disputes of governance professionals. As Stout explains, the narrow focus on shareholder value creation influenced an entire generation of business leaders and provided the rationale for conduct that ultimately led to the global financial crisis. Systematically and with barbed prose, she deconstructs the misguided logic of lawyers, economists, academics, financial advisors and regulators who transformed the theory of shareholder primacy into a business axiom. In four short chapters she builds a convincing case that the practice of running businesses exclusively with an eye on stock price and short-term profit was an epic misdirection that, in her words, caused companies "to engage in reckless, sociopathic, and socially irresponsible behaviors."

These first 60 pages should be required reading for CEOs and corporate directors, not to mention academics, lawyers, institutional investors and other professionals (including politicians and regulators) whose decisions led to disastrous consequences for companies and the global economy.

Unfortunately, Stout abandons her intellectual rigor when she gets to Part II, cryptically entitled "What Do Shareholders Really Value?" Here she seems to argue that shareholders are primarily responsible for an array of activities — including accounting fraud, abusive compensation practices, and various forms of "financial engineering" — that were rooted in the shareholder value myth.

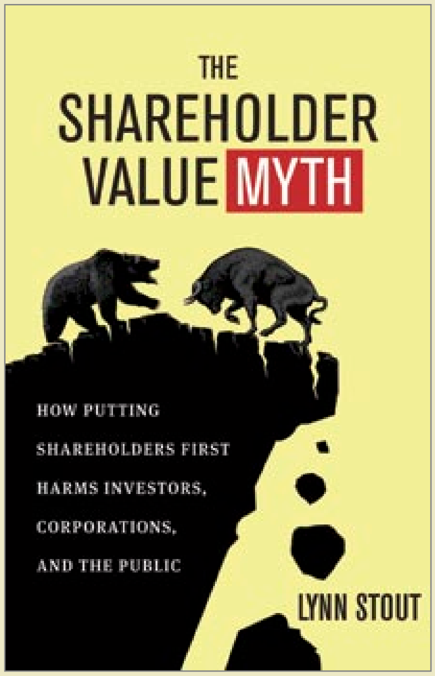
In her effort to have it both ways — to discredit shareholder primacy while holding shareholders primarily accountable for the actions of listed companies and the financial markets — she subjects the reader to pages of theoretical musings, mythological analogies, and other eso-

The myth of governing for shareholder value

Back when I was a law school student in the early 1980s, my professors taught me that shareholders "own" corporations and that the purpose of corporations is to "maximize shareholder value." I was just out of college at the time and not very familiar with the business world, so this made sense enough to me. When I first began lecturing and writing in business law myself, I incorporated the shareholder value thinking that I had been taught into my own teaching and scholarship.

It soon became apparent to me there was a problem with this approach. The more I read business law cases, the more obvious it became that U.S. corporate law does not, in fact, require corporations to maximize either share price or shareholder wealth. My first reaction was puzzlement and frustration. Shareholder value thinking was almost uniformly accepted by experts in law, finance, and management. Why then, I asked myself, wasn't it required by the actual rules of corporate law?

Put bluntly, conventional shareholder value thinking is a mistake for most firms — and a big mistake at that. Shareholder value thinking causes corporate managers to focus myopically on short-term earnings reports at the expense of long-term performance; discourages investment and innovation; harms employees, customers, and communities; and causes companies to indulge in reckless, sociopathic, and socially irresponsible behaviors. It threatens the welfare of consumers, employees, communities, and investors alike. This book explains why.



From **The Shareholder Value Myth** *by Lynn Stout. Copyright ©2012 by the author. Published by Berrett-Koehler Publishers Inc. (www.bkconnection.com).*

terica that read almost like a parody of the distorted thinking she so effectively skewers in Part I. In her zeal to get companies off the hook, she creates her own new myth: "Corporations are Real, Shareholders are Fictions." But her political agenda is apparent. She is conducting a rearguard action to revive management-centric governance, discourage scrutiny of boardroom decisions, discredit shareholder activism, and resurrect traditional corporate defenses such as classified boards and dual-class common stock. Stout's myth of shareholder culpability is no more valid than the myth of shareholder primacy she so ably discredits.

John C. Wilcox

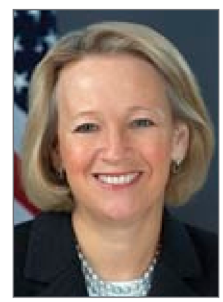
Conveniently for the reader, the value of this book can be obtained by reading Part I with attention, scanning Part II, and concentrating on the brief but excellent conclusion where Stout offers nuanced and realistic ideas for company boards, managers and shareholders to work together in pursuit of common goals. Even though Stout half-heartedly tries to convince us that shareholders are to blame, she understands, as we all do, that the buck stops with the board of directors.

that they will not run a proxy contest at the company's 2013 annual meeting.

Private company governance: More than two-thirds of private companies (71%) have a formal board of directors, according to PwC US's latest "Private Company Trendsetter Barometer" survey. Although formal corporate governance isn't a regulatory requirement for most private businesses, a large majority (80%) are adopting elements of corporate governance for the business benefits, according to the survey.

NOVEMBER

Speculation abounds as to what **Barack Obama's reelection** means for business. Will it be "the start of a promising new political era for business or the beginning of another four years of bickering?" the *WSJ* asks, and answers: "To hear it from America's chief executives, they hope it's the former but fear it's the latter."

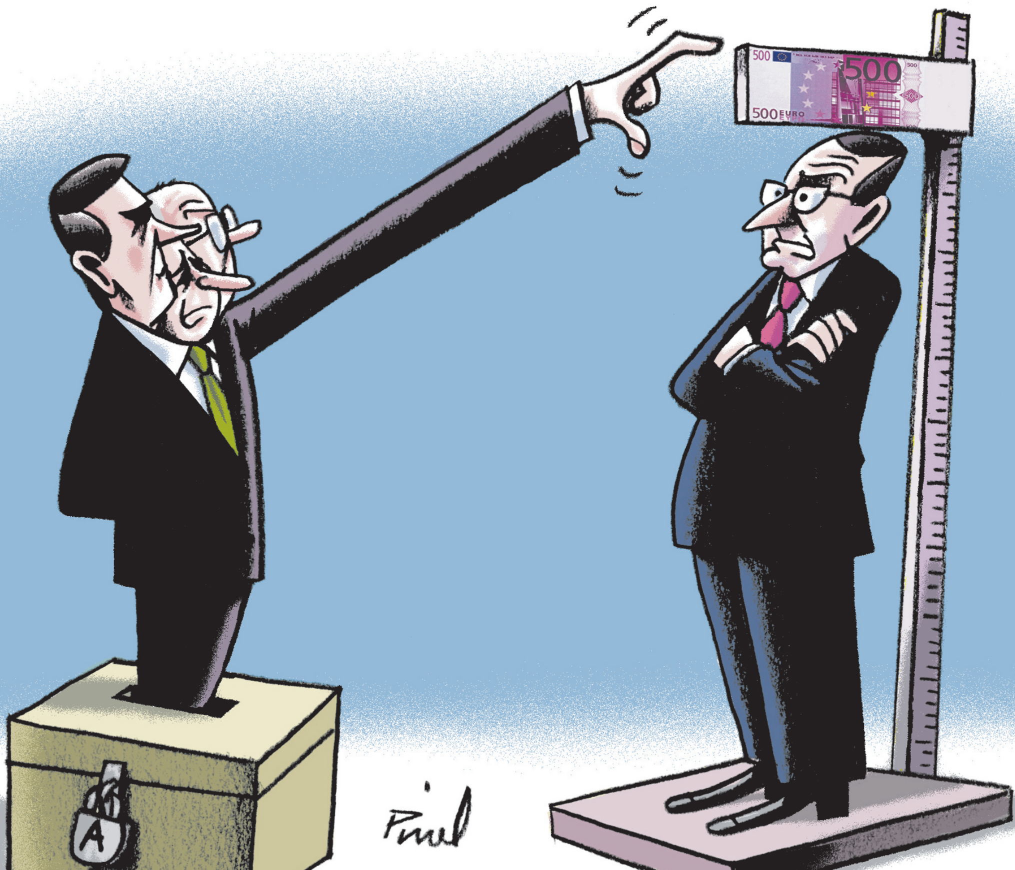


Mary Schapiro

Mary Schapiro announces her resignation as chair of the SEC. The agency "was in disarray" when she took over in January 2009, writes former SEC chair Harvey Pitt in a *WSJ* op-ed, adding that she "leaves the place better off, but the next chairman will be dogged by the effects of Dodd-Frank."

FCPA clarity: The U.S. Department of Justice and the SEC issue a report that helps clear up what kind of payments would be considered illegal under the Foreign Corrupt Practices Act. The SEC also issues a report urging the boards of the credit ratings agencies to tighten oversight of their businesses, citing "several dozen instances of poor corporate governance and failure to follow company policies" *(FT)*.

More than 3,000 tips: That's the number of whistleblower tips the SEC reveals it has received in the first year of the



Pinel pour « Les Echos »

Le « say on pay » et ses effets sur la rémunération des dirigeants

Laurence Boisseau
lboisseau@lesechos.fr

L'ANALYSE DE LA RÉDACTION

Les actionnaires peuvent désormais se prononcer sur la rémunération des patrons en France. La pratique dans les autres pays démontre que ce principe n'est pas un outil de modération.

On en parlait depuis plus d'un an, depuis les assemblées générales 2012. Les actionnaires français avaient regardé avec curiosité leurs homologues d'outre-Atlantique qui avaient refusé d'avaliser le salaire versé au PDG de Citigroup, Vikram Pandit. Car eux n'avaient pas cette faculté. La donne vient de changer. Après de multiples débats au sein du gouvernement et du patronat – ce principe aurait dû faire l'objet d'une loi avant que le ministre de l'Economie, Pierre Moscovici, n'y renonce –, la France a adopté le fameux « say on pay », le vote des actionnaires sur la rémunération des patrons, en assemblée générale. Ce dernier est désormais inclus dans le code de bonnes pratiques de gouvernance des organisations patronales Afep-Medef, qui vient d'être remanié à la mi-juin, et servira désormais de référence aux entreprises cotées. Le vote sera finalement consultatif (et non contraignant comme évoqué pendant un temps) et portera sur des montants de rémunération a posteriori. Ce sera Pernod Ricard, pour cause d'un exercice décalé clos au 30 juin et d'une assemblée générale en novembre, qui ouvrira officiellement le bal. Si Publicis lui a grillé la politesse fin mai, le groupe de publicité a agi de sa propre initiative, alors qu'aucune règle ne l'y contraignait. Du coup, les actionnaires n'ont voté que sur des résolutions proposées par Publicis, à savoir les rémunérations d'Elisabeth Badinter, présidente du conseil de surveillance, et de Maurice Lévy, président du directoire.

Le « say on pay » est déjà entré en vigueur dans de nombreux pays. Quinze Etats de l'Union ont adopté ce principe. Pionnier dans son développement il y a dix ans, le Royaume-Uni devrait durcir sa pratique et passer d'un système consultatif à un système mixte, avec un vote contraignant sur la politique de rémunération tous les trois ans et un vote consultatif sur la mise en œuvre de la politique de rémunération pour l'année précédente. Aux Etats-Unis, le vote consultatif a été imposé en 2011, après l'éclatement de la bulle de crédit et l'intensification des débats sur les rémunérations élevées.

Les partisans du « say on pay » prônent l'exigence de transparence et un plus grand contrôle des rémunérations, pour éviter les excès manifestes. Il existerait donc des critères objectifs, équitables et lisibles – à la fois par l'entreprise et ses parties prenantes (actionnaires, salariés, partenaires et clients) – susceptibles de fixer la rémunération d'un dirigeant de manière juste, efficace et consensuelle. A l'inverse, ses détracteurs pensent que plus de transparence induit une plus grande comparaison avec les autres dirigeants étrangers et provoque une inflation des salaires. Concrètement, qu'en est-il ? Le « say on pay » est-il la solution pour éviter les abus ?

Après deux ans d'application de cette règle aux Etats-Unis, malgré le cas emblématique de Citigroup, les Américains contestent peu les rémunérations des patrons. Un peu moins de 3 % des assemblées générales ont émis un vote négatif sur ce sujet, d'après les statistiques basées sur 2.025 firmes de l'index Russell 3.000. Soit 53 sociétés qui se caractérisaient par des situations extrêmes de rendement total négatif pour les actionnaires et d'augmentations de rémunération pour les dirigeants. Les actionnaires ne s'opposent donc pas aux résolutions.

Au Royaume-Uni, en 2012, des investisseurs excédés par la déconnexion entre les performances de certaines entreprises et le salaire de leurs dirigeants ont fait entendre leur voix. Andrew Moss, le directeur général de l'assureur Aviva, ou Sly Bailey, la patronne du « Trinity Mirror », ont même été poussés à la démission pour ces raisons. Une étude de l'Edhec (1) rappelle que Fabrizio Ferri et David Maber, respectivement professeurs à Columbia et à Los Angeles, ont mis en évidence en 2012 une sensibilité de la rémunération aux performances opérationnelles et boursières en augmentation. Surtout en cas de mauvaises performances. Toutefois, la mise en place du « say on pay » n'a pas eu d'influence sur le taux de croissance de la rémunération. Il a abouti à une plus grande dispersion des rémunérations des dirigeants, mais a été sans influence sur le niveau moyen.

Selon l'auteur de l'étude de l'Edhec, le professeur Frédéric Palomino, ce qui est flagrant, en revanche, ce sont les angoisses des dirigeants sur ce sujet. Ils craignent que les résolutions sur les rémunérations n'obtiennent pas de score élevé. « *L'illustration la plus parlante de ce phénomène est sans doute le cas du directeur exécutif de la banque Barclays*, commente Frédéric Palomino. *Ses revenus ont ainsi atteint 17,7 millions de livres en 2011, un record au Royaume-Uni, alors que les performances de la banque se sont dégradées entre 2010 et 2011. Cette rémunération a été approuvée par 68 % des actionnaires. Cependant, c'est le fait que 32 % des actionnaires désapprouvent cette rémunération qui a amené le président du conseil à présenter des excuses aux actionnaires.* »

Pour éviter ce type de désagrément, les sociétés se mettent à engager en amont un dialogue avec les actionnaires qui représentent un poids significatif du capital social. Davantage de communication avec les actionnaires avant les assemblées générales pour éviter une mauvaise image de marque, c'est, semble-t-il, la principale conséquence du « say on pay ». Mais si ce dernier n'est pas l'outil de modération attendu des rémunérations des dirigeants, alors quel est « *le bien fondé d'une réglementation qui impose un coût administratif nouveau à toutes les entreprises pour corriger seulement quelques situations extrêmes* », s'interroge Frédéric Palomino.

(1) « Rémunération des dirigeants d'entreprise : que peut-on attendre du « say on pay » ?, novembre 2012

Gestión Empresarial

El inversor busca algo más que números: el 80% del valor de una compañía es intangible

El informe integrado ofrece datos sobre la sostenibilidad de las empresas y las tendencias de futuro

Miguel Ángel Gavira MADRID.

Los estándares de información corporativa, como se entienden hasta ahora, están evolucionando y se dirigen hacia documentos que expliquen de una forma más clara, concisa y útil el modo en el que las empresas crean valor. Hasta ahora existen muchos documentos –Libro de cuentas, Gobierno Corporativo, Memorial Anual, Informe de Responsabilidad Corporativa, etc.– pero ya hay una compañía en el Ibex 35, Acciona, que ha querido ser pionera en este terreno.

Así lo asegura Juan Ramón Silva, director general del Área de Sostenibilidad de Acciona en una mesa redonda titulada *Reportes corporativos: el reto de convencer a los inversores*. Silva explica la clara apuesta de la compañía de la familia Entrecanales para que el atractivo de una empresa para el inversor sea algo más que el dato puro y duro. "Hemos hecho un resumen integrado y lo que damos a conocer es nuestro enfoque de negocio, la estrategia, los riesgos y oportunidades, los capitales que gestionamos, la proyección de negocio del futuro, los principales indicadores de desempeño y el sistema de Gobierno que tenemos y su eficacia".

Para el responsable de sostenibilidad de Acciona este nuevo informe integrado "responde a la demanda por parte de inversores, analistas y diferentes grupos de interés". Todos ellos quieren una información que no sólo se quede en el terreno económico-financiero, sino que integre aspectos sociales, ambientales y de Gobierno.

José Luis Blasco, socio responsable de Cambio Climático y Sostenibilidad de KPMG, ofrece un argumento que ayuda a entender este cambio de tendencia: "¿Cuál es el verdadero valor de las compañías? Es la gran pregunta que se hace el mercado". Blasco cree que el valor en capitalización o el valor en libros comienzan a ser elementos relativos. "Las compañías tienen aproximadamente un 80 por ciento de su valor en intangibles", señala.

Ante este nuevo escenario ¿realmente reflejan los balances o la capitalización el valor de las compañías? La respuesta es no. Durante los últimos 30 ó 40 años se ha producido un efecto muy llamativo: el desacople entre el valor de capitalización y el valor en libros. Existen compañías del Ibex cuya capitalización bursátil es siete veces el valor en libros, mientras que en otras apenas alcanza el 0,50 o el 0,80.

En la imagen, los participantes en la mesa redonda 'Reportes corporativos: el reto de convencer a los inversores'. FERNANDO VILLAR

"El nuevo informe integrado responde a la demanda de inversores, analistas y grupos de interés".

Juan Ramón Silva
Director General del Área de Sostenibilidad de Acciona

"El valor en libros y la capitalización bursátil comienzan a ser elementos relativos".

José Luis Blasco
Socio Responsable Cambio Climático y Sostenibilidad de KPMG

"El inversor medio no tiene tres días para analizar una compañía, necesita un estándar".

Borja Miranda
Responsable de operaciones Iberia y Latam de Sodali

"Se convertirá en la herramienta clave para que el inversor se acerque a una compañía".

Raimundo Fernández-Cuesta
Director de Fusiones y Adquisiciones de Acciona

En el futuro, se deberá explicar el modelo de negocio de una compañía con variables cada vez menos sujetas a los aspectos contables. La calidad del *management*, los activos estratégicos, la innovación, la capacidad de las compañías para adaptarse a un entorno cambiante... Nadie puede tomar decisiones mirando al espejo retrovisor. Gracias a este nuevo formato se explica el futuro de la compañía, que interesa mucho más al potencial inversor que esté barajando entrar en su capital. En el terreno del Gobierno Corporativo todavía queda mucho por recorrer. Según el World Economic Forum, España se encuentra en la posición número 103 en cuanto a efectividad y funcionamiento de los consejos.

Mercado globalizado

Raimundo Fernández-Cuesta, director de Fusiones y Adquisiciones de Acciona, cree que "este informe se convertirá en una de las herramientas clave de los analistas e inversores para acercarse a una compañía". Tanto quien no conozca bien una empresa como quien quiera profundizar en algún aspecto de la misma puede apoyarse en este nuevo documento.

"El mercado cada vez está más globalizado. El inversor ya no es sólo el español, que conoce bien las compañías del Ibex 35. Te encuentras con una rotación cada vez mayor de inversores internacionales que a veces apuestan por tu empresa porque invierten temáticamente o por valor y cuando se acercan a estas compañías empiezan desde cero". Para este perfil de inversor es especialmente atractivo el informe integrado, un documento que, además del lanzamiento pionero de Acciona, está ya elaborándose por otra media docena de compañías del Ibex entre las que se encuentran Inditex, Telefónica, Enagás, Indra, Repsol y BBVA.

Es lo que Borja Miranda, responsable de operaciones Iberia y Latam de Sodali, define como "crear valor transparente para el inversor". Los informes anuales de Gobierno Corporativo, los de Sostenibilidad y el informe integrado son una evolución del mercado, de lo que cada vez pide más el inversor.

"Ni yo, ni ningún inversor, tenemos tres días para analizar una compañía. Si encontramos estándares y fórmulas sería incluso beneficioso para las agencias de calificación crediticia", afirma Borja Miranda. Si una agencia, que escruta al límite una compañía, no encuentra una información determinada considera que no existe, con los efectos perjudiciales que ello representa.

No pueden volver a ocurrir casos como los de los últimos años en los que empresas con un gobierno corporativo desastroso llevaron a la pérdida de valor a millones de accionistas. El inversor busca algo más que números.

Publié sur *Le Cercle Les Echos* (http://lecercle.lesechos.fr)

Say on Pay : Hurry up slowly !

Les sujets de rémunérations sont restés au cœur des préoccupations des actionnaires au cours de la saison des AG 2013. Le dispositif du nouveau code AFEP-MEDEF prévoit désormais un vote consultatif annuel des actionnaires sur l'ensemble de la rémunération des dirigeants mandataires sociaux. Les conséquences pratiques du Say on Pay ne doivent pas être sous-estimées.

Les sujets de rémunérations sont restés au cœur des préoccupations des actionnaires au cours de la saison des AG 2013. Toutes les résolutions ont été approuvées, mais plusieurs grands Groupes cotés ont frôlé le rejet, lorsque les actionnaires se sont prononcés sur les plans de stock-options et d'actions de performance ou sur les indemnités de départ des dirigeants.

Des composants sensibles des packages de rémunération sont déjà soumis au vote liant de l'Assemblée. Désormais s'ajoute le dispositif du nouveau code AFEP-MEDEF qui prévoit notamment un vote consultatif annuel des actionnaires sur l'ensemble de la rémunération des dirigeants mandataires sociaux.

Les conséquences pratiques du Say on Pay ne doivent pas être sous-estimées.

Dans le cadre de ce nouveau dispositif :

– Les émetteurs devront inclure dans leur document de référence annuel une présentation détaillée de la politique de rémunération des dirigeants mandataires sociaux, rédigée avec le concours du Comité des Rémunérations, qui rassemblera dans un "chapitre" spécifique l'ensemble des informations requises.

– Conformément à la loi, les entreprises continueront de soumettre au vote les résolutions habituelles (conventions réglementées, indemnités de départ, plans de stock-options et d'actions de performance).

– Nouveauté : les actionnaires devront annuellement voter à titre consultatif sur les éléments de la rémunération (fixe, variable annuelle et pluriannuelle, retraites, stock-options ou actions de performance) due ou attribuée au titre de l'exercice clos à chaque mandataire social.

Les investisseurs institutionnels étant habitués à se prononcer sur un rapport qui fait le lien entre la stratégie de l'entreprise, la politique de rémunération et les packages de rémunération effective des dirigeants mandataires sociaux, l'étanchéité entre le Say on Pay "à la Française" et le chapitre pourrait n'être qu'apparente. Comment les actionnaires pourraient-ils approuver le versement d'un bonus, quel qu'en soit le montant, alors qu'ils ne connaitraient pas ou seraient en désaccord avec les modalités de détermination de ce bonus – critères de performance, objectifs et cibles à atteindre – exposées dans le chapitre ?
En somme, le rejet du package de rémunération d'un mandataire social résulterait soit d'une désapprobation de la mise en œuvre de la politique de rémunération exposée dans le chapitre, soit d'une critique de la politique de rémunération elle-même.

Périmètre

Le Say on Pay à la française élargit le champ du vote actuel à la rémunération fixe, à la rémunération variable annuelle et pluriannuelle (Phantom Stocks, unités de performance...) et aux objectifs contribuant à la détermination de cette part variable.

Depuis plusieurs années, les émetteurs ont fait des efforts considérables en matière de transparence. Pour autant :

– Concernant la rémunération fixe, les investisseurs ne seront-ils pas désireux de connaître (a posteriori) les critères de constitution du panel de comparaison (benchmark) et le positionnement par rapport au marché de référence ? Les investisseurs, dans un souci de cohérence interne, ne souhaiteront-ils pas comparer les augmentations de la rémunération fixe des mandataires sociaux avec celles des autres salariés de l'entreprise ?

– Concernant les bonus annuels des mandataires sociaux, ceux-ci seront-ils l'objet d'autant d'attention que les éléments de rémunération variable long terme (objectifs, choix des critères de performance, barème d'attribution, taux d'atteinte...) puisque bien plus personnalisés ? Les proxy advisors seront-ils aussi exigeants sur les modalités de la rémunération variable annuelle et/ou pluriannuelle que sur les plans d'options d'actions et d'actions de performance ? Les actionnaires accepteront-ils que les sociétés s'exonèrent de divulguer certains objectifs fixés aux dirigeants qu'elles jugent sensibles vis-à-vis de leurs concurrents ?

Mise en œuvre

Plusieurs questions se posent quant à la mise en œuvre concrète du Say on Pay à la française :

– Les entreprises vont-elles harmoniser leurs pratiques sur la rédaction du chapitre et de la résolution?

– La formalisation des fondements et principes de la politique de rémunération est-elle aujourd'hui suffisante en support de la rédaction du chapitre ?

– Comment anticiper les attentes des investisseurs institutionnels et des proxy advisors sur ces sujets nouveaux, alors qu'aucune politique de vote écrite n'a été publiée ?

Face à ce nouveau dispositif, les Conseils seront-ils amenés à reconsidérer certains composants du package de rémunération des mandataires sociaux, même déjà approuvés par l'Assemblée générale des actionnaires (retraite chapeau, indemnités de départ, clause de non-concurrence…) ? Les entreprises continueront-elles à valoriser les options d'actions et les actions de performance attribuées aux mandataires sociaux sans appliquer de décote pour les critères de performance dits "hors marché" risquant ainsi d'afficher des packages surévalués ?

Quel niveau de contestation par l'Assemblée traduira un désaveu des décisions du Conseil ? Est-ce réellement le seuil des 50 % qui déclenchera une communication de la part du Conseil ? Et une attention particulière sera-t-elle accordée au taux d'approbation des actionnaires minoritaires, éventuellement selon que le capital de la société est plus ou moins contrôlé ?

Responsabilité de l'Assemblée générale et du Conseil d'Administration

L'expérience étrangère montre que les résolutions Say on Pay font l'objet de peu de rejets, et qu'il n'y a pas d'effets directs sur le niveau des rémunérations. L'impact concerne essentiellement la gouvernance.

Le Say on Pay accroît la responsabilité de l'Assemblée et du Conseil :

Les investisseurs institutionnels, qui ont une obligation fiduciaire à l'égard de leurs épargnants, doivent justifier qu'ils limitent les risques de leur portefeuille et agissent en actionnaire responsable. Au travers d'une politique de vote spécifique sur ces thèmes, ils s'assureront que la rémunération des dirigeants est fixée dans l'intérêt long terme de la société, et que le Conseil joue bien son rôle de contrôle. Pour évaluer la qualité de ce contrôle, ils ne pourront se contenter de suivre mécaniquement les consignes de vote des proxy advisors. Ils devront s'engager dans un dialogue constructif direct avec les émetteurs.

La gouvernance fonctionne selon une double délégation. L'Assemblée générale délègue au Conseil la responsabilité de désigner les dirigeants, d'évaluer leur performance et de fixer leur rémunération. Le Say on Pay constitue pour les actionnaires un véritable thermomètre du fonctionnement de la gouvernance, et au-delà des montants attribués, ils exigent la transparence sur le processus de décision.

Cette responsabilité accrue du Conseil pose la problématique du pilotage de la démarche de détermination de la rémunération des dirigeants pour répondre à ces nouveaux enjeux.

L'expérience étrangère montre que pour les investisseurs, c'est bien le Comité des Rémunérations qui porte la responsabilité ultime des décisions de rémunération. Le renouvellement des mandats de ses membres est susceptible d'être contesté en Assemblée générale si les pratiques de rémunérations sont régulièrement jugées inappropriées.

En France, le Comité des Rémunérations assumera-t-il ce rôle de chef d'orchestre et de coordinateur des différents acteurs opérationnels internes (Secrétaire du Conseil, DRH, Direction juridique, Direction financière...) ou se limitera-t-il à un rôle d'influence ?

La dispersion du capital des sociétés cotées françaises, le poids des investisseurs étrangers et en conséquence l'influence des proxy advisors rendent cette réflexion nécessaire.

Par Louis Barbier, Hélène Solignac, Jean Lambrechts et Jean-Claude Sobel

Louis Barbier

URL source: http://lecercle.lesechos.fr/entreprises-marches/finance-marches/bourse/221177275/say-on-pay-hurry-up-slowly

July 15, 2013

IR Global Rankings postpones registration deadline to August 19!

Following intense interest in new company registrations and innumerable requests for an extension, IR Global Rankings (IRGR) has postponed the registration deadline **for the rankings and the POP+** vote to August 19! To register, just go to: www.irglobalrankings.com

This year's great innovation is the **TOP CFO/IRO** award, the winner of which will be the person with the highest total number of points in all four classifications: IR website, online annual report, financial disclosure procedures and corporate governance. The Top 3 **CFO/IROs** in each region will all receive awards, as will the overall TOP CFO/IRO in the world.

Your company may also be elected for the **POP+** awards, which determine the world's best IR website by popular vote. The aim is to improve the general public's knowledge of companies' IR areas through their respective IR sites, as well as recognize the best stakeholder communications procedures. Any company, local or multinational, with an IR website in English can take part in the POP+ vote and voters can come from any country. Nor do they have to have any connection with the capital markets. Voting is free, with one vote per person, and can be effected through the IRGR site (www.irglobalrankings.com). All participating companies can make use of the disclosure materials made available by IR Global Rankings (banners, logos, etc.) in order to encourage votes. The winners can show the **POP+** prize and the logo on their sites until the next awards in 2014.

Both the ranking and POP+ results will be announced at the IR Global Rankings awards ceremony, which will take place in London in November 2013.

For more information on voting, participation terms and conditions, and registration for the other IRGR categories, please go to: www.irglobalrankings.com.

Yours Sincerely,

IR Global Rankings Team
NY: 1 347-797-5165 | SP: 55 11 3529-3707

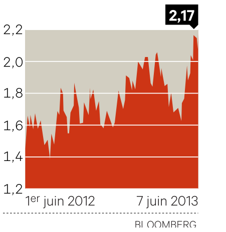
Media relations:
IR Global Rankings: +55 11 3529-3468
Paula Moscardi - p.moscardi@irglobalrankings.com: +55 11 97473-9797

About IR Global Rankings: *Solid communication with the investment community is a key priority for investor relations and corporate governance professionals, once value creation (stock prices) and risk perception can be managed. The implementation of best practices in communicating with the capital markets and fair disclosure procedures do help companies in earning and maintaining investor confidence. The annual IR Global Rankings and Awards Survey is the most comprehensive auditing and ranking system for IR Websites, Online Annual Reports, Corporate Governance Practices and Financial Disclosure Procedures - a great opportunity to benchmark IR efforts vis-à-vis peers and industry leaders. Based on extensive proprietary research of publicly held companies and investors, and supported by input from an independent audit, corporate governance and legal experts, IR Global Rankings' (www.irglobalrankings.com) methodology is highly detailed, transparent and fully accessible to all participants. The annual IR Global Rankings and Awards has grown each year since 1999*

REBOND DES TAUX AMÉRICAINS

C'était l'un des rendez-vous majeurs de la semaine : le rapport sur l'emploi américain s'est révélé meilleur que prévu, avec 175.000 créations de postes, au lieu de 163.000 attendus. La Réserve fédérale ayant arrimé sa politique aux indicateurs du marché du travail, le taux obligataire à 10 ans a grimpé de près de 7 points. Le marché craint une sortie précoce du dispositif de crise.

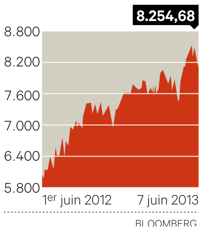
Le taux à 10 ans En %



LA BOURSE DE FRANCFORT REMONTE

Le DAX a repris 1,92 % vendredi, mais reste en baisse de 1,13 % sur l'ensemble de la semaine. Le principal indice allemand s'est nettement éloigné des sommets historiques atteints en mai. Cette semaine, les regards se tourneront vers la Cour constitutionnelle allemande, qui doit examiner en détail demain et mercredi le plan de sauvetage de la zone euro.

L'indice DAX En points



Des assemblées générales encore très animées cette année

GOUVERNANCE

Crise, plans sociaux, diminution du rendement obligent, les réunions d'actionnaires ont été agitées.

laurence Boisseau
lboisseau@lesechos.fr

Service d'ordre très visible, temps de dialogue limité pour les actionnaires… Cette année, les sociétés ont pris leurs précautions. Crise économique, plans sociaux ou diminution du rendement obligent, elles ont eu peur que leurs assemblées générales se transforment en théâtre d'affrontement entre des salariés ou des investisseurs déçus et les dirigeants. Si des AG aussi troublées que celle de PagesJaunes, avec des minoritaires rebelles, ont été rares, les débats peuvent être musclés sur les éléments de rémunération des patrons ou encore sur les autorisations financières (notamment les émissions d'actions sans droit préférentiel de souscription). *« Il n'y a pas de contestation virulente mais l'opposition est palpable »*, remarque Louis Barbier, représentant de l'Europe chez Sodali, société de conseil en gouvernance. A l'assemblée générale de Sanofi, la rémunération du directeur général du groupe, Christopher Viehbacher, a été sifflée.

Orienter le vote

Les résolutions sont encore très souvent votées haut la main, avec des scores très confortables, supérieurs à 80 % pour les conventions réglementées portant sur les parachutes ou bien sur les autorisations financières. Mais *« il faut se méfier des chiffres sans les analyser. Quand le score est confortable, c'est souvent que les actionnaires de référence sont importants. Si l'on soustrait leur vote, l'opposition est parfois significative »*, note Louis Barbier. Chez Thalès, dont le flottant ne représente que 34 % des droits de vote, la résolution permettant à Luc Vigneron, ancien PDG, de conserver le bénéfice de ses actions gratuites et ses stock-options n'a été approuvée qu'à 87 %. Sur le même sujet chez Vallourec, pour Philippe Crouzet, président du directoire, la résolution est passée à 54 %. *« Cela préfigure de quelques points d'achoppement, quand le "say on pay" sera mis en place »*, note Louis Barbier.

Même si, dans l'immédiat, les actionnaires français ne vont pas aussi loin que les Suisses. Le président du conseil d'administration de Nestlé, Peter Brabeck-Letmathe, a été interpellé sur la politique de distribution d'actions de l'entreprise à ses dirigeants, sur le thème : « Rappelez-vous ce qui est arrivé à M. Vasella », ex-patron de Novartis, qui a dû renoncer à 60 millions d'euros de parachute doré, après un tollé général.

Même quelques jours avant leurs assemblées, les entreprises n'hésitent plus à appeler les grands investisseurs institutionnels pour tenter d'orienter leur vote, dès qu'elles sentent que certaines résolutions sont très sensibles. A l'assemblée de Natixis, le plafond global de dilution de cinq autorisations financières a été modifié directement en séance, passant de 3 à 1,5 milliard d'euros suite aux remarques de différents actionnaires comme CNP Assurances. Téléperformance a vu quatre résolutions rejetées sur les autorisations financières et les modifications de statut. ■

> Les débats peuvent être musclés sur les éléments de rémunération des patrons.

> A l'assemblée générale de Sanofi, celle du directeur général a été sifflée.

Les géants de l'aluminium s'attaquent à la surabondance du marché mondial

MATIÈRES PREMIÈRES

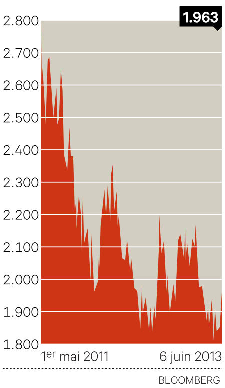
Les cours de l'aluminium ont chuté de 30 % en deux ans.

La consommation mondiale de métal reste solide.

Muryel Jacque
mjacque@lesechos.fr

En un mois, trois grands producteurs d'aluminium à travers le monde ont décidé de réduire leurs capacités de manière drastique. En cause, la baisse des cours du métal liée à la surabondance du marché. Mercredi dernier, le numéro un chinois, Chalco, a suspendu ses capacités de 380.000 tonnes. Une première pour le groupe depuis 2009. Mi-mai, l'américain Alcoa a indiqué qu'il fermait définitivement deux séries de cuves. Au total, d'ici à fin 2013, le géant américain devrait retirer du marché 460.000 tonnes. De son côté, le premier producteur mondial, le russe Rusal, a baissé sa production de 4 % au premier trimestre et envisage d'aller plus loin. Les petits producteurs ne sont pas épargnés. La dernière fonderie d'aluminium de Bosnie – 160.000 tonnes par an – prévoit de fermer le 17 juin.

Le cours de l'aluminium
En dollars par tonne, à trois mois



Hausse des charges

Le volume de ces réductions resterait toutefois insuffisant pour changer la donne : le surplus devrait atteindra 782.250 tonnes cette année et 896.000 tonnes en 2014, selon des analystes sondés par Reuters.

Pour les entreprises, les charges n'ont cessé de s'alourdir, les coûts de l'énergie sont très importants. Aux cours actuels, les fonderies les plus coûteuses – 10 % du secteur – fonctionnent à perte. Le prix plancher pour l'industrie est d'environ 2.000 dollars la tonne, estime ANZ. Vendredi, elle valait 1.963 dollars sur le London Metal Exchange (LME).

Au plus bas de l'année début mai, les cours ont remonté de 8 %. Mais depuis deux ans, la chute reste impressionnante : – 30 %. *« Le potentiel de baisse des prix paraît à présent limité »*, avance Robin Bhar à la Société Générale, *« car les opérateurs ont déjà intégré le fait que le marché va rester significativement excédentaire »*. Il l'est depuis des années, mais pas en raison d'un manque de demande. L'augmentation de la consommation reste importante. Elle devrait progresser de 7,8 % cette année. Voire de 10 % par an d'ici à 2020, prévoit Jim Lennon à Macquarie. L'industrie automobile pourrait en utiliser dix fois plus qu'aujourd'hui. ■

Le courtier Raymond James contraint à des suppressions d'emplois à Paris

COURTAGE

Raymond James Euro Equities est en train de se séparer de plusieurs collaborateurs.

Sa maison mère américaine a pris 100 % du capital.

Marina Alcaraz
malcaraz@lesechos.fr

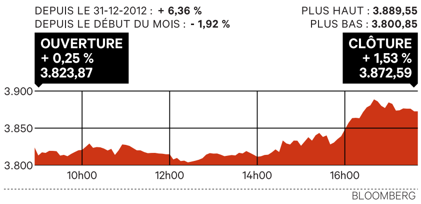
Raymond James Euro Equities allège ses équipes. Le courtier spécialiste en recherche européenne, appartenant au groupe financier américain Raymond James, *« a entrepris une restructuration pour ramener la structure européenne à l'équilibre »*, confirme Emmanuel Laussinotte, président de Raymond James European Securities (holding détenant Raymond James Euro Equities). *Dans un environnement morose pour le secteur du courtage, nous avons subi des pertes en 2012. L'objectif est de pérenniser la société. »*

De source de marché, 8 collaborateurs – dont 2 analystes – sur une trentaine à Paris de Raymond James Euro Equities seraient visés. Le chiffre n'est pas définitif, le processus étant en cours.

Parallèlement, le courtier n'a pas pu se développer à Londres comme elle le souhaitait, en raison *« de la conjoncture défavorable »*. Le bureau britannique compte 4 personnes. *« La stratégie à Londres est maintenant déterminée par notre maison mère américaine qui a pris 100 % du capital de notre structure au début de l'année »*, reprend Emmanuel Laussinotte. L'entreprise outre-Atlantique, cotée en Bourse, avait commencé à se renforcer dans le capital du bureau parisien il y a environ deux ans. ■

> **8**
> **COLLABORATEURS**
> sur une trentaine, à Paris, de Raymond James Euro Equities seraient visés.

LA SÉANCE DU 7 JUIN 2013



Le CAC 40 se reprend grâce à l'emploi américain

● La Bourse de Paris a terminé en hausse vendredi, progressant de 1,53 % à 3.872,59 points, dans un volume de transactions assez modéré d'un peu moins de 3 milliards d'euros. Après un début de semaine morose, le CAC 40 s'est repris, encouragé par les chiffres de l'emploi américain. En mai, les Etats-Unis ont créé 175.000 emplois de plus qu'ils n'en ont détruit.

Un indicateur encourageant, même si le taux de chômage a augmenté de 0,1 point à 7,6 % de la population active, là où le marché anticipait une stabilisation. Paradoxalement, ce bémol est plutôt positif car l'amélioration de l'emploi n'est pas assez franche pour que les investisseurs anticipent la réduction massive des injections de liquidités par la Fed. Dès lors, les indicateurs se sont mis au vert en Europe, Francfort progressant vendredi de 1,92 % et Londres de 1,20 %.

A Paris, les financières ont bien profité de cette éclaircie. **AXA**, en tête des valeurs du CAC 40, a bondi de 4,15 % à 15,7 euros. **BNP Paribas** a repris 1,68 % à 44,44 euros, **Crédit Agricole** 2,91 % à 7,113 euros et **Société Générale** 1,67 % à 30,11 euros.

Egalement au palmarès des hausses, vendredi, de grosses valeurs comme **France Télécom** (+1,80 % à 7,63 euros), **Sanofi** (+2,02 % à 80,89 euros), **Schneider Electric** (+2,69 % à 59,97 euros). A contre-courant, **Air France-KLM** et **Artprice** perdaient respectivement 3,09 % et 0,54 %. ■

L'OPÉRATION DU JOUR

Walmart lance un nouveau plan massif de rachat d'actions

● Le conseil d'administration du groupe de distribution américain Walmart Stores a annoncé vendredi un plan de rachat d'actions de 15 milliards de dollars (11,4 milliards d'euros), le premier en deux ans. Au 6 juin, le premier distributeur mondial disposait encore de 712 millions de dollars dans le cadre d'un plan similaire de 15 milliards de dollars adopté en juin 2011. Ce programme de rachat a été annoncé par le directeur financier du groupe, Charles Holley, lors de l'assemblée générale du groupe. A Wall Street vendredi, l'action Walmart a pris 0,93 % à 76,33 dollars. Elle est en hausse de 11,87 % depuis le début de l'année. A ce cours, Walmart affiche une capitalisation boursière de plus de 250 milliards de dollars. ■

L'AVIS

Les risques de la désinflation compétitive

L'excès de zèle en matière budgétaire et fiscale comme en matière de désinflation a des impacts économiques désastreux.

Par **Philippe Ithurbide**

La compétitivité est un thème récurrent dans la recherche de solutions à la crise, et nul ne conteste la nécessité de maîtriser prix et salaires. Mais pour que la désinflation compétitive (l'amélioration des parts de marché et des soldes commerciaux grâce à des baisses de prix) ne devienne pas contre-productive, il y a trois conditions : d'abord, l'endettement pouvant en découler (temporairement ou non) doit être financé à un taux d'intérêt inférieur au taux de croissance de l'économie, afin d'éviter que l'effet « boule de neige » de la dette ne mette en péril la croissance ; ensuite, la maîtrise de l'inflation (et du différentiel d'inflation à l'égard des partenaires commerciaux) ne doit pas avoir pour contrepartie une forte augmentation du chômage. Enfin, la désinflation ne doit pas mener à la déflation, situation dans laquelle les taux d'inflation deviennent négatifs, ce que l'on retrouve dans certaines économies européennes. Des études menées dans les années 1990 sur de nombreux pays avaient cependant permis de dégager plusieurs conclusions : la vitesse et l'ampleur de la désinflation sont déterminantes dans l'ampleur de la montée du chômage de longue durée ; plus la désinflation est importante, et plus la croissance du chômage sera durable ; plus les périodes de désinflation sont longues, et plus la hausse du chômage est importante. Voilà de quoi méditer. L'excès de zèle en matière budgétaire et fiscale, comme en matière de désinflation a des impacts économiques désastreux. Il est préférable d'amender les politiques d'austérité déflationnistes, de mener des réformes structurelles, et de miser sur des mesures de relance « budgétairement neutres » qu'accroître précarité et pauvreté via des baisses de salaires et des pertes de pouvoir d'achat… cela améliore la compétitivité, mais tue la croissance et l'emploi.

Philippe Ithurbide, directeur recherche, stratégie et analyse d'Amundi

Bloomberg

Bloomberg.com | Businessweek.com | Bloomberg TV+ | Premium

‹ Back to Homepage

Bloomberg TV+

LIVE TV VIDEO SHOWS PLAYLIST

Shareholders and Non-Standard Corporate Governance

00:06 / 03:37 SHARE POP OUT

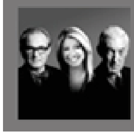
INFO COMMENTS (0)

June 19 (Bloomberg) -- John Wilcox, chairman at Sodali, discusses shareholders of companies employing non-standard corporate governance and whether the government can get involved in regulation. He speaks on Bloomberg Television's "Bloomberg Surveillance."

Bloomberg

Bloomberg Surveillance Podcast
Tom Keene, Sara Eisen and Ken Prewitt have the economy and the markets "under surveillance."

Subscribe RSS iTunes


Hosted by Tom Keene, Sara Eisen and Ken Prewitt

Sodali's Wilcox Says JPM Board Needs More Spine (Audio)

May 15, 2013

John Wilcox, chairman of Sodali Ltd. and former senior vice president of corporate governance at Teachers Insurance and Annuity Association - College Retirement, says activist shareholders of JPMorgan Chase want Jaime Dimon to retain his top job and they want the board of directors to "show more spine". Wilcox talks with Bloomberg's Tom Keene, Sara Eisen and Scarlet Fu on Bloomberg Radio's "Bloomberg Surveillance".

Les enjeux des assemblées générales 2013

- Les rémunérations restent au cœur des préoccupations des actionnaires.
- Publicis fera figure de précurseur avec le premier « Say on pay » français.


Vinci ouvrira demain le bal des assemblées générales 2013.
Photo Hamilton/REA

GOUVERNANCE

Laurence Boisseau
lboisseau@lesechos.fr

En France, Vinci va ouvrir demain le bal des assemblées générales. Comme l'an dernier, les actionnaires seront très attentifs aux rémunérations des dirigeants. Le sujet est d'autant plus capital que le gouvernement prépare un projet de loi d'ici l'été.

● RÉMUNÉRATIONS

La rémunération différée de 16 millions d'euros touchée par Maurice Lévy avait défrayé la chronique l'an dernier. Cette fois, Publicis va se distinguer par ses innovations. Le groupe va soumettre dès cette année au vote de ses actionnaires les rémunérations de ses deux dirigeants mandataires sociaux, Elisabeth Badinter et Maurice Levy. Ce ne sont pas les rémunérations elles-mêmes qui sont soumises au vote, mais leurs principes et leurs mécanismes. Le vote sera consultatif, mais Publicis précise que *« dans la pratique cela revient au même car le conseil de surveillance de Publicis prendrait naturellement en compte un vote négatif »*.

Le groupe publicitaire prend les devants, puisque le gouvernement prépare pour l'été un projet de loi qui devrait imposer cette pratique du « Say on pay » à partir de l'année prochaine.

Des mesures pour rendre les stock-options moins attractives pourraient aussi y être incluses. Cette année pourtant, beaucoup de sociétés demandent encore aux actionnaires l'autorisation de consentir des options de souscriptions à leurs dirigeants. C'est le cas d'Air Liquide, Total, Schneider, Sanofi, Lafarge, Technip, Safran ou encore de Legrand. Chez Thales, l'assemblée générale sera même appelée à voter sur le maintien de stocks options de Luc Vigneron, l'ancien PDG, qui a quitté le groupe l'an passé. Une mesure qui n'est jamais très bien perçue par les actionnaires.

● CONCENTRATION DES POUVOIRS

La question va se poser chez Schneider, qui change de gouvernance pour adopter une structure « moniste », dans laquelle Jean-Pascal Tricoire deviendrait président directeur général. Un fonds activiste a appelé à voter contre cette résolution, craignant un déplacement du centre de décision du groupe hors de France – Tricoire est actuellement installé à Hong Kong.

● RÉSOLUTIONS DISSIDENTES

Le Comité central d'entreprise de l'UES Amont de Total a demandé la constitution d'un comité d'éthique indépendant constitué d'administrateurs, ainsi que l'établissement de liens entre indicateurs de sécurité industrielle et éléments de rémunération. Chez GDF Suez. le FCPE qui demande une baisse du dividende. Enfin, chez Altamir Amboise, Colette Neuveille et le fonds Moneta demandent aux gérants de la société de racheter ses propres actions en vue *« d'optimiser la gestion de son actif net réévalué par action »*.

● DIVIDENDES EN ACTION

C'est un moyen de permettre à l'actionnaire de bénéficier d'une fiscalité allégée. Vinci, Unibail, Carrefour, Veolia, Saint-Gobain le proposent, parfois avec une décote importante incitant les actionnaires à opter pour ce dividende, parfois non.

● AUGMENTATIONS DE CAPITAL

Elles sont de nature diverse, avec ou sans droit préférentiel de souscription, certaines sous forme de placement privé. Une question importante pour les entreprises, alors que certains bilans sont tendus. *« Ce qui est notable, c'est que les sociétés sont plus raisonnables dans les montants sollicités. La dilution potentielle sur le capital est plus faible qu'auparavant pour prendre en compte les attentes des actionnaires. Elle est la plupart du temps en ligne avec les recommandations de l'Association française de gestion qui préconise de ne pas dépasser les 50 % avec droit préférentiel de souscription (DPS) et 10 % sans DPS »*, note Louis Barbier, responsable France pour Sodali, cabinet de conseil en gouvernance. ■

Will Say-on-Pay come to Finland?

The annual meetings of companies in many countries around the world have been transformed by a legal mandate that gives shareholders the right to vote on executive and director remuneration. This right, which originated in the UK in 2003, is known as Say-on-Pay.

Say-on-Pay, SOP, has been adopted in various forms in more than a dozen countries around the world. Although not yet required by Finnish law, it is likely that the practice will come to Finland soon, and directors of Finnish listed companies should be prepared to deal with its special demands.

SOP can take either of two forms: First as a binding vote, which means that directors cannot implement the compensation plan if it is not approved by shareholders; or as an advisory or 'consultative' vote, which means that directors have discretion to decide what to do if the plan is not approved.

A survey of institutional investors conducted earlier this year by Sodali, the corporate governance consultancy, revealed that global institutional investors overwhelmingly endorse the SOP process. They believe that the SOP vote is an important accountability mechanism that keeps board members on their toes when designing compensation plans and puts constraints on overreaching CEOs. While excessive CEO pay is not considered a problem in Finland, it has long been a source of concern in the U.S. and a number of European countries, particularly at banking and financial service companies.

Rather advisory rather than binding

Interestingly, the Sodali survey showed that institutional investors prefer the SOP vote to be advisory rather than binding, which indicates that they do not want to micromanage the details of pay at individual companies. This preference also indicates that shareholders view remuneration schemes as a window into the board room and a useful way to measure the directors' independence and competence.

Shareholders see SOP as a proxy for good corporate governance. They view it as a measure of how well the board handles sensitive and conflicted issues where shareholder interests may differ from those of management. This point was further underscored in the Sodali survey by shareholders' strong preference for a vote on general compensation policy rather than on specific elements of pay plans.

Sodali also performed an analysis of the negative recommendations made by proxy advisory firm Institutional Shareholder Services (ISS) on 2012 AGM resolutions for several companies throughout continental Europe and Latin America. The result of the analysis is revealing of trends that might apply if SOP were adopted in Finland. Sodali evaluated companies from the Nasdaq OMX Helsinki 25 where it is interesting to note the following:

Both the number of Finnish companies that received at least one 'against' recommendation, as well as the total number of resolutions that received 'against' recommendations, increased from 2011. This statistic indicates that shareholders are looking more closely and critically at Finnish companies.

Customized to companies

The majority of these negative recommendations represented agenda

A PROXY IN A NUTSHELL

A proxy firm or proxy advisor is a firm hired by shareholders of public companies, usually large institutions. to recommend and sometimes cast proxy statement votes on their behalf. The top two proxy firms are Glass, Lewis & Co., currently owned by the OTPP – Ontario Teachers' Pension Plan, and ISS – Institutional Shareholder Services, a subsidiary of MSCI after that firm's acquisition of Riskmetrics. Proxy Advisors provide voting analysis recommendations to investment advisors to assist them in making their voting decisions on Agenda resolutions submitted by their investee companies ahead of General Meetings.

WRITERS

John C. Wilcox
Chairman,
Sodali

Andrea Di Segni
Head of Corporate
Advisory, Sodali

SODALI

Sodali is an independent, international consultancy serving corporations in continental Europe and the Middle East, Latin America, Asia and developing markets. It provides expertise and services relating to shareholder transactions, corporate governance, board assessment and institutional investor relations.

resolutions pertaining to Director Elections, followed by proposals to approve the remuneration of Auditors. As SOP votes relates to director performance, this could be a worrisome trend for Finnish companies if SOP is adopted.

Despite the concerns raised by these statistics, SOP does not mean that compensation plans must be standardized at every company. On the contrary, pay should be customized to the particular business circumstances and strategies of individual companies. SOP, however, does add to the difficulties of customizing pay schemes. For example, if a company's strategic plan requires payment of special bonuses or the use of variable pay levels that are outside industry norms, shareholders and proxy advisory firms will take notice and the risk of a negative vote will increase. In such cases, the directors will be obligated to explain clearly and in detail why the pay is justified, what metrics were used and why it will act as an incentive for executives to achieve strategic goals that will create value for the business and its shareholders.

> Say-on-Pay adds to the difficulties of customizing pay schemes

The SOP vote raises important issues that are currently being examined by the European Commission. In its second Green Paper in 2011, the Commission was highly critical of the quality of the 'explanations' provided by companies under the EU's principles-based, 'comply-or-explain' governance system. The SOP vote mechanism also puts a spotlight on the quality and content of explanations provided by boards in support of executive remuneration. As the Commission cautioned, 'group think' and boilerplate explanations will not suffice.

The Sodali survey gave a clue as to the factors that should appear in explanations where companies are seeking approval from shareholders on compensation. The most important are: 'performance criteria for short/medium/long-term incentives'; 'company financial performance'; 'balance between long-term/short-term incentives'; 'total compensation'; and 'quality of the justification for the remuneration policy'. This list of criteria can be used by boards and compensation committees as a guide to designing pay plans and explaining them to shareholders when an SOP vote is in place.

Because it requires so much boardroom transparency, SOP presents a fundamental challenge to traditions of board privacy and restrictions on communication between directors and shareholders. Many directors are likely to have difficulty making the transition from behind-the-scenes advice, which have been the board's traditional role, to a more open boardroom and a more active role in shareholder engagement. However, governance reforms over the past 25 years and new global best practices all point to greater accountability and a more visible and active role for directors.

A constructive view of SOP is that shareholders can actually help companies in setting remuneration that is aligned to a long-term perspective and avoiding excessive pay or pay for failure. This is particularly true when directors are dealing with an overreaching CEO making excessive demands. SOP gives directors a good and objective reason to keep pay at reasonable levels. For this to succeed, engagement between directors and shareholders is helpful, as only through dialogue boards and shareholders can reinforce each other's views about remuneration in the context of a particular business circumstance.

What would happen in Finland?

If SOP comes to Finland, companies and their boards will have to face the reality of active shareholder involvement in sensitive company decisions. Annual general meetings will no longer be routine affairs. The role of directors will be defined separately from that of management. Shareholder relations will change and take on greater importance even at companies with family ownership, majority control groups, or state ownership.

Preparations for the AGM will have to begin at least six months

> Directors will be expected to participate in an outreach campaign to proxy advisory firms and shareholders expected to cast a negative SOP vote

before the meeting date and include the following activities: a comprehensive corporate governance and compensation benchmarking against peer companies and global standards; an analysis of voting results and shareholder feedback from last year's annual meeting; a shareholder identification and ownership profile, analyzing the implications of recent ownership changes and market activity; a review of recent correspondence and communications with top shareholders, both local and global, including members of controlling groups or families; and a list of voting decision-makers at top institutional investors.

With these preparations in place, the company will be ready to plan its AGM and organize an outreach campaign to proxy advisory firms and major shareholders expected to cast a negative SOP vote. The role of directors will be more important than ever before. They will be expected to write a detailed explanation and justification for the compensation plan, including metrics and long-term strategic goals. They will be expected to participate in an outreach program and engage with shareholders that have questions relating to compensation. Much of the outreach will be conducted electronically, with the assistance of the company secretary and other executives, but in some cases the compensation committee chair may have to assume the role of spokesman on compensation matters. Directors will have to be present at the AGM and prepared to answer questions in person.

Although SOP has not yet come to Finland, it is not too early for the directors of Finnish companies to begin thinking about the responsibilities they will face when that day does come. While change is never easy, there is no reason for Finnish companies to fear the consequences of a more open and transparent boardroom and closer relations with the shareholders they represent. SOP does not mean lower pay levels or less customized or appropriate pay. It simply means that directors will have to do a more thorough job of linking pay to performance and explaining to shareholders how they have done so.

WHAT ARE SOME PROXY ADVISORY FIRMS' CRITERIA FOR VOTING ON SOP?

ISS	Glass Lewis
Timely, sufficient disclosure of: ► Maximum compensation award limits ► Guaranteed/discretionary payments ► Long-term incentive plan (LTIP) exercise/strike price (options) ► LTIP grant date/period and discount ► LTIP exercise/vesting period ► LTIP performance criteria	**Disclosure of:** ► Internal and external (peer) benchmarking process ► Rationale for bonus performance metrics or targets
Pay-for-performance misalignment: ► Guaranteed/discretionary compensation ► Equity-based plans not linked to long-term company performance ► Lack of stringent performance-based bonus awards linked to shareholder value ► Disproportionate focus on short-term variable compensation **Pay-for-failure:** ► Severance pay in excess of 24 months' pay ► Misaligned arrangements regarding pensions and post-mandate exercise of equity-based awards ► Missing link or significant discrepancies between company performance and variable awards	► Excessive bonuses, equity awards or severance payments (golden handshakes and golden parachutes) ► Guaranteed bonuses ► Bonuses in negative performance levels ► Lowered performance targets without justification ► High executive pay compared to peers ► Lack of '*malus*' provisions to reclaim unwarranted bonus portions ► Lack of 3-year minimum deferral period on at least 40% of bonus payments

ISS and Glass Lewis are two of the most prominent proxy advisory firms. Information on their policies can be found on their websites at www.issgovernance.com and www.glasslewis.com.

IR magazine

DECEMBER 2012-JANUARY 2013 ■ ISSUE 244

A Cross Border publication ISSN 2041-8868

25 YEARS

THE SOUVENIR ISSUE

Investor relations: the global growth of an industry, as reported by *IR Magazine*

Brave new world

John Wilcox, chairman of Sodali

Whether it was a stroke of luck or pure genius, Janet Dignan's decision to launch *IR Magazine* 25 years ago could not have been better timed. We recognize today that the mid-1980s were an inflection point in the development of IR, which 25 years ago was just beginning to branch out from financial public relations. The hot topics were takeovers, greenmail, raiders, arbitrageurs, poison pills, proxy fights and the plaintiff's bar.

But the most controversial and enduring event of 25 years ago was the infamous 1987 letter from CalPERS to the SEC setting forth a laundry list of demands for improved shareholder rights, board accountability and corporate governance. This letter, which marked the birth of institutional investor activism, set in motion forces that caused the global transformation of IR that continues today.

IR now confronts a set of governance-related problems that were unimaginable 25 years ago. Even a partial list is daunting: empowered shareholders, activist investors, confrontational annual meetings, high-frequency trading, empty voting, imperial CEOs, say on pay, short-termism, boardroom transparency, director-shareholder communication, websites and new technology. The list goes on.

Given the volume and urgency of these problems, it's surprising that IR practice remains focused on financial communication with analysts and portfolio managers; it has made only limited progress in establishing lines of communication with institutional decision makers responsible for governance policy and proxy voting. This is largely the fault of institutional investors that keep these functions separate and are reluctant to bring non-financial metrics into their investment models. This continues despite ample evidence that governance failures can create havoc at firms and cost investors dearly.

But it is also the fault of companies. Boards continue to prize collegiality and privacy over transparency. Legal counsel warn against board communication with shareholders. Budgets constrain co-operation between IR and governance functions.

Will companies succeed in creating a form of holistic IR to embrace the full scope of financial, non-financial and governance issues endemic to all businesses? That depends largely on whether financial institutions accept their fiduciary and stewardship responsibilities. It also depends on a shift to younger, more tech-savvy CEOs and directors who are committed to transparency and skeptical about theories of market efficiency and shareholder primacy.

There is no question that IR practitioners will play a central role in the development of this new company model – or that *IR Magazine* will continue to lead the way for the profession. ■

Andrea Di Segni, Head of Corporate Advisory at Sodali

Making the grade

Is Italy keeping pace with its European counterparts when it comes to Say on Pay? Andrea Di Segni reflects on a year of progress.

This has been the most confrontational year ever for shareholders, according to a study released by Institutional Shareholder Services (ISS) on the 2012 institutional voting results in Europe, with remuneration proposals receiving the highest levels of dissent.

This controversy is reflected in the huge debate as to whether remuneration proposals should be presented to the shareholder as a consultative or binding vote. The differences of opinions are vast and agreement at seems some way off. However, at some point a redde rationem is bound to be demanded, and perhaps then a consensus will be dragged into existence and implemented.

While controversy still reigns, what is generally agreed upon is that shareholders can help companies in helping set remuneration in alignment with a long-term perspective without getting into the micro-management of the company. But in order for this to succeed, engagement between companies and shareholders must be recognised as a critical point – only through dialogue can corporations help shareholders understand the rationale behind their remuneration plans.

Before getting into a practical demonstration on how an engagement plan over the years can pay, it is necessary go over a brief overview of the 'say on pay' debate in Europe, what has been done in the Italian market, and finally the investors' view point via a survey conducted by Sodali during the summer.

The European context

This is the fundamental question and, as mentioned above, opinions vary considerably among the decision makers involved in the debate, and there are a great many with a stake – the EU Commission, individual member-state regulators, politicians, corporations, the media and institutional investors and the associations that represent their interests all have their own corners to fight.

In 2002, the UK advocated an advisory shareholder vote on the annual executive and non-executive director compensation practices of UK listed companies. This has now been taken one step further with new proposals to reform the approval process for director remuneration, including the introduction of a binding vote on remuneration policies. Switzerland is also considering whether to introduce a binding say-on-pay vote, with a referendum to be held pending the executive salary review initiative which was launched in 2006. The Netherlands, on the other hand, has had a binding vote in place since 2004, though there have been few cases in which a negative vote has actually been cast.

Sweden adopted requirements for non-binding shareholder votes on remuneration reports in 2005. Norway, Spain, Portugal, Denmark and, most recently, France, have followed suit and Germany is now among a number of countries currently considering introducing legislation.

On top of this, the EU Commissioner, Michel Barnier, is pushing to introduce a binding vote on say on pay as a practice in Europe, but this plan has encountered a lot of resistance at state level, who argue that the existing cultural diversity that helps differentiates the various financial marketplaces would make such an introduction difficult. At present there is no empirical evidence to suggest whether a binding or advisory vote, when it comes to say on pay, is better for financial markets. Variables such as market requirements, company circumstances and the shareholders' will to commit resources to such an undertaking make it a complex matter. Furthermore, the import of cultural attitudes to compensation must not be underestimated, not to mention the uncertainty of finding one's bearing at a regulatory level, and the still-controversial role of proxy advisory firms.

With this in mind, Sodali recently performed a survey of the major institutional investors to figure out what they really think about say on pay. Results are in many cases straightforward and give guidelines for future discussions:

- More than 50% of the respondents acknowledge that a say on pay vote strongly increases board accountability and protects shareholder rights.
- Two-thirds prefer the advisory vote approach, and slightly less than 80% want an annual vote.
- More than 50% want the vote on remuneration policy to encompass a company's approach and objectives

There was a clear indication that say on pay should reflect the efficiency of the board. However, this clear message should not decide the action of the board – there was strong preference for having an advisory vote so as to allow the board full responsibility to align remuneration to long-term sustainability and performance. This also removes the temptation for corporations to be micro-managed by shareholders.

The Italian situation

In response to the many differing views on the subject, the Italian regulators recently opted for a compromise option whereby remuneration policies of financial institutions and insurance companies receive a binding vote from shareholders, while for all other companies a consultative 'say on pay' mechanism is in effect.

In 2008, the Bank of Italy dictated that ordinary shareholder meetings need to approve (in a binding vote) and be involved in the setting up of remuneration policies and in establishing equity-based compensation plans. In addition, in March 2011, the Bank published a set of supervisory provisions to implement the third Capital Requirements Directive. These provisions meant that the remuneration of members of the board and committees having supervisory, management and control functions (including any share-based incentive plans) should be approved at the shareholders' meeting with a binding vote.

On 23 December 2011, the Commissione Nazionale per le Società e la Borsa (CONSOB) adopted new regulations over the content and timing of the mandatory public remuneration report on directors, general managers and managers with strategic responsibilities of Italian listed companies, as well as the relative resolution to be approved at the general meeting. In relation to the role of the shareholders at the general meeting, in applying the say on pay principle, the regulation stipulates that the shareholders' meeting provides an advisory vote on the first section of the remuneration report. The shareholders' resolution is not binding, but the results of the vote must be publicly available on the website of the issuer.

“the import of cultural attitudes to compensation must not be underestimated engagement does not mean that corporations should blindly follow the results of shareholder discussions”

Italian proxy season

The 2012 Italian proxy season has seen an increase in the number of companies with dissenting shareholder votes. Some commentators attribute these failures to an increasing disconnect between pay and performance, fueled by negative recommendations from proxy advisory firms like ISS. Others note that the failures correlate more closely to shareholder dissatisfaction with corporate performance (an issue wholly aside from whether pay levels were appropriate for the performance actually achieved), or are attributable to high absolute or relative pay levels, above-median benchmarking or use of inappropriate types of compensation.

According to a report released by ISS on the Italian market, dissent increased significantly – up from 3.2% in 2011 to 4.6% this year, mainly due to the introduction of 'say on pay' resolutions. Out of the 128 say-on-pay resolutions proposed, only in one company, Impregilo, was the motion rejected.

While the results of the 2012 proxy season say-on-pay votes have been very encouraging, it remains clear that the ownership structure of Italian companies has a significant effect in reducing the practical impact of the dissent level to such resolutions. Furthermore, the against votes expressed by several international investors, together with many negative recommendations issued by the main proxy advisory firms, has sent a signal that Italian companies need to consider how their compensation policies are defined.

We, as Sodali, have been through this matter with many Italian listed companies. They are starting to

>

appreciate that in future, say on pay resolutions need to be addressed in advance and that a different, to some extent more holistic, approach needs to be defined so as to better anticipate and address the critical arguments about how the remuneration policies are structured.

The survey Sodali conducted reinforces the idea that outreach and dialogue with shareholders is the best course of action following a negative vote on say on pay. This, together with more openness by corporations, seems to reflect a new unity in governance thinking where constructive dialogue is the best path to aligning interests.

Expectations

Engagement with investors. It is through this principle that, from a corporation's perspective, the greatest benefit will be achieved. It will not be the 'panacea' for moderating shareholders expectations, nor will it repair the broken linkage between pay and sustainability – but it will help corporations understand which road to follow in order to regain shareholder confidence. Engagement creates long term share value and improves governance practices by building trust in the decisions taken by management. Furthermore, constructive engagement with investors will improve the approach of the company toward its governance and risk management policies, while making it more competitive.

However, engagement does not mean that corporations should blindly follow the guidance that results from these discussions – corporations and shareholders have different interests, perspectives and objectives. It should be viewed as a tool for both parties to hold meaningful discussions and to renew the 'contract' which is the base of the relationship.

Case study: Unicredit Group

What has been said until now can be seen as a sort of 'idealism, a decription how things should be done in the financial world. Often this is kind of argument is viewed as simply 'words in the air' – a discussion that will never be applied to what is happening 'on the ground'.

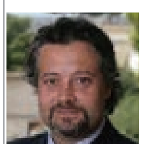
To counter this view Sodali, together with Unicredit Group, one of the leading European financial institutions, embarked on a 24-month remuneration engagement program. It's aim was to better understand what shareholders wanted in order to align their interests with that of the Board. Through its Human Resources & Compensation, Investor Relations and Corporate Law teams, Unicredit developed a plan for dialogue between international investors and proxy advisory firms in order to gain positive endorsements for the company's remuneration policy and compensation plans.

In 2011, an outreach program was launched to contact international investors and proxy advisory firms and to gather data on voting expectations and concerns over remuneration. Initial feedback showed slightly less than 50% of the target had constructive feedback to offer. In 2012, a second outreach program was undertaken, this time with a more customized approach, taking into consideration the previous year's response. Almost 75% of the those contacted responded with constructive suggestions in regard to the proposed compensation schemes. Encouragingly, many of the investors welcomed the active approach to engagement that Unicredit displayed in relation to its remuneration policies.

As a result of the outreach programs, the workingw group identified a number of very specific suggestions for the management and board to consider when developing its future compensation plans, remuneration reports and other materials for the 2012 general meeting. Thanks to the willingness of both Unicredit and its shareholders to engage in dialogue, the company's 2012 general meeting was a success. Better still, UniCredit is now perceived as one of the leading financial institutions when it comes to remuneration practices.

In the period since the program started, international investor support for the remuneration schemes increased from an average of 63% to an impressive 96% – highlighting how a strong commitment from the board and management to listen and factor in other points of view, along with a tailored communication plan, can produce extraordinary results. Even though it is often difficult to find empirical evidence, this results achieved by this exercise should encourage other corporations, both in Italy and abroad, to seek constructive dialogue with their shareholders and regain the lost alignment between ownership and management.

ABOUT THE AUTHOR



Andrea Di Segni is Head of Corporate Advisory at Sodali

ΕΠΕΝΔΥΤΗΣ

EPENDYTIS NEWSPAPER – Saturday, 1 December, 2013

Interview with John C. Wilcox, Chairman of Sodali to Alexandros Stylianos

Privatizations: the importance of management structure

In a country like Greece, with galloping recession, good corporate governance affords an exit strategy from the crisis, according to John Wilcox, Chairman of Sodali, a global leader in corporate governance advisory. Mr. Wilcox analyses the various needs of Greek companies in relation with others of Europe, points out that all state owned enterprises included in the privatization programme need fundamental changes in their operation and he underlines that Greek companies should initiate meaningful dialogue with their investors on certain critical issues imminently.

1. ***Give us please a brief description of the services you provide specifically in the Greek market. Are these different than the ones you offer on a European basis and why?***

   Sodali advises companies and boards on how to improve corporate governance and communications with their shareholders in all types of transactions ranging from annual shareholder meetings, mergers and acquisitions, rights issues and general corporate governance advisory. We advise our Greek clients on ways to improve overall communication with their institutional investors with the aim of maximizing favorable response during any given corporate action. Sodali's services are customized to the needs of individual companies while also taking account of local rules and practices in different countries. We work through local experts in each market we serve and add our global expertise. We do not seek to impose one standard of governance - our main aim is to work individually with companies to preserve what is best in their governance and business *models, correct perceived weaknesses, explain the benefits of attributes that differ from global standards, educate investors and thereby improve perceptions and valuation in the marketplace.*

2. ***We'd like to know your experience from the Greek market, the rate of penetration, and possibly some success stories.***

   We have been present in the Greek market for over four years now and have worked on a variety of transactions. Most of our initial client base came from the banking sector where we have been supporting some of the larger banks, in improving their communications with their foreign investors as well as defending them in critical M&A situations. Over the last 2-3 years, following the changes to the EU Shareholder Directive and subsequent changes to the Greek Companies Law 2190, we also have a collaboration with the Athens Exchange, with the aim of enhancing standards of best practice to all Greek listed companies. A very good success story is the work we did with OPAP last year for their EGM where we helped secure favourable support from their foreign investors who held 58% of the company. This allowed OPAP to secure the implementation of the largest investment program in the company's history.

3. ***Do you see any substantial differences between the way Greek and European businessmen run their firms in terms of corporate governance?***

   Large families still tend to control a lot of the companies and members of the controlling families usually serve as the top managers. This is not a unique characteristic to Greece – family ownership, state ownership and control groups are also present in most markets except for the US and the UK. Sodali is accustomed to working with these companies and believe that their special governance needs can be understood if well explained.

4. ***In the era of such a crisis, can Sodali find clients here in Greece and in what fields? It seems rational that at this point, when Greek companies have "hot" issues to deal with (like lack of liquidity), to not prioritise consultation on corporate governance…***

   We believe exactly the opposite. Crisis conditions clarify the need for good corporate governance, particularly when governance failures have been one of the causes of the crisis –boards failed to ensure risk controls were in place and properly implemented by management. Corporate governance is even more of a priority now - companies should view it as a means to reduce risk, improve management efficiency and increase long-term value. Companies with good corporate governance are more likely to perform better and hence attract more long-term investors. We are currently speaking to a lot of companies about this very subject and are suggesting they benchmark themselves against their peers *in order to understand what they need to do to implement a plan to improve and align themselves with best practice.*

5. ***I know that you see opportunities in the upcoming privatizations in Greece. Can you tell us why?***

   The privatization process which is currently underway is a very challenging project which is being run under very difficult market conditions. All of the state owned Enterprises included in the privatization program of the Hellenic Republic will face some significant changes with respect to the way they have operated until now. The changes in the ownership structure of these companies will lead to far more scrutiny by the international investor community and certain decisions will require majority shareholder approval, henceforth no longer subject to state control. Aside from the internal challenges that companies involved in this process will face, in order to secure attention from the international investor community, it will be very important to convey that these companies operate under high standards of best practice. We strongly believe that such companies should have good governance structures in place BEFORE undergoing privatisation. This should not only help prevent a market discount at the time of the offering but should also make a company better able to deal with the demands of the listing and the aftermarket.

6. ***Which firms of the ones under privatization might be in need of your services? How would you help them to change, which structures are in need of change?***

   Any company undergoing a privatization is like a company doing an IPO and therefore needs to be fully prepared. Those companies that are about to issue stock to the public can benefit from ownership profiling and targeting, namely getting a better understanding of investors and their behaviour. Those that are already listed can benefit from Sodali assessing their current corporate governance structures and figuring out ways that they can align themselves with peers in their industry. Above all, in both cases, the most important exercise for them is to engage proactively with investors with the aim of gaining the confidence of global institutions. It is important for these companies to understand and convey that successful performance will require strong relationships with stakeholders that will be based on mutual trust.

7. ***Can you give us a plain example of how a Greek company could benefit from your services?***

   We can help any company that has to improve its relationship with shareholders because it may have been misperceived or undervalued in the marketplace. Depending on its needs, we can prepare a short, medium and long term plan of activities that can allow it to strengthen its credibility with its investors. The simplest exercise is to ensure something as routine as the annual general meeting is organized and communicated properly to the *investors base. This basic exercise allows a company to have an open dialogue with investors which can be very useful when more important situations arise.*

8. ***What are the steps that you have taken for your current Greek clients, to help them overcome the debt crisis?***

   We are actually working much closer with our Greek clients than ever before. A lot of our clients will need to engage with their investors on some very critical issues. We are helping them further enhance their efforts with their investors, in order to be ready to initiate immediate proactive communication when extraordinary needs arise. We are also helping them with internal assessments of their corporate governance structures such as ownership profiling, preparation of comply or explain explanations and benchmarking of their governance structure with their peers.

9. ***What will be the "hot topics" of the forthcoming board meetings? Judging from your clients' responses, what are the issues that trouble and puzzle corporate Europe at the moment?***

   Controversy at AGMs has become a fact of life for listed companies around the world. It is a serious challenge that we believe corporate boards and managers will face once again in 2013. Moreover, changes in shareholder demographics have concentrated voting power in a powerful cadre of global institutional investors. Even hybrid companies in developing markets –those with family ownership, majority control groups, voting agreements, or state-owned "golden shares" – will usually find themselves having to answer to sophisticated global investors who bring critical perspectives, diverse investment strategies and a wide range of attitudes toward governance and activism. Some of these perspectives will focus on director independence, shareholder nomination of directors, remuneration policy, say on pay voting, risk oversight and succession planning. Remuneration and risk controls will be particularly prevalent, especially where bailouts have occurred and where the public is facing austerity measures.

10. ***Trying to put the debt and financial crisis into a corporate perspective, what have the firms learned from the crisis? Do you think that they have changed structures, scope or profile?***

    The financial crisis is rooted in problems within the financial services industry. Sorting out the problems is particularly difficult at listed companies that are themselves part of the financial services industry. Stewardship codes are one approach to imposing standards on institutional investors. There is a lot of focus on regulation to reduce risky practices and impose standards of business conduct – Dodd Frank is a start in the US, but much more is being done by the EC.

FINANCE & MARCHES

indices

+ 23,21 %

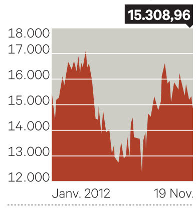
EN HAUSSE
SAS
La compagnie aérienne scandinave a conclu avec les syndicats un accord de réduction des coûts qui prévoit des baisses de salaires et des suppressions de postes.

– 14,24 %

EN BAISSE
FUGRO
Le groupe néerlandais, à qui la français CGG Veritas vient de racheter sa division Géoscience pour 1,2 milliard d'euros, a prévenu qu'il ne tiendrait pas son objectif de bénéfice net.

MILAN À LA FÊTE
La Bourse de Milan a clôturé en forte hausse de 3,05 %, rendue optimiste par la perspective d'un accord sur le budget aux Etats-Unis. L'indice vedette de la Bourse de Milan, le FTSE MIB, a nettement accéléré en fin de séance à l'instar des autres places européennes et clôturé à 15.309 points. Parmi les plus fortes hausses figurent Mediaset (+ 5,32 %), Autogrill (+ 4,37 %) et Finmeccanica (+ 4,85 %).

L'indice FTSE MIB en points



BLOOMBERG

CAC 40 : le grand retour des actionnaires « activistes »

● Après Safran avec TCI, Danone a vu arriver le fonds Trian Partners dans son capital.
● La France n'est pas le terrain de chasse préféré des activistes, qui repartent souvent bredouilles.

ACTIONS

Laurence Boisseau
lboisseau@lesechos.fr

Deux actionnaires activistes qui débarquent en moins d'un mois dans des groupes du CAC 40, cela s'est rarement vu. Mi-octobre, le fonds britannique The Children's Investment Fund Management (TCI) a pris environ 3 % du capital de la société Safran. Début novembre, Trian Partners, le fonds de l'activiste Nelson Peltz, a notifié à Franck Riboud l'acquisition de près de 1 % de Danone. L'Américain a l'habitude de prendre des parts dans des groupes alimentaires, comme Heinz, Kraft et Cadbury. Mais c'est la première fois qu'il fait irruption dans une société cotée française. Selon des sources outre-Atlantique, il voudrait même continuer à grimper au capital.

Pourtant, la France n'est pas le terrain de chasse préféré des activistes. Ces investisseurs qui prennent une – petite – part du capital, font beaucoup de bruit pour faire évoluer la stratégie du groupe en question, et espèrent voir ainsi grimper le cours de Bourse. Il y a bien eu Eric Knight, dès décembre 2004 dans Suez, puis plus tard dans Carrefour. Ou encore Guy Wyser Pratt chez Lagardère. Mais ceux-ci ont beaucoup vociféré pour pas grand-chose. Eric Knight a beau s'être enorgueilli d'avoir fait évoluer la stratégie de Suez en réclamant, à partir de décembre 2004, la séparation des pôles énergie et environnement, il n'avait rien inventé. Depuis la fin 2003, les analystes ne cessaient de démontrer l'intérêt d'une scission. Même constat chez Carrefour, où Knight a exigé un fauteuil au conseil d'administration pour obtenir le départ de Lars Olofsson. Une demande qui s'inscrivait aussi dans l'air du temps. Quant à Guy Wyser Pratt, il n'a obtenu aucun siège au conseil de surveillance de Lagardère et n'a pas réussi à faire évoluer les statuts de la société en commandite. David Einhorn, président du hedge fund Greenlight Capital, n'a pas eu plus de succès lorsqu'il entra en 2008 dans le capital de Natixis en réclamant la cession des participations dans les Caisses d'Epargne et dans les Banques Populaires.

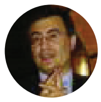
Des méthodes maladroites

« Leur méthode est souvent maladroite, note Pierre-Henry Leroy, président de Proxinvest. Ils peuvent tenir des propos très agressifs et se posent très vite en ennemis des dirigeants d'entreprise. A l'inverse, ces derniers sont souvent peu ouverts aux propositions des actionnaires et ne reconnaissent que les rapports de force », commente-t-il. *« Les activistes hostiles sont en général assez peu efficaces »*, conclut-il.

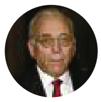
De fait, Nelson Peltz chez Danone ne remet pas fondamentalement en cause la stratégie de Franck Riboud. Son fonds ne critique pas l'action de la direction générale — elle y est même saluée. Ce qu'il veut, en revanche, c'est une plus forte réduction des coûts, une approche plus équilibrée entre croissance du chiffre d'affaires et résultat net et la fin des acquisitions dilutives pour les actionnaires.

Cette approche serait-elle le signe d'un tournant vers un mode de communication moins agressif ? Peut-être. En tout cas, *« les actionnaires qui sont le plus efficaces sont ceux qui font preuve de discrétion, qui instaurent un dialogue en amont avec les entreprises »*, continue Pierre-Henri Leroy. Blackrock l'a bien compris. Le numéro un mondial de la gestion envoie une lettre aux entreprises dans lesquelles il détient une participation significative pour échanger sur différents sujets. *« Dans le passé, ce genre de lettre était adressée aux relations investisseurs. Maintenant, c'est le conseil d'administration qui est de plus en plus souvent destinataire »*, commente Louis Barbier responsable France pour Sodali, cabinet de conseil en gouvernance. Les entreprises les plus efficaces à désamorcer les situations de conflit sont, note John Wilcox, président de Sodali. ■

Ils ont dit



« L'objet de ce courrier est de vous faire part de notre insatisfaction quant à la politique de Safran en matière de déploiement de ses capitaux. »
CHRISTOPHER HOHN fondateur de TCI



« La direction a globalement bien dirigé Danone. Il devrait être possible d'améliorer les résultats et les revenus pour les actionnaires. »
NELSON PELTZ Cofondateur de Trian Partners

En apparence bon marché, la Bourse de Paris n'est pas sous-valorisée

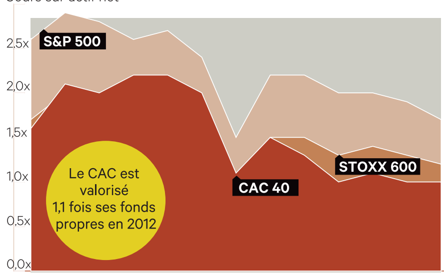
Le CAC 40 est valorisé 1,1 fois ses fonds propres et 10 fois ses bénéfices. C'est peu, mais les estimations de résultat pourraient encore être dégradées.

L'arrivée d'investisseurs activistes invite à se poser la question : les entreprises françaises sont-elles aujourd'hui plus vulnérables à de telles irruptions ? Autrement dit, le CAC 40 est-il sous-valorisé ? Certes, près de la moitié des groupes de l'indice phare valent moins que leurs fonds propres – ils n'étaient qu'un tiers en 2007. Par ailleurs, l'indice français se paie 10 fois les résultats nets par action estimés pour 2013, et affiche ainsi une décote de 12 % sur sa moyenne historique.

Pourtant, il est difficile de parler de sous-valorisation de la Bourse de Paris. D'abord parce que, de manière générale, la France ne semble pas inspirer aux investisseurs une défiance particulière. *« Il n'y a pas de décote liée à la signature française »*, assure Pierre Sabatier, chez PrimeView.

Ensuite, comparer les prix relatifs des indices est toujours un exercice délicat car le poids des secteurs est très différent. Si aux Etats-Unis, le S&P 500 se paie 2 fois son actif net 2012, contre 1,1 fois pour le CAC 40, il comprend beaucoup de valeurs technologiques mieux valorisées que les financières, qui pèsent beaucoup dans l'indice français. *« Le marché américain se paie cher par rapport à la forte pression déflationniste et au soutien budgétaire et monétaire dont le pays a bénéficié. Les anticipations des analystes sont trop agressives ; les investisseurs n'en ont pas encore pris pleinement conscience »*, note Pierre Sabatier, convaincu que le marché américain va baisser.

Des fonds propres moins bien valorisés
Cours sur actif net



« LES ÉCHOS » / SOURCE : FACTSET

« Il n'y a pas de décote liée à la signature française. »
PIERRE SABATIER chez PrimeView.

Enfin, les spécialistes s'attendent à des révisions à la baisse des prévisions de bénéfices, qui rendraient la sous-valorisation apparente des valeurs françaises beaucoup moins manifeste. *« Il y a, en fait, une différence de perception entre les investisseurs et les analystes financiers*, souligne Pierre Sabatier. *Les premiers sont plus circonspects que les seconds devant la capacité des entreprises à générer autant de richesse que dans le passé. Or, la France frôle la récession et subit de lourdes pressions déflationnistes. Et, historiquement, pendant ces périodes, on a pu constater que les marchés actions sous-performaient les autres classes d'actifs et que les analystes financiers se trompaient fortement. On a relevé des écarts de 30 à 40 % entre leurs estimations de résultats et les bénéfices réalisés par les entreprises l'année d'après. Il faut donc s'attendre à de nouvelles révisions en baisse des profits. Et ce, pour le vingt-quatrième mois d'affilée. »* — **L. BOI.**

ING obtient des délais de Bruxelles mais écope de nouvelles contraintes

BANQUE

La Commission européenne a reporté les dates butoir du plan de restructuration d'ING pour lui donner un peu d'oxygène.

Didier Burg
— Correspondant à Amsterdam

Du temps et rien d'autre, c'est finalement tout ce qu'ING a obtenu après avoir battu en brèche la cure d'amaigrissement que lui impose la Commission européenne depuis 2009 pour avoir perçu 10 milliards d'euros d'aides publiques. De fait, les autorités bruxelloises ont, *« pour tenir compte des difficultés actuelles du marché »*, reporté les dates butoir des grandes étapes du plan de restructuration déjà sur le métier.

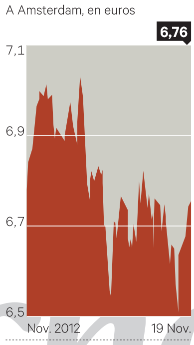
Un calendrier à la précision « suisse »

Ne remettant en cause aucune des mesures contraignantes initialement prévues et allant même jusqu'à en alourdir certaines, les gardiens de la concurrence européens donnent simplement un ballon d'oxygène au bancassureur. Le remboursement de la totalité des 4,5 milliards d'euros encore dus à l'Etat néerlandais est repoussé à mai 2015. L'opération se décomposera en quatre tranches dont la première, de 1,12 milliard d'euros, interviendra le 26 novembre.

Quant au programme de cessions de l'ensemble des activités d'assurance, la Commission accepte de l'étaler dans le temps – jusqu'à 2018 pour certaines opérations – mais en l'assortissant d'un calendrier à la précision « suisse ». Ainsi un quart du pôle d'assurances américain devra être sorti du groupe financier en 2013, la moitié en 2014 et le tout en 2016. ING a engagé les premières démarches pour introduire ces filiales en Bourse. Au global, le groupe estime que les coûts des opérations de cession jusqu'à présent engagées (ING Direct USA, Canada et Royaume-Uni, filiales d'assurances sud-américaines et asiatiques) ont atteint 500 millions d'euros.

Enfin, ING voit son interdiction de mener des acquisitions et celle de se lancer dans une concurrence tarifaire prolongée jusqu'en 2015. ■

ING en Bourse
A Amsterdam, en euros



BLOOMBERG

en bref

Affaire UBS : nouvelle mise en examen

FRAUDE FISCALE — Un ex-directeur général de la filiale française d'UBS, Patrick de Fayet, vient d'être mis en examen pour *« complicité de démarchage illicite »* dans l'enquête sur des soupçons de fraude fiscale de la banque suisse. Il s'agit de la troisième mise en examen dans cette information judiciaire ouverte en avril à Paris sur les pratiques de la banque soupçonnée d'avoir démarché illégalement des clients en France et d'avoir mis en place une double comptabilité pour masquer des mouvements de capitaux avec la Suisse.

20
banques partenaires de l'Etat français pour placer sa dette

La liste des vingt Spécialistes en Valeurs du Trésor (SVT), ces banques qui aident l'Etat français à placer sa dette en s'engageant notamment à en acheter, a été renouvelée pour trois ans. Parmi les établissements sélectionnés figurent toujours quatre Français (BNP Paribas, Crédit Agricole, Natixis et Société Générale). Malgré la restructuration de ses activités, UBS reste SVT.

LONDON - October 18, 2012

Sodali has hired Arent Rønn Christensen as Director of Business Development for the Nordic Region

Sodali, the global consultancy specializing in corporate governance and shareholder services (www.sodali.com), announced today that it has hired Arent Rønn Christenson as Business Development – Nordic Region in the firm's Copenhagen office.


Arent Ronn

Mr. Rønn brings more than 13 years of experience in the structure and operations of global equity markets and services to listed companies. His most recent position was as Associate Vice President for European Development and Corporate Solutions at NASDAQ OMX market in Copenhagen.
Mr. Ronn, working from Sodali's Copenhagen office, will work with clients in Denmark, Sweden, Finland and Norway and will monitor regulatory developments in these countries.

Mr. Rønn said: "I am enthusiastic about joining Sodali. I was attracted by their consultative approach to advising companies in dealing strategically with their shareholders. The team is composed of international experts in the proxy solicitation and corporate governance field, and I am convinced we have optimal solutions to provide senior-level advice to Nordic clients and help them deal effectively with the concerns and expectations of their global shareholder base".

Alvise Recchi, CEO of Sodali, added, "While Sodali is a global company, local expertise and credibility are a hallmark of our firm's strategic approach. Hiring Arent is yet another step of our global plan to bring together an association of word class executives, experienced staff and local experts committed to providing customized services in each market we serve. Arent is for Sodali the ideal person to represent us in the Nordics Regions. The combination of expertise and access to institutional decision-makers in the world largest capital markets and knowledge of the mechanics of local jurisdictions is key to achieve our goal of aligning the interests of our Nordic corporate clients and their institutional investors".

About Sodali

Sodali is a global consultancy providing advice, shareholder services and corporate governance expertise to companies in Europe, Latin America, Asia and developing markets. It has offices and representatives in major financial centers around the world. Sodali's services include: preparation and conduct of shareholder meetings, bondholder campaigns, mergers and acquisitions, capital restructurings, corporate governance consulting, IPO transition services, board evaluation and training, research on strategic issues and shareholder outreach programs. Sodali's mission is to help companies anticipate, understand and deal effectively with the expectations of shareholders, institutional investors and the global financial markets.

SHAREHOLDER EUGENICS IN THE PUBLIC CORPORATION

Edward B. Rock†

In a world of active, empowered shareholders, the match between shareholders and public corporations potentially affects firm value. This Article examines the extent to which publicly held corporations can shape their shareholder base. Two sorts of approaches are available: "direct" or "recruitment" strategies and "shaping" or "socialization" strategies. Direct or recruitment strategies, which attract "good" shareholders to the firm, include going public, targeted placement of shares, traditional investor relations, the exploitation of clientele effects, and "de-recruitment." Shaping or socialization strategies, which transform shareholders of a "bad" or unknown type into shareholders of the "good" type, include choice of domicile, choice of stock exchange, the new "strategic" investor relations, and capital structure. For each type of strategy, I consider the extent to which corporate and securities law facilitates or interferes with the strategy as well as the ways in which it controls abuse. In examining the relationship between shareholder base and firms, this Article attempts to merge investor relations, very broadly construed, with corporate governance.

---

† Saul A. Fox Distinguished Professor of Business Law, University of Pennsylvania Law School. Thanks to Yakov Amihud, Bill Bratton, Alex Edmans, Jill Fisch, Marcel Kahan, Leo Katz, Eric Roiter, John Wilcox, and participants in workshops at the University of Pennsylvania, New York University, and Columbia University for helpful comments, suggestions, and criticism. My research has been supported by the Saul A. Fox Research Endowment.

Introduction

A private corporation chooses its shareholders. New participants can be recruited or shunned. When a firm goes public, it relinquishes much of this freedom. As Warren Buffett put it: "Mrs. Astor could select her 400, but anyone can buy any stock. Entering members of a shareholder 'club' cannot be screened for intellectual capacity, emotional stability, moral sensitivity or acceptable dress. Shareholder eugenics, therefore, might appear to be a hopeless undertaking."[1]

Is "shareholder eugenics," in fact, a hopeless undertaking? Are there tools for screening entering members for capacity, stability, sensitivity, or dress? To what extent does the law facilitate shareholder eugenics? To what extent does it interfere? When it interferes, does it do so unnecessarily?

---

1 Letter from Warren E. Buffett, Chairman of the Bd., Berkshire Hathaway Inc., to Shareholders (Mar. 14, 1984), *available at* http://www.berkshirehathaway.com/letters/1983.html.

Many of the reasons for choosing good co-investors in the private firm (and for avoiding bad ones) carry over into the publicly held firm. We know from venture capital that sophisticated investors may be able to contribute managerial skill, relationships with customers and suppliers, contacts with investment bankers, and sage counsel to a start-up business.[2] Likewise, we know from private equity experience that sophisticated investors may be particularly skilled at several different but important functions: reorienting a mature business that has lost its focus while public, including undoing excessive diversification; providing high-powered incentives to managers combined with high-powered monitoring; and providing patient capital during a period of unsettled market conditions.[3] Similarly, in the public corporation context, there are reasons to believe that the right match between investors and firms can be important to firm value. Is shareholder eugenics as hopeless an undertaking as it might first appear?

There are, in fact, a wide variety of modes of shareholder eugenics. At the same time, there are clear limits to a firm's ability to craft its shareholder base. Once one seriously entertains the notion that the composition of a firm's shareholder base can impact a firm's success, the methods for shaping that base—for good or for ill—become a salient dimension of corporate governance, a dimension that has been largely ignored. Put differently, investor relations, broadly construed, begins to converge with corporate governance.

From the perspective of financial economics, this Article focuses on the relationship between the shareholder base and firm value. Two seminal contributions are the models developed by Amihud and Mendelson[4] and Merton.[5] Both start from the intuition, nicely stated by Merton, that the "portfolios held by actual investors (both individual and institutional) contain only a small fraction of the thousands of traded securities available" and then draw a link between the shareholders of a company and its cost of capital.[6]

The Merton model starts from the observation that shareholders will only choose among known stocks—the "investor recognition hy-

---

2 *See generally* PAUL GOMPERS & JOSH LERNER, THE VENTURE CAPITAL CYCLE 127–54, 157–70 (2d ed. 2004) (discussing the structure of venture capital investing and the importance of the private equity organizational form); ANDREW METRICK & AYAKO YASUDA, VENTURE CAPITAL & THE FINANCE OF INNOVATION 9–14, 94–183 (2d ed. 2011) (discussing the history and development of the venture capital industry and examining how top-tier venture capitalists add value through investing, monitoring, and exiting).

3 *See* JOSH LERNER, FELDA HARDYMON & ANN LEAMON, VENTURE CAPITAL AND PRIVATE EQUITY: A CASEBOOK 72–111 (4th ed. 2009).

4 Yakov Amihud & Haim Mendelson, *Asset Pricing and the Bid–Ask Spread*, 17 J. FIN. ECON. 223, 223–47 (1986).

5 Robert C. Merton, *A Simple Model of Capital Market Equilibrium with Incomplete Information*, 42 J. FIN. 483, 487–508 (1987).

6 *Id.* at 488, 499–504; *see* Amihud & Mendelson, *supra* note 4, at 223–24, 246–47.

pothesis," an assumption of incomplete information.[7] This limits a firm's ability to raise capital.[8] Merton's model introduced the useful concept of "set-up" costs:

> If an investor does not follow a particular firm, then an earnings or other specific announcement about that firm is not likely to cause that investor to take a position in the firm. If, for each firm, investors must pay a significant "set-up" (or "receiver") cost before they can process detailed information released from time to time about the firm, then this fixed cost will cause any one investor to follow only a subset of the traded securities. Because this fixed cost is a "sunk cost" for existing shareholders, the effective information received by current shareholders, even from a public announcement by the firm, will not be the same as that received by other investors.[9]

Merton shows that, especially for small firms, these set-up costs can raise the cost of capital and reduce the value of the firm.[10]

By contrast, Amihud and Mendelson developed a model in which liquidity generates a clientele effect: short-term investors prefer stocks with a small bid–ask spread, while longer-term shareholders gravitate towards larger-spread assets.[11] Because longer-term shareholders get paid for giving up liquidity in the form of higher expected returns, there is a connection between liquidity and the cost of capital. Thus, as in the Merton model, the shareholder base and cost of capital are correlated.[12]

Although these models draw different (but potentially complementary) connections between the identity of the shareholders—the shareholder base—and the firm's cost of capital, the key foundational insight of both is that there *is* such a connection. The models have generated a large literature, which this Article will address as it becomes relevant.[13] As will become clear, these models are important for understanding the extent to which companies can tailor their shareholder base and the means for doing so. An immediate implication of both models is that firms have an incentive to invest in expanding their shareholder base. Indeed, the process of attracting investors who do not currently own shares may be similar to marketing the firm's products.[14] Buffett's question about shareholder eugenics involves both (a) the link between shareholder base and firm

---

7 *See* Merton, *supra* note 5, at 488, 494–95.

8 *See id.* at 484–87.

9 *Id.* at 489–90 (internal footnote omitted).

10 *See id.* at 484–85, 502.

11 *See* Amihud & Mendelson, *supra* note 4, at 246.

12 *See id.* at 224, 246.

13 *See infra* Part II.D.3.

14 *See* Merton, *supra* note 5, at 501.

value, and (b) the extent to which a firm can influence its shareholder base.

We live in an era of empowered shareholders. Shareholding is more concentrated than ever before.[15] Shareholders vote on more things than they ever have, with proposals to give them even more power.[16] Activist shareholders and intermediaries of various stripes have emerged and have had a significant impact.[17] Although controversy continues over whether empowering shareholders is good or bad,[18] different and more interesting questions arise from an acknowledgement that shareholders *are* empowered. That new reality requires rethinking the relationship between shareholders and the firm. Learning how to interact productively has never been more important to shareholders or firms. From a regulatory perspective, we need to reconsider some current limitations that treat shareholders like children.

This Article is an investigation into the tools available for recruiting and shaping the shareholder base. Part I briefly explores the goals of crafting a shareholder base in a public corporation. Part II turns to the available tools for directly shaping that base, what I refer to as "direct" or "recruitment" strategies: the tools for identifying "good" shareholders and bringing them into the firm (and the related "de-recruitment" strategies of discouraging or ousting bad shareholders). They include going public, targeted placement of shares, traditional investor relations or communications strategies, the exploitation of clientele effects, and de-recruitment. Part III examines what I refer to as "shaping" or "socialization" strategies, which transform shareholders of a "bad" or unknown type into shareholders of the "good" type. In contrast to the direct or recruitment strategies, shaping or socialization strategies largely shape the shareholder base by modifying the shareholder role. They include choice of domicile, choice of stock exchange, "strategic" investor relations, and capital structure. For each type of strategy, I consider the ways that corporate and securities

---

15 Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 995–98 (2010).

16 *See, e.g.*, Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 836 (2005).

17 *See* Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1029 (2007).

18 *Compare* Bebchuk, *supra* note 16, at 836 ("Increasing shareholder power to intervene . . . would improve corporate governance and enhance shareholder value . . . ."), *with* William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 659 (2010) (arguing against shareholder empowerment and in favor of the "prevailing legal structure"), *and* Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1750 (2006) (rejecting Bebchuk's argument and responding that "shareholder voting is properly understood not as a primary component of the corporate decisionmaking structure, but rather as an accountability device of last resort, to be used sparingly, at most").

law facilitates or undermines the strategy, as well as the ways in which it controls abuse. I close with a brief conclusion.

I
Goals in Crafting the Shareholder Base in the Public Corporation

What are firms looking for in shareholders? In short, they are looking for good shareholders and hoping to avoid bad ones.

A. What is a Good Shareholder?

What makes a shareholder a good shareholder? First and foremost, shareholders provide money. In particular, firms look for money that is committed to the firm forever and that is available at an attractive price. Thus, in going public, both Blackstone and KKR, the pioneers of private equity, acknowledged the comparative advantage of the public company form in raising long-term committed capital that permits long-term investments. As Blackstone stated in its S-1:

> We have decided to become a public company:
> - to access new sources of permanent capital that we can use to invest in our existing businesses, to expand into complementary new businesses and to further strengthen our development as an enduring institution;
> - to enhance our firm's valuable brand;
> - to provide us with a publicly-traded equity currency and to enhance our flexibility in pursuing future strategic acquisitions;
> - to expand the range of financial and retention incentives that we can provide to our existing and future employees through the issuance of equity-related securities representing an interest in the value and performance of our firm as a whole; and
> - to permit the realization over time of the value of our equity held by our existing owners.[19]

Similarly, KKR described the advantage of listing on the NYSE as providing "a significant source of permanent capital to further grow our business and an equity currency that we may use to attract, retain and incentivize our employees and to fund opportunistic acquisitions."[20]

But the relationship with shareholders is a long-term relationship. In addition to providing money, shareholders create the secondary market for shares. A well-functioning market for shares allows existing shareholders to exit at a price that is a reasonable estimate of

---

19 Blackstone Grp. L.P., Securities Registration Statement (Form S-1), at 7 (Mar. 22, 2007).

20 KKR & Co. L.P., Securities Registration Statement (Form S-1), at 1 (Sept. 16, 2010).

the value of the investment in the firm and likewise allows new shareholders to enter at a reasonable price. Moreover, a secondary trading market with reasonably accurate prices means that shares can be used to make acquisitions without dilution of the buying firm's shareholders (in the case of undervalued shares) or dilution of the selling firm's shareholders (in the case of overvalued shares).[21] Similarly, a reasonably accurate stock price makes stock- or option-based compensation a more useful tool for aligning manager and shareholder interests. Therefore, one definition of a "good shareholder base" is a shareholder base that produces a stock price that reasonably approximates firm value. In this context, a good shareholder is one who evaluates firms according to long-term fundamental value rather than short-run earnings.[22]

Beyond these two fairly uncontroversial propositions, one may also understand a good shareholder to be one who increases firm value. Here, controversy abounds over who counts as a good shareholder. One person's "active monitor" is another person's "intrusive busybody" or "speculator." A shareholder who is good from a shareholder's perspective may be bad from a manager's perspective. In what follows, I largely bracket the question of what sorts of shareholder activities increase or decrease firm value and focus instead on mechanisms for shaping the shareholder base. But, before doing so, it is worth considering some of the ways in which shareholders can potentially add value.

Shareholders may bring specific skills or expertise to a firm. For example, they may bring "monitoring" expertise.[23] These skills can vary and may be more valuable to some firms than to others. When Warren Buffett invested in Goldman Sachs during the darkest days of the financial crisis, it was viewed as a huge vote of confidence in Goldman Sachs' soundness.[24]

Using Hirschman's typology, monitoring expertise can impact governance through the exercise of "voice" or "exit."[25] Voice, in this

---

21 *See* Merritt B. Fox, Randall Morck, Bernard Yeung & Antyom Durnev, *Law, Share Price Accuracy, and Economic Performance: The New Evidence*, 102 MICH. L. REV. 331, 333–57 (2003).

22 *See* Alex Edmans, *Blockholder Trading, Market Efficiency, and Managerial Myopia*, 64 J. FIN. 2481, 2482, 2486–87 (2009).

23 *Id.* at 2482.

24 Ben White, *Buffett Deal at Goldman Seen as a Sign of Confidence*, N.Y. TIMES, Sept. 24, 2008, at A1, *available at* http://www.nytimes.com/2008/09/24/business/24goldman.html.

25 *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 1–54 (1970) (detailing the role of shareholder voice); Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L.J. 445, 451–63 (1991) (crediting Hirschman for the "the fundamental insights into the shifting dynamics of institutional structure and the vocabulary for thinking about institutions").

context, includes all the modes of shareholder activism from informal discussions with management to full-fledged proxy fights. Exit and the threat of exit impact governance largely through the effect (or threatened effect) on stock price. In some models, one may understand a good shareholder as one who, through self-interested decisions to sell or not sell, renders the firm's strategies and disclosures more credible and incentivizes managers to increase firm value.[26] But the goodness of shareholders can also be more diffuse and aggregative; one may view the stock price, which emerges from the interaction of buying and selling shareholders, as a running commentary on managerial performance. For both voice and exit, the size of a shareholder's block may be critical in providing incentives to invest in monitoring and in limiting a shareholder's ability to exit.[27]

Shareholder monitoring—and thus shareholders with particular monitoring skills—may be more or less valuable depending on the volatility of the returns, the nature of the assets, the presence of other constituencies (e.g., institutional lenders or government regulators) who provide some monitoring, and a host of other factors.[28] In addition, shareholders may increase firm value through their ability to help the firm with management or marketing, either through experience with similar companies or through industry contacts.[29] In yet another variant, shareholders—or shareholdings—may be "hostages" that support bilateral exchange.[30] For example, in a joint venture, cross-shareholdings may be part of the glue that holds the relationship together and facilitates investment in relationship-specific assets.[31]

As I discuss below, the contestability of control that accompanies going public creates obvious dangers of its own. Outside parties may threaten disruption as a way of extracting payments. If the market price undervalues the firm, buyers may try to buy the firm on the cheap. Shareholders with conflicting interests may support plans that benefit other firms. A good shareholder is one who will protect a corporation from these dangers.

---

26 *See* Anat R. Admati & Paul Pfleiderer, *The "Wall Street Walk" and Shareholder Activism: Exit as a Form of Voice*, 22 REV. FIN. STUD. 2645, 2646, 2649 (2009); Edmans, *supra* note 22, at 248; Alex Edmans & Gustavo Manso, *Governance Through Trading and Intervention: A Theory of Multiple Blockholders*, 24 REV. FIN. STUD. 2395, 2396 (2011). *See generally* Sreedhar T. Bharath, Sudarshan Jayaraman & Venky Nagar, Exit as Governance: An Empirical Analysis 7–27 (July 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1572940 (demonstrating a robust relation between exogenous increase or decrease in liquidity, block ownership, and managerial sensitivity to stock price and firm value).

27 *See* Edmans & Manso, *supra* note 26, at 2398–99, 2404.

28 Edward M. Iacobucci & George G. Triantis, *Economic and Legal Boundaries of Firms*, 93 VA. L. REV. 515, 552–57 (2007).

29 *Cf. id.* at 551–52 (noting that shareholders may have incentives to monitor management).

30 OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE 121 (1996).

31 *See id.* at 124–37.

B. What is a Bad Shareholder?

Bad shareholders are the inverse of good shareholders. An example of this type of shareholder is one who, through their manic-depressive personalities or attitudes or by intentional actions, causes the stock price to depart from a reasonable estimate of long-term fundamental value. This can hurt the firm by increasing its cost of capital or by interfering with the positive contribution that can be made by a steady, accurate stock price.[32]

A different type of bad shareholder is one who seeks to gain at the expense of other shareholders by extracting non–pro rata payments (e.g., targeted share repurchases or "greenmail") or by benefiting a different firm. Another variety of bad shareholder is one who pursues short-term gain at the expense of long-term value. This could mean triggering a change of control at an inopportune time or pressuring a firm to pay dividends beyond the free cash flow. Additionally, a bad shareholder can be one who brings bad publicity on the firm for personal gain (e.g., a shareholder who is net short and seeks gain by convincing the market that the stock price is overvalued, when it is not).[33] Finally, a bad shareholder may be an excessively litigious shareholder who, to collect fees, brings litigation that injures the shareholders as a group.[34]

The line between a good and a bad shareholder may be a fine one, as it depends on the interpretation of the shareholder's conduct. In addition, different firms are likely to need different sorts of shareholders, and a shareholder who injures one type of firm may aid another, and vice versa.

It is beyond the scope of this Article to take a position on what proportion of shareholders are good or bad, or on whether any particular shareholder or shareholder action hurts or helps any particular firm. Because my focus is primarily on the mechanisms of shareholder eugenics, I assume that shareholders of both types exist, but I remain agnostic on their identities and the proportions of the two types. Moreover, one cannot assume that the shareholder type is an inherent or intrinsic characteristic. Indeed, in general, shareholder type is likely to be significantly a function of incentives. This malleability is what makes shareholder eugenics possible.

---

32 *See, e.g.*, Letter from Warren E. Buffett, *supra* note 1.

33 For example, Overstock.com claims to have been the victim of such a "bear raid." *See* Press Release, Overstock.com, Rocker Pays $5 Million to Overstock.com to Settle Lawsuit (Dec. 8, 2009), *available at* http://investors.overstock.com/phoenix.zhtml?c=131091&p=irol-newsArticle_pf&ID=1363917&highlight=.

34 *See generally* Bratton & Wachter, *supra* note 18, at 655–726 (discussing problems with shareholder control).

C. The Potential Benefits of an Optimal Shareholder Base: A Simple Illustration

Suppose that a firm has a choice between two investments. Project A has an expected value of ten and is easy to understand and communicate to the market. Project B has an expected value of fifteen but is complex and hard to explain, and thus the value is unlikely to be reflected in stock price until the project has come to fruition. Suppose further that shareholders come in two types: impatient and patient. Finally, suppose that shareholders collectively have enough power, one way or another, to influence the managers' choice of projects.[35]

If firms cannot effectively shape their shareholder base and end up with impatient shareholders, managers are likely to "manage to the market"[36] and choose project A: responsive to their impatient shareholders, they choose the lower value project that will be reflected in the stock price and leave the extra five on the table because of the unbridgeable asymmetry of information. On the other hand, if firms can craft a shareholder base of patient shareholders, who are willing to trust managers and wait for hard-to-value projects to come to fruition, then managers will be free to choose project B with its higher returns.[37] Indeed, even if shaping the shareholder base is costly, it would make sense to spend up to five in doing so to capture the higher returns from project B.[38]

D. The Dangers of Picking Your Shareholders

The ability to choose shareholders can be abused. Indeed, nearly every structure and strategy of shareholder eugenics discussed below can benefit managers or controlling shareholders at the expense of noncontrolling shareholders. As I will show, the law makes many of these strategies possible. It also addresses, albeit incompletely and imperfectly, the dark side of shareholder eugenics.

The problem, of course, is that certain sorts of shareholders may be good for managers or controlling shareholders but bad for share-

---

35 This is a variation of a hypothetical by William Bratton and Michael Wachter. *See id.* at 700–03.

36 *Id.* at 690.

37 For some evidence of a link between stock liquidity (and thus the proportion of short versus long-term shareholders) and investment choice, see Vivian W. Fang, Xuan Tian & Sheri Tice, Does Stock Liquidity Enhance or Impede Firm Innovation? 3, 11–14 (Jan. 23, 2011) (unpublished manuscript), *available at* http://ssrn.com/abstract=1746399.

38 As this example shows, the link between shareholder base and firm value is entirely consistent with common views of the informational efficiency of markets. *See, e.g.*, Edmans, *supra* note 22, at 2504–05 (arguing that shareholders who hold small blocks of shares can have a significant impact on the firm's value by "gathering and trading on intangible information").

holders overall, or vice versa. To the extent managers or controlling shareholders have discretion to shape the shareholder base to increase firm value, they can use that discretion to benefit managers or controlling shareholders at the expense of firm value.

The dark side of manager and controlling-shareholder discretion is a pervasive issue in corporate law. Indeed, many features of corporate law—from independent directors and shareholder voting to management compensation and shareholder litigation—are at least partially responses to these agency problems. I will not rehash these general arguments. Rather, with regard to each of the structures or strategies of shareholder eugenics discussed below, I will identify the distinctive agency costs that can emerge and any specific legal responses.

II
Tools for Crafting the Shareholder Base: "Direct" or "Recruitment" Strategies

As noted earlier, there are numerous means for recruiting shareholders of a desired type, at least in part. In this Part, I examine some of them.

A. Going Public

In the first instance, going public itself is a fundamental choice about shareholder base. In going public, the company is embarking on a process in which the existing shareholders (employees, venture capitalists, private equity investors, or other private investors) are replaced with shareholders of a very different sort. Institutions like mutual funds, pension funds, insurance companies, and charitable endowments rarely invest directly in privately held companies but do in public companies. Similarly, most individual investors do not and cannot invest in private companies but often are quite keen to invest in newly public companies.

As a result, the initial public offering (IPO) will often mark the beginning of the end of the relationship with sophisticated investors who played a prominent role in the company during its period as a private company. When a venture capital-financed start-up company goes public, the venture capital funds are often expected to exit in a secondary offering shortly thereafter.[39] Likewise, when a company taken private by a private equity fund reemerges as a public company, the private equity fund will begin to cash out its position either in the IPO itself or shortly thereafter in a secondary offering. In each case,

---

[39] Bernard S. Black & Ronald J. Gilson, *Venture Capital and the Structure of Capital Markets: Banks Versus Stock Markets*, 47 J. Fin. Econ. 243, 257–58 (1998).

the investor's comparative advantage is in developing or restructuring companies while private. Once the company goes public, these specialized investors desire to redeploy their capital to other engagements where their ability to profit is greater.[40]

Further, once a firm goes public, its relationship with its shareholders is transformed. While a private firm is free to share information with shareholders without revealing it to the world (and competitors), doing so is much harder for public companies. Moreover, a private company can be selective in revealing information to shareholders to a much greater degree than a public company can. Regulation Fair Disclosure (FD) limits (although does not eliminate) a public firm's ability to make such selective disclosures.[41]

1. *Underwriter Share Placement in IPOs and Secondary Offerings*

The process of going public provides an opportunity for choosing a shareholder base. Whether in a firm-commitment or best-efforts underwriting, the underwriter's key role is to place the shares of the issuer with investors. Underwriters play this role both in IPOs as well as in subsequent offerings. The IPO is of particular interest because it is when the issuer is first introduced to the capital markets, its shareholder base is first created, and the share price in the secondary market creates the baseline for subsequent offerings.[42]

The IPO process and the persistent phenomenon of "underpricing" have attracted much theoretical and empirical interest.[43] One of the key stylized facts that has emerged from the literature is that underwriters typically do not sell the shares by open auction but rather allocate them. In particular, it is generally believed that underwriters seek to place the shares with "long-term investors" who have a track record with the underwriter.[44] When Goldman Sachs went public, for example, it placed shares "with a group of institutional investors and rich individuals who Goldman believed would remain loyal, long-term holders and not 'flip' the stock after its opening."[45] This general view

---

40 *Id.* at 252–58.

41 *See* 17 C.F.R. §§ 243.100–03 (2011).

42 *See* Fox et al., *supra* note 21, at 345.

43 For a brief review, see Lawrence M. Benveniste & Paul A. Spindt, *How Investment Bankers Determine the Offer Price and Allocation of New Issues*, 24 J. FIN. ECON. 343, 344–46 (1989); Tim Jenkinson & Howard Jones, *IPO Pricing and Allocation: A Survey of the Views of Institutional Investors*, 22 REV. FIN. STUD. 1477, 1478–79 (2009).

44 *See* Tim Jenkinson & Howard Jones, *Bids and Allocations in European IPO Bookbuilding*, 59 J. FIN. 2309, 2328–31 (2004).

45 Charles Gasparino, *Goldman IPO Lives up to Expectations, Posts 33% Gain in First Trading Day*, WALL ST. J., May 5, 1999, at C19.

is supported by survey evidence[46] as well as an examination of underwriters' books.[47]

Share placement provides one of many explanations for IPO underpricing.[48] From the investors' perspective, a commitment to hold for the long term creates a risk for which they need to be compensated. From the issuers' and underwriters' perspectives, underpricing both compensates the investors for this increased risk and bonds the investors' commitments to hold for the long term.[49]

The terms of investors' implicit commitment to hold remain somewhat unclear. On the one hand, it is a commitment not to sell (much) in the early days following the IPO. Overall, investors only sell around 15% of their allotment during the first days after an IPO.[50] The reselling of these shares, combined with short selling and market-making activity, results in a relatively high trading volume.[51] Interestingly, flipping is less common in "cold" than "hot" IPOs: in cold IPOs, institutional investors sell on average about 20% of their allocations, while in hot IPOs they sell close to 47% of their allocation.[52] Under the typical underwriting agreement, when investors flip shares the managing underwriter can reclaim fees earned by broker-dealers through the imposition of a "penalty bid."[53] The Depository Trust Company's IPO Tracking System allows underwriters to monitor flip-

---

46 *See* Jenkinson & Jones, *supra* note 43, at 1495–96, 1496 fig.4.

47 *See* Jenkinson & Jones, *supra* note 44. High quality investors are defined as "investors who are likely to be long-term holders of the [s]hares." *Id.* at 2316 (quoting the definition of investor quality from the "Rules of Engagement" given to members of underwriting syndicates).

48 A partially competing, partially complementary theory is bookbuilding—a mechanism by which informed investors reveal their valuation through a price limit on their order and are compensated through underpricing. *See* Lawrence M. Benveniste & William J. Wilhelm, *A Comparative Analysis of IPO Proceeds Under Alternative Regulatory Environments*, 28 J. FIN. ECON. 173, 193–95 (1990); Francesca Cornelli & David Goldreich, *Bookbuilding and Strategic Allocation*, 56 J. FIN. 2337, 2337 (2001); Francesca Cornelli & David Goldreich, *Bookbuilding: How Informative Is the Order Book?*, 58 J. FIN. 1415, 1415–17 (2003); Alexander P. Ljungqvist & William J. Wilhelm, Jr., *IPO Allocations: Discriminatory or Discretionary?*, 65 J. FIN. ECON. 167, 169 (2002); Ann E. Sherman & Sheridan Titman, *Building the IPO Order Book: Underpricing and Participation Limits with Costly Information*, 65 J. FIN. ECON. 3, 3–6 (2002). If this is the dominant effect, then bookbuilding is not so much about crafting a reliable shareholder base but simply part of the underwriting process itself. *See* Cornelli & Goldreich, *Bookbuilding and Strategic Allocation*, *supra*, at 2337–39.

49 *See* Jenkinson & Jones, *supra* note 44, at 2332–34.

50 *See* Reena Aggarwal, *Allocation of Initial Public Offerings and Flipping Activity*, 68 J. FIN. ECON. 111, 118 (2003).

51 *See id.* at 132–33.

52 *Id.* at 113.

53 *See* Trading Practices Rules Concerning Securities Offerings, 61 Fed. Reg. 17,108, 17,124–25 (Apr. 18, 1996); Review of Antimanipulation Regulation of Securities Offerings, 59 Fed. Reg. 21,681, 21,689–90 (Apr. 26, 1994).

ping, either for the purpose of imposing penalty bids or for future allocation.[54]

Given these data, one can view the commitment not to flip during the stabilization period as fundamentally a commitment by buyers not to undermine the public offering to the detriment of the underwriter. In the case of cold IPOs, the underwriter will end up buying back the flipped shares, so flipping is particularly problematic.[55] In hot IPOs, flipping is less of a problem. First, because of the excess demand for the shares, flipping does not impose any costs on the underwriters. Second, investors who sell their allotment may not be acting opportunistically. In a hot IPO, the allotments to specific investors may be smaller than requested and also smaller than an investor's minimum block size. Under these circumstances, it is understandable that an investor would decide to sell the allotment rather than buy additional shares at the overheated market price.[56] Indeed, underwriters may even be pleased to see flipping in hot IPOs because it generates volume and commissions.[57]

Yet the expectation and the commitment seem to extend beyond the first few days. In placing shares, the anecdotal evidence described earlier suggests that issuers and underwriters are, in fact, seeking long-term shareholders, not simply trying to avoid flippers.[58] Although Aggarwal's data show a low level of flipping after IPOs by both institutions and individuals, the data do not extend far enough to allow the calculation of average holding periods.

Viewed in this way, the allocation of shares in an underwriting provides an example of directly building a shareholder base, an effort that is costly but that presumably provides benefits in return. The key benefit provided by selling to long-term shareholders seems to be stability in the secondary trading market for shares: stable shareholders limit the number of shares traded. From this perspective, a good shareholder is one who will hold the allotted shares for the long term and thereby provide stability in the development of a secondary trading market.[59]

Directly limiting the transfer of shares would not achieve the same stability in the secondary trading market for at least two reasons. First, it would undermine the emergence of a genuine secondary market. Second, it would muddy the desired signal: shareholders who are

---

54 *See* Aggarwal, *supra* note 50, at 116 (citing Order Approving a Proposed Rule Change Implementing the Initial Public Offering Tracking System, Exchange Act Release No. 34-37208, 61 SEC Docket 2365 (May 13, 1996)).

55 *See id.* at 115.

56 *See id.* at 115, 127.

57 *See id.*

58 *See* Jenkinson & Jones, *supra* note 43, at 1496 fig.4.

59 *See* Jenkinson & Jones, *supra* note 44, at 2310.

legally prohibited from selling will not convey confidence in the current price.[60] Instead, underwriters rely on softer, blurrier restraints underpinned by repeat interactions and motivated by investors' desire to be offered underpriced shares.

2. *Controlling the Dark Side of Going Public*

The general risks of going public are twofold. First, when a company goes public, shareholders who have an incentive and the ability to monitor (such as the original venture capitalists) are replaced with dispersed shareholders without the incentives or skills to do so. This can lead to an increase in managerial slack. Second, corporations sometimes go public and then fail to grow to efficient scale. When this happens, they end up as "zombie" companies: ignored by analysts and investors, bereft of many of the key levers of corporate governance. Such companies are often poorly governed. Because these risks are well known and because, on the whole, the cost is borne by the selling shareholders, the law does not worry much about them.

The collapse of the dot-com bubble revealed some lesser-known practices, including "spinning" and "laddering."[61] In spinning, the underwriter offers shares of a hot IPO to top executives of clients or potential clients, with the hope or expectation of future business.[62] This sort of share allocation hurts the issuer in two ways: first, by allocating shares to buyers likely to flip instead of to long-term investors; and second, by depriving the issuer of the quid pro quo for the underpricing. It also hurts the firm for which the buyers work, because it diverts an investment opportunity that the buyer's employer could have exploited and introduces a distortion into the choice of investment banker. Spinning can be attacked under state law as a diversion of corporate opportunity as well as under various agency theories (and against the banker as aiding and abetting a breach of fiduciary duty).[63] In some instances, favored clients were expected to return some of their profits to the underwriter—a practice that, if undisclosed, violates federal securities law.[64]

---

60 Although, one can also imagine an offsetting effect where shareholders willing to accept selling restrictions would manifest an extra level of confidence in the current price that might more than compensate for any decrease in confidence.

61 *See* Christine Hurt, *Moral Hazard and the Initial Public Offering*, 26 CARDOZO L. REV. 711, 738–44, 751–54 (2005) (surveying the problematic practices of spinning and laddering).

62 *Id.* at 738.

63 *See, e.g.*, *In re* eBay, Inc. S'holders Litig., No. C.A. 19988-NC, 2004 WL 253521, at *5 (Del. Ch. Feb. 11, 2004); Sean J. Griffith, *Spinning and Underpricing: A Legal and Economic Analysis of the Preferential Allocation of Shares in Initial Public Offerings*, 69 BROOK. L. REV. 583, 632–43 (2004).

64 *See* 15 U.S.C. § 78(q)(a)(1) (2006); SEC v. Credit Suisse First Bos. Corp., No. 1:02–00090–RWR, 2002 WL 479836, at *1–4 (D.D.C. Jan. 29, 2002); 17 C.F.R. § 240.17a–3

The related practice of laddering (also known as a "tie-in") is even more obviously illegal: in laddering, the recipient of an allocation in a hot IPO agrees, explicitly or implicitly, to buy additional shares in the secondary market, as a way of increasing volume and pushing up the price.[65] As the SEC has reminded market participants, such agreements violate Regulation M (which governs IPO stabilization activities) and may well violate antifraud and antimanipulation provisions.[66]

Although this sort of "funny business" interferes with creating the desired shareholder base in an IPO, and while it may have been fairly widespread during the dot-com boom, even then the magnitude seems not to have been large. Aggarwal's data, which come from the early stages of the dot-com boom (May 1997 to June 1998), show a system of share allocation that largely creates the sort of shareholder base that issuers seek: mostly institutional with a degree of individual participation.[67] While the system is subject to abuse, especially during frothy periods,[68] the existing legal framework is well adapted to control those abuses. More importantly for our purposes, the framework does not interfere with targeting IPO allocations to desirable shareholders.[69]

B. "Relational" Investing

Another version of direct recruitment is the private placement of shares with an investor thought to be of a good type. Goldman Sachs' sale of $5 billion in preferred stock to Warren Buffett is a classic example.[70] In the late 1980s and 1990s, commentators referred to this sort of share placement as "relational investing," and it had a period of

(2011); Complaint at 1, SEC v. Credit Suisse First Bos. Corp., No. 1:02–00090–RWR, 2002 WL 479836 (D.D.C. Jan. 29, 2002), 2002 WL 32151973; *FINRA Rule 2110. Standards of Commercial Honor and Principles of Trade*, FIN. INDUS. REG. AUTH., http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=5504 (last visited Mar. 10, 2012); *FINRA Rule 3110. Books and Records*, FIN. INDUS. REG. AUTH., http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3734 (last visited Mar. 10, 2012).

65 *See* Stephen J. Choi & A.C. Pritchard, *Should Issuers Be on the Hook for Laddering? An Empirical Analysis of the IPO Market Manipulation Litigation*, 73 U. CIN. L. REV. 179, 179 (2004).

66 SEC Staff Legal Bulletin No. 10 (Aug. 25, 2000), http://www.sec.gov/interps/legal/slbmr10.htm ("reminding" underwriters and broker-dealers that tie-in agreements violate Rules 101 and 102 of Regulation M and "may violate other anti-fraud and anti-manipulation provisions of the federal securities laws").

67 *See* Aggarwal, *supra* note 50, at 116–17, 117 tbl.1.

68 *See* Hurt, *supra* note 61, at 773 n.350, 788, 790.

69 However, some of the more radical proposals in response to these abuses could interfere with targeting IPO allocations to desirable shareholders. *See id.* at 778, 787–90.

70 *See* White, *supra* note 24.

popularity.[71] More recently, when practiced by private equity funds, it is called "PIPE" investing (Private Investment in Public Equity).[72]

Warren Buffett has acted as a relational investor for decades. He has a long track record of being supportive of management (which management views as a good characteristic) while also being a savvy judge of companies. He also acts quickly. His attributes made him the perfect (and maybe the only) relational investor for Goldman Sachs during the panic in the Fall of 2008. Goldman's challenge was to convince the markets that it had adequate funding sources even during the credit crunch and would thus not go broke. Buffett's investment provided credible reassurance: markets viewed him as a smart investor who would not invest without confidence that Goldman was sound; if he was wrong, he would lose his investment.[73]

Because Buffett's reputation is valuable to him both personally and in being offered opportunities to buy businesses for Berkshire Hathaway, Goldman could count on him to uphold his side of the bargain. In addition, he has a long track record of doing so.

But Buffett's services do not come cheaply. Berkshire Hathaway invested $5 billion in exchange for perpetual preferred stock with a 10% annual dividend and warrants.[74] It has proved to be an extremely profitable investment.[75]

As was clear in the earlier period of relational investing, the challenges include identifying a good type, ensuring that the good type stays good, and negotiating the price for being good.[76] As the Buffett example shows, a good relational investor can provide substantial value to the firm. Because Goldman's interest was in securing Buffett's support at the lowest price it could pay, while Buffett sought a profitable investment, the arm's-length bargaining protected shareholder interests. Buffett's reputation and his limited ability to exercise any control bonded his commitment.

---

71 *See* Edward B. Rock, *Controlling the Dark Side of Relational Investing*, 15 CARDOZO L. REV. 987, 1000–06 (1994).

72 *See* William K. Sjostrom, Jr., *PIPEs*, 2 ENTREPRENEURIAL BUS. L.J. 381, 381–85 (2007).

73 *See* White, *supra* note 24.

74 *See* The Goldman Sachs Grp., Inc., Current Report (Form 8-K), at 3 (Sept. 23, 2008) [hereinafter Godman Sachs' Form 8-K].

75 To escape from paying the 10% annual dividend, Goldman recently redeemed the preferred stock at the stated redemption price ($5.5 billion) plus a one-time preferred dividend of $1.64 billion. *See* Press Release, Goldman Sachs, Goldman Sachs to Redeem Preferred Stock Issued to Berkshire Hathaway (Mar. 18, 2011), *available at* http://www.goldmansachs.com/media-relations/press-releases/current/redeem-stock.html. Berkshire continues to hold the five-year warrant to purchase 43,478,260 shares of Goldman common stock at $115 per share. Goldman Sachs' Form 8-K, *supra* note 74. As of March 2012, Goldman was trading for $122.93 per share. *Goldman Sachs Group Inc.*, NYSE EURONEXT (Mar. 17, 2012, 4:33 PM), http://www.nyse.com/about/listed/lcddata.html?ticker=GS.

76 *See* Rock, *supra* note 71, at 1024.

But relational investing can also go wrong. Sometimes it fails because the contract negotiated by the firm and the investor creates a misalignment of incentives. Thus, in the toxic convertible PIPEs cases, the conversion option gave investors an incentive to act in ways that hurt the company.[77]

Sometimes relational investing can serve the interests of the managers (e.g., by providing "takeover protection") without serving the interests of the shareholders. In an earlier period of relational investing, examples of this sort of takeover protection emerged.[78] As I have discussed elsewhere, in this sort of relational investment, arm's-length negotiations—the typical hallmark of a fair transaction—will not suffice to protect the shareholders.[79] As in any protection racket, while arm's-length negotiations will occur—the buyer of protection (the managers) will seek the lowest price for the most protection from the seller (the relational investor), who has opposite goals—those negotiations will not assure that the agreement reached benefits the shareholders.[80] In sum, there are minimal specific legal protections against corrupt relational investing, with most of the work of limiting such activities achieved by general techniques such as contractual provisions that align the interests of managers and shareholders.[81]

C. Sale of Control Blocks

Yet another "recruitment" device is the identification and recruitment of a new control shareholder. The personality and characteristics of a controlling shareholder can be important to the success of a firm. A controlling shareholder who seeks to manage the company well has the advantage of large financial incentives to succeed and the ability to implement plans. This can be of great benefit to noncontrolling shareholders. On the other hand, control shareholders who focus on extracting non–pro rata distributions at the expense of noncontrolling shareholders can cause a great deal of harm, both to the noncontrolling shareholders and to the firm itself. The personality of the control shareholder, in turn, will affect what sorts of investors are willing to invest in noncontrolling shares of the company.

The transfer of a control block can thus be of great importance in the creation or preservation of a "shareholder base." In particular, the transfer from a bad controlling shareholder to a good controlling

---

77 *See* Deepa Nayini, Comment, *The Toxic Convertible: Establishing Manipulation in the Wake of Short Sales*, 54 Emory L.J. 721, 747 (2005).

78 *See* Rock, *supra* note 71, at 990.

79 *Id.* at 1011–12.

80 *See id.*

81 *See* Marcel Kahan & Edward B. Rock, *How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law*, 69 U. Chi. L. Rev. 871, 896 (2002).

shareholder can be very valuable to the firm, while the reverse can injure it.

What does Delaware law do to facilitate such transfers? Delaware law makes clear that, within limits, a controlling shareholder may sell its control block for a premium.[82] The limits are not entirely clear, however. Under Delaware law:

> [W]hen the circumstances would alert a reasonably prudent person to a risk that his buyer is dishonest or in some material respect not truthful, a duty devolves upon the seller to make such inquiry as a reasonably prudent person would make, and generally to exercise care so that others who will be affected by his actions should not be injured by wrongful conduct.[83]

Less certain is how far the controlling shareholder's right to sell control extends beyond the naked sale of the stock. In *In re Digex, Inc. Shareholders Litigation*, the court held that when the controlling shareholder leaned on the board of directors of the controlled corporation to waive the antitakeover protections of section 203 of Delaware's General Corporate Law, the board's decision would have to meet the standards of "entire fairness."[84] Delaware case law is undecided, however, about whether a controlling shareholder who uses its control to induce the company to cooperate in due diligence efforts must meet the standards of entire fairness.[85]

Whatever the outer limits of a controller's right to sell, Delaware leaves a large amount of flexibility in the substitution of one controller for another. This presents an interesting puzzle: although Delaware is relatively permissive of the sale of control blocks (in comparison to other countries),[86] sales of control are rare. The best explanation is that, for a variety of reasons (e.g., Delaware's limits on

---

82 Abraham v. Emerson Radio Corp., 901 A.2d 751, 758 (Del. Ch. 2006); Harris v. Carter, 582 A.2d 222, 234 (Del. Ch. 1990); *In re* Sea-Land Corp. S'holders Litig., Civ. A. No. 8453, 1987 WL 11283, at *5 (Del. Ch. May 22, 1987); Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785, 794 (2003).

83 *Harris*, 582 A.2d at 235. A minority view holds that the seller must have actual notice. *See, e.g.*, Gerdes v. Reynolds, 28 N.Y.S.2d 622, 647 (Sup. Ct. 1941).

84 789 A.2d 1176, 1207–09 (Del. Ch. 2000).

85 In *Harris v. Carter*, Chancellor Allen noted the Delaware principle that "when a shareholder presumes to exercise control over a corporation, to direct its actions, that shareholder assumes a fiduciary duty of the same kind as that owed by a director to the corporation." *Harris*, 582 A.2d at 234. This principle could ground a duty to use such control for the benefit of all the shareholders and not just the controlling shareholder. Gilson and Gordon, recognizing that a doctrinal foundation for such a claim exists under both Delaware law and the American Law Institute's Principles of Corporate Governance, argue that such actions by the controlling shareholder should not limit the controlling shareholder's ability to sell its shares for a premium. *See* Gilson & Gordon, *supra* note 82, at 810–14.

86 REINIER KRAAKMAN, JOHN ARMOUR, PAUL DAVIES, LUCA ENRIQUES, HENRY HANSMANN, GERARD HERTIG, KLAUS HOPT, HIDEKI KANDA & EDWARD ROCK, THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 256–63 (2d ed. 2009).

related party transactions, cultural factors, etc.), private benefits of control are low in the United States. With few opportunities for improper gain, purchasers seem generally to prefer to buy 100% of the company to capture 100% of the gains of improved performance.[87]

D. Traditional Investor Relations

1. *What is Investor Relations?*

Investor relations (IR) is now an established part of the corporate landscape, although not part of what we generally think of as "corporate governance." Its history is fairly recent. Although the first company to have an IR department was GE, which has had one since 1953,[88] the field exploded during the 1990s. A professional organization, the National Investor Relations Institute (NIRI), was established in 1969, and now has "more than 3,500 members represent[ing] 2,000 publicly held companies."[89] It was not until 1994 that a majority of Fortune 500 companies had an official IR function.[90] By the late 1990s, IR had become standard at large companies and was increasingly recognized in smaller companies. The growth of IR thus tracks the emergence of institutional investors as an important force in corporate governance.[91]

Although originally regarded as part of the public relations function, with most IR managers drawn from that field, by the late 1990s the profile began to change. More and more IR managers began their careers as analysts or investment bankers.[92] At the same time, because the IR group must be well informed to communicate effectively with shareholders, it has become more common for the chief IR officer to be "involved in the top management strategy, planning and operational meetings."[93] Moreover, as the "voice of the market," the chief IR officer commonly meets with the board to explain the "market's" view of the company.[94]

---

87 *See generally* Alexander Dyck & Luigi Zingales, *Private Benefits of Control: An International Comparison*, 59 J. FIN. 537, 538, 554–56 tbl.III, 574–84 (2004) (documenting cross-country differences in private benefits); Tatiana Nenova, *The Value of Corporate Voting Rights and Control: A Cross-Country Analysis*, 68 J. FIN. ECON. 325, 341–48 (2003) (same).

88 William F. Mahoney, *The Evolution of IR Practice: IR Professionals Take Changing Role in Stride*, 3 INVESTOR REL. Q. 4, 5 (2000).

89 *About Us*, NAT'L INVESTOR REL. INST., http://www.niri.org/FunctionalMenu/About.aspx (last visited Mar. 10, 2012).

90 *See* Hayagreeva Rao & Kumar Sivakumar, *Institutional Sources of Boundary-Spanning Structures: The Establishment of Investor Relations Departments in the* Fortune *500 Industrials*, 10 ORG. SCI. 27, 28 (1999).

91 Kahan & Rock, *supra* note 15, at 995–98.

92 *See* GREGORY S. MILLER, DANIELA BEYERSDORFER & ANDERS SJÖMAN, IR AT BP: INVESTOR RELATIONS AND INFORMATION RECONNAISSANCE 3 (2006).

93 *Id.*

94 *See id.*

IR is about managing a firm's relationships with its shareholders. As described by NIRI, "[i]nvestor relations is a strategic management responsibility that integrates finance, communication, marketing and securities law compliance to enable the most effective two-way communication between a company, the financial community, and other constituencies, which ultimately contributes to a company's securities achieving fair valuation."[95] This vision of IR contrasts with using public relations to keep the stock price high, a form of IR that NIRI and leading IR practitioners condemn.[96]

Although IR can be viewed as a communications function, it also involves shareholder recruitment, stability, and conditioning. Accordingly, I will divide my discussion of IR somewhat artificially between recruitment of shareholders, discussed here, and the "shaping" of shareholders, discussed below.

IR is first and foremost a communications function: to provide information to analysts and investors so as to attract them to the firm. For public companies at risk of being ignored, this provides tremendous value. By reducing the asymmetry of information, IR can increase liquidity and, in turn, increase share prices.[97] For public companies without a wide following, the IR strategy typically starts with encouraging current shareholders to be more active and building a retail following.[98] In implementing these strategies, IR professionals typically use direct mail, press releases, and other attempts to get press coverage.[99] With greater visibility usually comes greater interest by analysts and, if successful, greater interest by institutional investors.[100]

For companies that already have liquidity and visibility, IR efforts are somewhat different. As with small companies, communication is the core of the function. But with analysts already following the company, the role shifts to interacting with analysts—providing them with the information they need and making sure they understand the information they have.[101] Here, again, IR professionals talk about telling a clear and consistent story about the company.[102]

---

95 *About Us*, *supra* note 89.

96 *See* MILLER ET AL., *supra* note 92, at 2; Brian J. Bushee & Gregory S. Miller, Investor Relations, Firm Visibility, and Investor Following 1, 9 (Jan. 2005) (unpublished manuscript), *available at* http://ssrn.com/abstract=643223 ("Many IR professionals noted that they will not accept clients whose management is only looking for a short-term boost in stock price without the intention of developing a longer-term IR strategy.").

97 *See* Amihud & Mendelson, *supra* note 4, at 246; Yakov Amihud, Haim Mendelson & Beni Lauterbach, *Market Microstructure and Securities Values: Evidence from the Tel Aviv Stock Exchange*, 45 J. FIN. ECON. 365, 371 (1997); Michael J. Brennan & Claudia Tamarowski, *Investor Relations, Liquidity, and Stock Prices*, J. APPLIED CORP. FIN., Winter 2000, at 26, 31–32.

98 *See* Bushee & Miller, *supra* note 96, at 11–12.

99 *See id.*

100 *See id.*

101 *See* Brennan & Tamarowski, *supra* note 97, at 27.

102 *See* Bushee & Miller, *supra* note 96, at 10.

Berkshire Hathaway, as in many other areas, provides a distinctive alternative to conventional wisdom. Warren Buffet's annual shareholder letters provide a straightforward and consistent description of his investment approach and of Berkshire Hathaway's results. Equally important are the communications Berkshire Hathaway does *not* provide: no quarterly or annual guidance on revenues, earnings, or other financing information; no conference calls, analyst meetings, or investor conferences.[103]

Buffet has consciously sought to maintain a shareholder base of long-term individual holders and has succeeded: approximately 80% of Berkshire's Class A common stock (the original, high-voting stock) is held by individuals, compared to 40% of General Electric's;[104] in 2007, less than 15% of the company's outstanding shares traded, compared to 109% for Exxon Mobil.[105]

Indeed, at least once a firm achieves reasonable visibility and liquidity—something that most publicly held firms probably do not achieve—the possibilities for IR expand. In an interesting Harvard case on British Petroleum (BP), BP's IR Officer argued strongly that the market view of, for example, the future of the oil business or the level of investment by competitors, could usefully be incorporated into the internal BP planning models, at the very least as a check, and potentially even as an independent source of information.[106] Another approach, as illustrated by Berkshire Hathaway, is for IR to focus on recruiting good shareholders, discouraging bad shareholders, and teaching shareholders of an uncertain type to be good shareholders.[107] One sees aspects of this role in IR efforts to build a shareholder base of long-term, patient shareholders who understand the firm's business and can properly put developments, both good and bad, in context.[108] Recently, proxy statements are beginning to attempt to educate shareholders through something like a "Directors' Discussion and Analysis" section as a supplement to the mandatory "Management's Discussion and Analysis" in annual reports.[109] Like-

---

103 *See* David F. Larcker & Brian Tayan, The Management of Berkshire Hathaway 21 (2009).

104 *See id.* at 20–21.

105 *See id.* at 22.

106 Miller et al., *supra* note 92, at 9–12.

107 *See, e.g.*, Warren E. Buffett, *An Owner's Manual*, Berkshire Hathaway Inc. (1996), http://www.berkshirehathaway.com/ownman.pdf (describing shareholders' role at Berkshire Hathaway).

108 *See, e.g.*, *id.* at 1.

109 *See, e.g.*, Prudential Fin., Inc., Notice of Annual Meeting of Shareholders and 2011 Proxy Statement 3–5 (2011), http://www3.prudential.com/annualreport/report2011/proxy/images/Prudential-Proxy2011.pdf; John C. Wilcox, *Preparing for the 2011 Proxy Season*, Director Notes (The Conference Bd., New York, N.Y.), Nov. 2010, at 4, *available at* http://www.conference-board.org/retrievefile.cfm?filename=DN-017-10.pdf&type=subsite (arguing in favor of providing a Director Discussion and Analysis).

wise, with the rise of hedge funds and other "disruptive" investors, IR offices share the task of explaining to the shareholders why management's plans are, in fact, better than the alternatives hedge funds present.[110]

2. *The Legal Framework*

Because the IR function is, first and foremost, a communications function, the federal securities laws provide the basic regulatory framework, and a substantial part of a typical IR textbook is devoted to an overview of that legal framework. Thus, one guide to running an effective IR department covers the basics of the Securities Exchange Act, including separate chapters on disclosure, Management's Discussion & Analysis, forward-looking statements, and proxy solicitations.[111] In addition, it covers related regulation including state blue-sky laws and stock exchange listing requirements.[112]

Over the last decade, two developments have significantly complicated the function, both of which emerged out of a concern for equity analyst "independence": Regulation FD and the 2003 Global Research Settlement.

Regulation FD, which became effective in 2000, targets "selective disclosure" to investors and analysts.[113] From the SEC's perspective, there was a problem that reflected both its sense of the practice of IR as well as a judgment about that practice:

> [W]e have become increasingly concerned about the selective disclosure of material information by issuers. As reflected in recent publicized reports, many issuers are disclosing important nonpublic information, such as advance warnings of earnings results, to securities analysts or selected institutional investors or both, before making full disclosure of the same information to the general public. Where this has happened, those who were privy to the information beforehand were able to make a profit or avoid a loss at the expense of those kept in the dark.

---

110 Shareholders may have conflicting interests regarding transparency. For example, a large shareholder with private information on firm value may prefer that the firm be opaque so as to maintain an informational advantage over other shareholders to generate trading profits.

111 Steven M. Bragg, Running an Effective Investor Relations Department: A Comprehensive Guide 94–102, 122–27, 209–23 (2010).

112 *Id.* at 183, 206–08.

113 *See* 17 C.F.R. § 243.101 (2011). Prior to Regulation FD, the legal treatment of selective disclosure was unsettled. While the SEC viewed selective disclosure as a violation of Rule 10b-5, the courts took quite a different approach. *See* Dirks v. SEC, 463 U.S. 646, 666 n.27 (1983) (discussing Rule 10b-5 violations); SEC v. Bausch & Lomb Inc., 565 F.2d 8, 18 (2d Cir. 1977) ("[T]here is no *per se* rule requiring the issuance of an injunction upon the showing of a past [section 10(b)] violation."); Stevens, Litigation Release No. 12813, 48 SEC Docket 739, 1991 WL 296537 (noting the SEC's request to have a CEO permanently enjoined from violating Rule 10b–5).

> . . . .
> Regulation FD is also designed to address another threat to the integrity of our markets: the potential for corporate management to treat material information as a commodity to be used to gain or maintain favor with particular analysts or investors. As noted in the Proposing Release, in the absence of a prohibition on selective disclosure, analysts may feel pressured to report favorably about a company or otherwise slant their analysis in order to have continued access to selectively disclosed information. We are concerned, in this regard, with reports that analysts who publish negative views of an issuer are sometimes excluded by that issuer from calls and meetings to which other analysts are invited.[114]

In Regulation FD, the SEC essentially banned selective disclosure by mandating that an issuer who discloses material nonpublic information to a securities market professional—including both analysts and investors—must make simultaneous public disclosure of the same information if the disclosure was intentional, or prompt disclosure if unintentional.[115] In the adopting release, the SEC made clear that earnings guidance would be a violation of the rules.[116]

The regulation of equity analysts was spurred by the dot-com collapse, which revealed some appalling duplicity by buy-side equity analysts who responded to pressure to issue positive recommendations for investment-banking clients.[117] Elliot Spitzer, then–New York attorney general, went after the large brokerage houses and reached a "Global Research Settlement" in 2003.[118] Congress, through the Sarbanes-Oxley Act, mandated regulation of analysts by the SEC.[119] The SEC and the exchanges adopted a series of measures designed to insulate analysts from pressure from investment bankers.[120] The goal of these various regulatory or quasi-regulatory initiatives was to mandate analyst independence.[121]

These two regulatory developments had a substantial impact on how IR professionals performed their work. Regulation FD prohibited the informal, confidential relationship between IR officers and select analysts or investors that had been common and that allowed the IR officer to present in detail, and without fear of general disclo-

---

114 Selective Disclosure and Insider Trading, Securities Act Release No. 7881, Exchange Act Release No. 43154, Investment Company Act Release No. 24599, 65 Fed. Reg. 51,716, 51,716–17 (Aug. 24, 2000).

115 *See* § 243.100(a).

116 *See* Selective Disclosure and Insider Trading, 65 Fed. Reg. at 51,721.

117 *See* Jill E. Fisch, *Fiduciary Duties and the Analyst Scandals*, 58 ALA. L. REV. 1083, 1083–84 (2007).

118 *Id.* at 1085.

119 *Id.*

120 *See* Jill E. Fisch, *Does Analyst Independence Sell Investors Short?*, 55 UCLA L. REV. 39, 70 (2007).

121 *See id.* at 42.

sure, the firm's plans, problems, and results. Instead, anything told to any particular analyst or investor has to be publicly disclosed. From the perspective of the IR community, Regulation FD was a huge change that threatened to chill the production of information and firms' relationships with analysts and investors.[122]

The 2003 Global Research Settlement, against the backdrop of Regulation FD, affected IR programs in a somewhat different way: the number of analysts declined significantly and a large number of public companies were no longer followed by *any* analyst. In a 2006 report to the SEC, the Advisory Committee on Small Public Companies reported that

> approximately 1,200 of the 3,200 NASDAQ-listed companies, and 35% of all public companies, receive no analyst coverage at all. Statistics provided by the SEC Office of Economic Analysis indicate that in 2004 approximately 52% of companies with a market capitalization between $125 million and $750 million and 83% of companies with a market capitalization less than $125 million had no analyst coverage.[123]

It is beyond the scope of this Article to analyze in detail the merits of either Regulation FD or the 2003 Global Research Settlement. What I can say, however, is that the combined effect has created a real problem for smaller public companies. The loss of analyst coverage adds to the other governance problems that afflict such companies and can hardly leave shareholders better off.

3. *The Finance Framework*

Merton's approach, noted above, provides a useful framework for thinking somewhat more systematically about the effect of regulation on IR. Gomes, Gorton, and Madureira, drawing on Merton, divide the transmission of information from firms to markets into four channels:

---

122 *See* Boris Feldman, *Frequently Asked Questions About Regulation FD*, 3 INVESTOR REL. Q., no. 4, 2000 at 86, 86; Harvey L. Pitt, Karl A. Groskaufmanis, Jonathan P. Scott & Daniel H. Anixt, *Preparing to Implement Regulation FD, the SEC's Selective Disclosure Rule*, 3 INVESTOR REL. Q., no. 4, 2000 at 82, 82; Louis M. Thompson, Jr., *Regulation Fair Disclosure: Unintended Consequences and Emerging Practices*, 4 INVESTOR REL. Q., no. 1, 2001 at 4, 4–5; Editorial Staff, Editorial, *Goodbye, 2001: A Look Back at a Difficult Year Reg. FD, Pro Forma and Credibility Issues Dominate the Corporate Disclosure Landscape*, INVESTOR REL. BUS., Jan. 14, 2002, at 1 ("An audience survey on an Investor Broadcast Network Regulation FD Webcast found that while the disclosure rule made no difference to the amount of information companies were disclosing, it was succeeding in ruining many relationships between companies and analysts."); Howard Stock, *Year in Review: A Look Back at the Events That Shaped 2002*, INVESTOR REL. BUS., Jan. 13, 2003, at 2.

123 SEC, FINAL REPORT OF THE ADVISORY COMMITTEE ON SMALLER PUBLIC COMPANIES TO THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION 72 n.144 (2006) (citation omitted), *available at* http://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf.

> (1) [F]irms, in addition to mandatory disclosures, can disclose information to the public voluntarily (e.g., earnings pre-announcements); (2) firms can selectively disclose information, e.g., phone calls, or one-on-one meetings; (3) "sell-side" analysts can produce research which is released to the public, e.g., analysts reports; (4) private information can be produced by outsiders, "informed traders," who then trade on the basis of their information.[124]

This sets the landscape of the IR function. Items (1), (2), and (3) can all involve the IR officer in one way or another.

Within this framework, one can see how legal reform has affected IR. As described above, Regulation FD prohibits channel 2, while the 2003 Global Research Settlement constrained channel 3. Because there are some sorts of information that can be better conveyed in one-to-one meetings with trusted interlocutors than in more public settings,[125] Regulation FD was expected to, and has in fact, changed the information environment within which firms function. Now, in place of closed meetings or conference calls, firms must choose between disclosing to an open forum or not disclosing at all. Regulation FD caused "a reallocation of information-producing resources" which affected asset pricing.[126] Gomes, Gorton, and Madureira "document that small firms on average lost 17 percent of their analyst following, while big firms gained 7 percent, on average."[127] Moreover,

> the stocks of small firms that completely lost analyst coverage after Reg FD experienced significant increases in the cost of capital, while small stocks with no previous analyst coverage—which presumably did not have any analysts benefiting from selective disclosure pre-FD—experienced no significant change in the cost of capital. Moreover, we find that more complex firms (using intangible assets as a proxy for complexity) are more adversely affected by Reg FD than less complex firms.[128]

E. Exploiting Clientele Effects

The Merton model and the Amihud and Mendelson model both predict various sorts of segmentation of the shareholder population. This segmentation has led to the analysis of various sorts of "clientele

---

124 Armando Gomes, Gary Gorton & Leonardo Madureira, *SEC Regulation Fair Disclosure, Information, and the Cost of Capital*, 13 J. CORP. FIN. 300, 301 (2007).

125 *See id.* at 324 ("Bushee et al. (2004) empirically find that firms with more complex information (as proxied for by the level of intangible assets) were more likely to use closed conference calls to disseminate information in the pre-FD period (i.e., calls that restrict access to invited professionals, typically buy- and sell-side analysts)." (citing Brian J. Bushee, Dawn A. Matsumoto & Gregory S. Miller, *Managerial and Investor Responses to Disclosure Regulation: The Case of Reg FD and Conference Calls*, 79 ACCT. REV. 617 (2004))).

126 *Id.* at 302.

127 *Id.*

128 *Id.*

effects," a kind of selection effect.[129] To what extent can public firms exploit selection effects in shaping their shareholder bases? How does the law create or influence these selection effects?

1. *Dividend Policy*

Modigliani and Miller (M & M) showed that in perfect and complete capital markets, dividend policy will not affect firm value.[130] But capital markets are neither perfect nor complete. In the wake of M & M, there has been a cottage industry engaged in trying to understand dividend policy within their framework. Because one assumption of the M & M result was "no taxes,"[131] one approach has been to ask whether the presence of taxes can explain the observed practice of paying dividends, in preference to other corporate payout methods, principally share repurchases.[132]

In many periods for certain investors, dividends have been taxed differently than capital gains. For example, dividends received by individual investors have often been taxed as ordinary income while capital gains were taxed at a substantially lower rate when realized.[133] By contrast, for corporations, the opposite has been the case: intercorporate dividends have been taxed at a low rate, while capital gains were taxed at the higher, corporate income tax rate.[134] Could these differences in tax treatment explain the pattern of corporate payouts? If so, then dividend policy could be used to select for a particular sort of shareholder.

In the very active and rich theoretical literature, a variety of models have sought to explain dividend policy as a result of, or an attempt to attract, particular shareholder "clienteles."[135] In models in which minimizing taxes drives investment decisions, individuals will hold low-dividend stocks, corporations will hold high-dividend stocks, while medium-dividend stocks will be held by tax-free investors or investors who can otherwise avoid tax.[136] From the perspective of these models,

---

129 *See* Amihud & Mendelson, *supra* note 4, at 224; Merton, *supra* note 5, at 488.

130 The classic analysis comes from Franco Modigliani & Merton H. Miller, *The Cost of Capital, Corporation Finance and the Theory of Investment*, 48 AM. ECON. REV. 261 (1958). For the application to dividends, see Merton H. Miller & Franco Modigliani, *Dividend Policy, Growth, and the Valuation of Shares*, 34 J. BUS. 411, 411–15 (1961).

131 *See* Miller & Modigliani, *supra* note 130, at 411–32.

132 *See* Franklin Allen & Roni Michaely, Payout Policy 50 (Apr. 2002) (unpublished manuscript), *available at* http://ssrn.com/abstract=309589.

133 Until 2008, dividends were taxed as ordinary income. From 2008 to 2012, qualified dividends have been taxed at the same rate as capital gains—15%. *See id.* at 24. Even at equal tax rates, stock buybacks are tax advantaged because they allow the taxpayer to choose to defer payment of tax on the gain (by not selling). *See id.* at 24 n.4.

134 "Under the current tax code, 30% of dividends are taxed." *Id.* at 24.

135 *See id.* at 22–26.

136 *See* Franklin Allen, Antonio E. Bernardo & Ivo Welch, *A Theory of Dividends Based on Tax Clienteles*, 55 J. FIN. 2499, 2500–01 (2000); Edwin J. Elton & Martin J. Gruber, *Marginal*

the puzzle is why we observe individual investors in high tax brackets holding substantial amounts of dividend-paying stocks. A variety of models have sought to explain this puzzle, many of which have recognized that investors can adopt active tax minimization strategies and, therefore, not have to limit themselves to particular sorts of stocks. In light of this, Allen and Michaely conclude that "a pure dividend-related tax . . . clientele does not exist."[137]

Of course, there may be other dividend–clientele effects. Practitioners have long observed that individual investors prefer to own dividend-paying stocks, a view for which there is some supporting evidence.[138] Some have tried to explain these observations based on investor behavioral biases.[139]

For our purposes, the issue is not whether there is a theoretical basis for thinking that clientele affects the shareholder base. There clearly is. The more important question is which clienteles are significant? Pure tax-driven clientele effects do not seem to be observable, while the practitioner belief that widow-and-orphan investors gravitate towards dividend-paying stocks is fairly persuasive.[140] What is the magnitude of the effect? To what extent can managers use dividend–clientele effects in shaping the shareholder base? Although the evidence for any strong overall average effect is lacking, there do seem to be situations in which the choice whether or not to pay dividends or to continue to pay dividends can have a significant effect on the shareholder base. Specifically, to the extent that individual investors are attracted to dividend-paying stocks, companies that seek individual investors as shareholders—perhaps because of a belief, like Buffet's, that they are more reliable—can increase their proportion in the shareholder base by paying dividends (although Berkshire Hathaway does not, itself, pay regular dividends).[141]

Stockholder Tax Rates and the Clientele Effect, 52 REV. ECON. & STAT. 68, 68–74 (1970); Robert H. Litzenberger & Krishna Ramaswamy, *The Effect of Personal Taxes and Dividends on Capital Asset Prices: Theory and Empirical Evidence*, 7 J. FIN. ECON. 163, 190 (1979); Allen & Michaely, *supra* note 132, at 24.

137 Allen & Michaely, *supra* note 132, at 49.

138 *See, e.g.*, Harry DeAngelo, Linda DeAngelo & Douglas J. Skinner, *Corporate Payout Policy*, 3 FOUND. & TRENDS FIN. 95, 207–10 (2008); Ravi Jain, *Institutional and Individual Investor Preferences for Dividends and Share Repurchases*, 59 J. ECON. & BUS. 406, 426–27 (2007).

139 *See, e.g.*, Malcolm Baker & Jeffrey Wurgler, *A Catering Theory of Dividends*, 59 J. FIN. 1125, 1158–60 (2004); Malcolm Baker & Jeffrey Wurgler, *Appearing and Disappearing Dividends: The Link to Catering Incentives*, 73 J. FIN. ECON. 271, 284–87 (2004); DeAngelo et al., *supra* note 138, at 192–201; Hersh M. Shefrin & Meir Statman, *Explaining Investor Preference for Cash Dividends*, 13 J. FIN. ECON. 253, 258–76 (1984).

140 *See* DeAngelo et al., *supra* note 138, at 208.

141 *Berkshire Hathaway*, WARREN BUFFETT SECRETS, http://www.buffettsecrets.com/berkshire.htm (last visited Mar. 11, 2012).

2. *The Choice of Country and Stock Exchange*

The phenomenon of "home bias," another form of segmentation, is well documented. Investors, including the most sophisticated investors, disproportionately (and suboptimally) invest in their own country's companies.[142] Customers of Regional Bell Operating Companies disproportionately invested in their local company over other Regional Bell Operating Companies (when there still were local Bell Operating Companies!).[143] Portfolio managers tend to prefer closer companies over farther companies.[144] One of the explanations for cross-listing on different stock exchanges is to broaden the investor base. Foerster and Karolyi show that cross-listing by non-U.S. firms on U.S. exchanges results, on average, in an increase of around 28% in the number of U.S. shareholders.[145]

Besides these geographic effects, there are other ways in which investors sort themselves. NASDAQ is the launching pad for technology companies and thus attracts investors interested in technology companies. Goldman Sachs' GS Tradable Unregistered Equity OTC Market is an all-institutional investor marketplace in which unregistered shares can be traded among qualified investors.

Given these various forms of "home bias," the choice of corporate headquarters, domicile, and listing can become, at least to a degree, the choice of shareholder base. When an Israel-based start-up wants to go public, it often chooses the NASDAQ because of the appetite of NASDAQ investors for technology companies. Indeed, anticipating a future IPO, an Israel-based technology company can ease its future acceptance among investors who prefer Silicon Valley technology companies (over foreign technology companies) by initially incorporating in Delaware, designating its Silicon Valley office as its headquarters, and presenting itself as a Silicon Valley technology company.[146]

But the advantages of the familiar can play out in different ways as well. When a company's products have a particular geographic focus (e.g., a European online-betting site) a company may choose to go public in London because potential investors may well have heard of

---

142 *See* Kenneth R. French & James M. Poterba, *Investor Diversification and International Equity Markets*, 81 BEHAV. FIN. 222, 222 (1991).

143 Gur Huberman, *Familiarity Breeds Investment*, 14 REV. FIN. STUD. 659, 659–61 (2001).

144 *See* Joshua D. Coval & Tobias J. Moskowitz, *Home Bias at Home: Local Equity Preference in Domestic Portfolios*, 54 J. FIN. 2045, 2045 (1999).

145 *See* Stephen R. Foerster & G. Andrew Karolyi, *The Effects of Market Segmentation and Investor Recognition on Asset Prices: Evidence from Foreign Stocks Listing in the United States*, 54 J. FIN. 981, 987 tbl.II (1999).

146 *See* Edward B. Rock, *Coming to America? Venture Capital, Corporate Identity, and U.S. Securities Law*, *in* GLOBAL MARKETS, DOMESTIC INSTITUTIONS: CORPORATE LAW AND GOVERNANCE IN A NEW ERA OF CROSS-BORDER DEALS 476, 476–506 (Curtis J. Milhaupt ed., 2003); Edward B. Rock, *Greenhorns, Yankees, and Cosmopolitans: Venture Capital, IPOs, Foreign Firms, and U.S. Markets*, 2 THEORETICAL INQUIRIES L. 711, 716–19, 743 (2001).

the firm's product either from product advertising, word of mouth, or press coverage.[147] Likewise, product advertising can affect shareholder base.[148]

Different exchanges have different listing requirements and different rules for listed companies. The NYSE prides itself on attracting large, high-quality companies. One understanding of the decision to list on the NYSE is that it is a credible signal of quality that attracts the largest, best-known institutional investors.[149] To the extent this signal is accurate, listing on the NYSE can likewise be thought of as part of a strategy for shaping shareholder base.

3. *Stock Price*

Stock price itself can potentially affect the composition of the shareholder base. Here, the classic example is Berkshire Hathaway, whose original, high-voting, Class A shares have never been split and currently trade for around $120,000 per share.[150] Buffet famously resisted splitting shares of Berkshire Hathaway until the threatened emergence of Berkshire Hathaway "unit trusts" (that would have sold fractional interests in Berkshire Hathaway Class A shares to investors who could not afford a whole share) led Berkshire to offer low voting "Class B" shares.[151] In 1983, when Berkshire's shares were trading at $1300 per share, Buffett devoted a portion of his annual shareholder letter to explaining his decision:

> We often are asked why Berkshire does not split its stock. The assumption behind this question usually appears to be that a split would be a pro-shareholder action. We disagree. Let me tell you why.
>
> One of our goals is to have Berkshire Hathaway stock sell at a price rationally related to its intrinsic business value. (But note "rationally related", not "identical": if well-regarded companies are generally selling in the market at large discounts from value, Berk-

147 One example is Playtech, an Israel-based supplier of online gaming software. *See* *About*, PLAYTECH, http://www.playtech.com/html/#page/about (last visited Mar. 11, 2012). Note that a London listing, with a restriction against U.S. shareholders, also insulates Playtech from U.S. gambling regulation. *See* Alistair Osborne, *Playtech Game Plan Questioned; Opinion Divided About Software Supplier from Which Israeli Founder Has Taken £500m*, DAILY TELEGRAPH (London), Apr. 14, 2011, Business, at 5.

148 *See* Gustavo Grullon, George Kanatas & James P. Weston, *Advertising, Breadth of Ownership, and Liquidity*, 17 REV. FIN. STUD. 439, 458 (2004).

149 *See Company Overview*, NYSE EURONEXT, http://corporate.nyx.com/en/who-we-are/company-overview (last visited Mar. 11, 2012).

150 Berkshire Hathaway's (BRK.A) closing price on March 11, 2012, was $118,430. *Berkshire Hathaway Inc.*, NYSE EURONEXT (Mar. 11, 2012, 7:18 PM), http://www.nyse.com/about/listed/lcddata.html?ticker=BRKA.

151 *See* Letter from Warren E. Buffett, Chairman of the Bd., Berkshire Hathaway Inc., to Shareholders (Feb. 28, 1997), *available at* http://www.berkshirehathaway.com/letters/1996.html.

shire might well be priced similarly.) The key to a rational stock price is rational shareholders, both current and prospective.

If the holders of a company's stock and/or the prospective buyers attracted to it are prone to make irrational or emotion-based decisions, some pretty silly stock prices are going to appear periodically. Manic-depressive personalities produce manic-depressive valuations. Such aberrations may help us in buying and selling the stocks of other companies. But we think it is in both your interest and ours to minimize their occurrence in the market for Berkshire.

To obtain only high quality shareholders is no cinch. Mrs. Astor could select her 400, but anyone can buy any stock. Entering members of a shareholder "club" cannot be screened for intellectual capacity, emotional stability, moral sensitivity or acceptable dress. Shareholder eugenics, therefore, might appear to be a hopeless undertaking.

In large part, however, we feel that high quality ownership can be attracted and maintained if we consistently communicate our business and ownership philosophy—*along with no other conflicting messages*—and then let self selection follow its course. For example, self selection will draw a far different crowd to a musical event advertised as an opera than one advertised as a rock concert even though anyone can buy a ticket to either.

Through our policies and communications—our "advertisements"—we try to attract investors who will understand our operations, attitudes and expectations. (And, fully as important, we try to dissuade those who won't.) We want those who think of themselves as business owners and invest in companies with the intention of staying a long time. And, we want those who keep their eyes focused on business results, not market prices.

Investors possessing those characteristics are in a small minority, but we have an exceptional collection of them. I believe well over 90%—probably over 95%—of our shares are held by those who were shareholders of Berkshire or Blue Chip five years ago. And I would guess that over 95% of our shares are held by investors for whom the holding is at least double the size of their next largest. Among companies with at least several thousand public shareholders and more than $1 billion of market value, we are almost certainly the leader in the degree to which our shareholders think and act like owners. Upgrading a shareholder group that possesses these characteristics is not easy.

Were we to split the stock or take other actions focusing on stock price rather than business value, we would attract an entering class of buyers inferior to the exiting class of sellers. At $1300, there are very few investors who can't afford a Berkshire share. Would a potential one-share purchaser be better off if we split 100 for 1 so he could buy 100 shares? Those who think so and who would buy the stock because of the split or in anticipation of one would definitely downgrade the quality of our present shareholder group. (Could

> we really improve our shareholder group by trading some of our present clear-thinking members for impressionable new ones who, preferring paper to value, feel wealthier with nine $10 bills than with one $100 bill?) People who buy for non-value reasons are likely to sell for non-value reasons. Their presence in the picture will accentuate erratic price swings unrelated to underlying business developments.[152]

There is a lot here—including the source of this Article's epigraph—that applies more generally to the possibility of "shareholder eugenics" in a public corporation. For present purposes, though, I want to focus on unpacking Buffett's argument that keeping the stock price high will attract a better class of shareholder. First, unlike unknown small- or medium-sized public companies, Berkshire Hathaway is legendary, with a reputation that builds and is built by its CEO's reputation. This gives Berkshire Hathaway the luxury of worrying about attracting the attention of the right sort of shareholders, rather than simply attracting the attention of any shareholders. Second, Buffett, the controlling shareholder of Berkshire, can afford to, and has the power to, pursue his own vision of the appropriate stock price and what counts as a responsible investor.

Now consider the argument on its merits. As noted earlier, Berkshire Hathaway has a remarkably stable shareholder base, with fewer than 15% of the shares trading hands each year. Moreover, it stands out as having a largely individual rather than institutional shareholder population, with some 80% of its shares in the hands of individual investors (at a time when somewhere around 70% of all shares are in the hands of institutional investors).[153] The "manic-depressive" traders that Buffett sought to dissuade were institutional investors. For many years, because of the control block and the small size of the float, Berkshire Hathaway was not included in the S&P 500 index and thus not in the largest index funds. This changed in January 2010 when Berkshire replaced Burlington Northern—the company it had acquired in conjunction with a 50-for-1 split of Berkshire Class B shares.[154] But, for all the years that Berkshire was out of the index—

---

152 Letter from Warren E. Buffett, *supra* note 1.

153 LARCKER & TAYAN, *supra* note 103, at 20 (noting that about 80% of Berkshire's Class A common stock is held by individuals); Brian G. Cartwright, Gen. Counsel, SEC, Speech by SEC Staff: The Future of Securities Regulation (Oct. 24, 2007) (transcript available at http://www.sec.gov/news/speech/2007/spch102407bgc.htm) (describing estimates of retail ownership of as low as a little over 30%). For a fuller discussion of the current estimates of the distribution of shareholdings, see Kahan & Rock, *supra* note 15, at 995–98.

154 Scott Patterson, *Berkshire Hathaway Shares Added to the S&P 500 Index*, WALL ST. J., Jan. 26, 2010, http://online.wsj.com/article/SB10001424052748704905604575027653534246656.html.

as a result of the high share price—it had minimal institutional ownership, which is precisely how Buffett liked it.[155]

The effect of stock price on shareholder base can move in the opposite direction as well. Baker, Greenwood, and Wurgler propose a "catering" theory of nominal stock prices in which firms supply shares at a lower price level when investors place higher valuations on low-price firms, and vice versa.[156] To the extent that, for example, individual investors prefer shares with a low nominal price, a firm can shift its shareholder base towards individual investors by splitting its stock to reduce the nominal price.

4. *Liquidity*

In that same 1983 shareholder letter, Buffett also addressed the "liquidity" concern:

> One of the ironies of the stock market is the emphasis on activity. Brokers, using terms such as "marketability" and "liquidity", sing the praises of companies with high share turnover (those who cannot fill your pocket will confidently fill your ear). But investors should understand that what is good for the croupier is not good for the customer. A hyperactive stock market is the pickpocket of enterprise.
>
> For example, consider a typical company earning, say, 12% on equity. Assume a very high turnover rate in its shares of 100% per year. If a purchase and sale of the stock each extract commissions of 1% (the rate may be much higher on low-priced stocks) and if the stock trades at book value, the owners of our hypothetical company will pay, in aggregate, 2% of the company's net worth annually for the privilege of transferring ownership. This activity does nothing for the earnings of the business, and means that 1/6 of them are lost to the owners through the "frictional" cost of transfer. (And this calculation does not count option trading, which would increase frictional costs still further.)
>
> . . . .
>
> (We are aware of the pie-expanding argument that says that such activities improve the rationality of the capital allocation process. We think that this argument is specious and that, on balance, hyperactive equity markets subvert rational capital allocation and act as pie shrinkers. Adam Smith felt that all noncollusive acts in a free market were guided by an invisible hand that led an economy to maximum progress; our view is that casino-type markets and hair-trigger investment management act as an invisible foot that trips up and slows down a forward-moving economy.)

---

155 *See id.*

156 Malcom Baker, Robin Greenwood & Jeffrey Wurgler, *Catering Through Nominal Share Prices*, 64 J. FIN. 2559, 2559–63 (2009).

> Contrast the hyperactive stock with Berkshire. The bid-and-ask spread in our stock currently is about 30 points, or a little over 2%. Depending on the size of the transaction, the difference between proceeds received by the seller of Berkshire and cost to the buyer may range downward from 4% (in trading involving only a few shares) to perhaps 1 1/2% (in large trades where negotiation can reduce both the market-maker's spread and the broker's commission). Because most Berkshire shares are traded in fairly large transactions, the spread on all trading probably does not average more than 2%.
>
> Meanwhile, true turnover in Berkshire stock (excluding inter-dealer transactions, gifts and bequests) probably runs 3% per year. Thus our owners, in aggregate, are paying perhaps 6/100 of 1% of Berkshire's market value annually for transfer privileges. By this very rough estimate, that's $900,000—not a small cost, but far less than average. Splitting the stock would increase that cost, downgrade the quality of our shareholder population, and encourage a market price less consistently related to intrinsic business value. We see no offsetting advantages.[157]

Buffett is thus not just indifferent to Berkshire's large bid–ask spread, but seems positively to value it. Is this a plausible strategy as an element of his shareholder eugenics, or is it just perverse?

Consider Amihud and Mendelson's model and subsequent work. They have convincingly demonstrated that the bid–ask spread generates a clientele effect: short-term investors prefer stocks with a small (relative) bid–ask spread, while longer-term shareholders gravitate towards higher-spread assets.[158] Moreover, they show that longer-term shareholders get paid in the form of higher expected returns for giving up liquidity.[159] Their explanation is entirely intuitive: shareholders who trade in and out of shares rapidly want to minimize their transaction costs.

The implications of this liquidity effect on corporate governance are complex. Bhide argues that high liquidity undermines corporate governance because unhappy shareholders exit rather than expend resources on monitoring or exercising voice.[160] Maug counters that illiquidity will deter potential shareholder monitors from buying

---

157 Letter from Warren E. Buffett, *supra* note 1.

158 *See* Amihud & Mendelson, *supra* note 4, at 224. Liquidity is the ease of trading a security. Sources of illiquidity are various: transaction costs; demand pressure and inventory risk; asymmetry of information regarding the fundamentals of the security and the order flow; and search frictions (the difficulty of locating a counterparty). Yakov Amihud et al., *Liquidity and Asset Prices*, 1 FOUND. & TRENDS FIN. 269, 270–71, 301, 340 (2005). Liquidity is a complex and elusive concept but, to a first approximation, can be identified with the bid–ask spread.

159 *See* Amihud & Mendelson, *supra* note 4, at 229.

160 Amar Bhide, *The Hidden Costs of Stock Market Liquidity*, 34 J. FIN. ECON. 31, 31, 41–45 (1993).

blocks, while liquidity is likely to increase shareholder monitoring by making it easier to buy and increase blocks.[161] More recently, Edmans, Fang, and Zur have shown that liquidity will affect the *choice* of governance mechanism, with high (low) liquidity tilting governance towards exit (voice).[162] Norli, Ostergaard, and Schindele find that shareholder activism is more likely the more liquid the stock.[163] When an investor holds a large block, illiquidity makes it more difficult for the investor to exit, thereby reducing his or her ability to trade short term and pushing the investor to focus on long-term value and governance by voice. But for this to work, the potential profits must be sufficiently large to induce the investor to acquire a hard-to-trade block position initially.[164]

The Amihud and Mendelson results and the subsequent literature generate a number of intriguing shareholder base strategies. If, for example, a firm wishes to shift its shareholder base toward long-term shareholders—as many companies claim—it can and should adopt financial policies that increase (or avoid policies that decrease) the bid–ask spread. Although Amihud and Mendelson correctly suggest that their results show that firms have an incentive to increase their value by adopting financial policies that increase their liquidity, their results also support the opposite strategy: by adopting financial policies that reduce liquidity, firms can attract more patient capital. Although firms will pay more for their capital, in return they will attract longer-term holders.[165]

Alternatively, if firms wish to expose themselves to greater governance by exit, increase the size and number of block holdings, especially by hedge funds, and increase the amount of shareholder activism, then efforts to increase liquidity are appropriate. I suspect that if one explained to directors that these are some of the benefits of increased liquidity, they might well be skeptical of the wisdom of such efforts.

Buffett seems to have adopted the first strategy as he crafts his optimal shareholder base. Given the Amihud and Mendelson result,

---

161 Ernst Maug, *Large Shareholders as Monitors: Is There a Trade-Off Between Liquidity and Control?*, 53 J. FIN. 65, 68 (1998).

162 Alex Edmans Vivian W. Fang & Emanuel Zur, *The Effect of Liquidity on Governance* 1–8 (Eur. Corp. Governance Inst., Finance Working Paper No. 319/2011, 2012), *available at* http://ssrn.com/abstract=1905224.

163 Øyvind Norli, Charlotte Ostergaard & Ibolya Schindele, Liquidity and Shareholder Activism 25–26 (Apr. 26, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1344407.

164 *See id.*

165 *See* Amihud & Mendelson, *supra* note 4, at 246 (“The higher yields required on higher-spread stocks give firms an incentive to increase the liquidity of their securities, thus reducing their opportunity cost of capital. Consequently, liquidity-increasing financial policies may increase the value of the firm.”).

the question for the firm becomes whether the *benefits* to the firm of a longer-term shareholder base justify the *cost* in increased cost of capital? That is a difficult calculation that requires, *inter alia*, an estimate of the magnitude of the liquidity effect on shareholder identity. Buffett, at least, seems to think that such a strategy is cost justified.

But how does a firm implement such a strategy? What are liquidity-suppressing financial policies? What steps can a firm take to maintain a large bid–ask spread? Going public, standardization of contractual forms of securities, limited liability, exchange listing, and information disclosures can all operate to some degree as investments in increased liquidity.[166] Avoiding such steps, then, can be viewed as a strategy for *decreasing* liquidity.

As the 1983 shareholder letter suggests, Buffett believes that *not* splitting the stock will reduce liquidity (by a tolerable amount).[167] As the stock price gets higher and higher, volume is reduced with a predictable increase in the bid–ask spread. This strategy is interestingly and importantly counterintuitive.

Buffett's strategy bucks the conventional wisdom that once a stock price gets above the "normal range," a corporation should split its stock. An example of this conventional wisdom appears in the letter announcing Marriott's 2006 two-for-one split:

> It is my pleasure to inform you that on April 28, 2006, the Board of Directors of Marriott International, Inc. ("Marriott") approved a two-for-one split of the company's Class A common stock in the form of a stock dividend. The stock split was declared in recognition of our strong *confidence in our company's* strength, competitive position, and *growth prospects*. We also believe that the split will make a share of Marriott common stock *more affordable* to a *broader range of potential investors* and *increase liquidity* in the trading of Marriott shares.[168]

According to surveys, "managers justify splits on the basis that they improve liquidity and marketability."[169] Stock splits are common (over one hundred per year), typically occuring after very strong firm performance, and are accompanied by small excess-positive abnormal returns.[170]

---

166 *Id.*

167 Letter from Warren E. Buffett, *supra* note 1.

168 Letter from Terri L. Turner, Corporate Sec'y, Marriott Int'l, Inc., to Shareholders (June 9, 2006) (emphasis added), *available at* http://files.shareholder.com/downloads/MAR/1483037545x0x153628/73f014ac-cad1-4cb8-b65e-dfa44b5f0df6/lettertoshareholders.pdf.

169 Çelim Yıldızhan, Stock Splits, a Survey 22 (Mar. 17, 2009) (unpublished manuscript), *available at* http://ssrn.com/abstract=1362259.

170 *See id.* at 3, 22.

But the conventional wisdom is puzzling. How can it be that slicing the pizza into twice as many slices increases the size of the pie? Various theories have emerged to try to explain both the prevalence of stock splits and the fact that they seem to correlate with increased firm value.[171] The most convincing group of theories views the stock split as a credible signal of strong future prospects.[172]

Another variety of explanations focuses on the observation that firms strive to keep their shares within some "optimal" trading range. For example, between 1943 and 1994, the average share price on the NYSE remained at $30, despite a 1500% increase in the S&P 500 and a 500% increase in the consumer price index.[173]

The studies evaluating the "liquidity" explanation are particularly interesting. It is hard to find any increase in trading volume and, to the extent that liquidity is measured by the bid–ask spread as a percentage of the share price, the bid–ask spread does not seem to be reduced.[174] So it may be that stock splits do not genuinely increase liquidity, which makes the conventional wisdom even more puzzling. Moreover, stock splits seem to correlate with an increase in volatility.[175]

On balance, then, it is difficult to make a strong case that stock splits increase firm value. Instead, the best explanation seems to be a combination of signaling and agency costs: managers of companies that are performing strongly and with private information about strong future performance split their shares.[176] Intermediaries (brokers and market makers) who benefit from a per-share based commission have an incentive to promote the stock heavily. With more promotion, more investors buy the stock, expanding the shareholder base.[177]

This, of course, is not a very strong justification for stock splits, especially given the Amihud and Mendelson findings that lower bid–ask spreads attract short-term investors. To the extent that firms are genuinely interested in attracting long-term investors and avoiding

---

171 *See* Carroll Howard Griffin, *Abnormal Returns and Stock Splits: The Decimalized vs. Fractional System of Stock Price Quotes*, 5 INT'L J. BUS. & MGMT. 3, 3–4 (2010) (summarizing various theories of increased firm value due to stock splits).

172 *See, e.g.*, Yıldızhan, *supra* note 169, at 22–24.

173 James J. Angel, *Tick Size, Share Prices, and Stock Splits*, 52 J. FIN. 655, 655 (1997).

174 *See* Yıldızhan, *supra* note 169, at 33–34.

175 *See id.* at 2–3.

176 *See id.* at 40–41.

177 *See id.* The link between stock splits and liquidity is complicated by the "round lot" tradition of brokerage fees. In Japan, where firms can choose their stock-trading unit, Amihud, Mendelson, and Uno show that the reduction in the minimum trading unit increases the number of individual investors, liquidity, and stock price. Yakov Amihud, Haim Mendelson & Jun Uno, *Number of Shareholders and Stock Prices: Evidence from Japan*, 54 J. FIN. 1169, 1169–71 (1999).

short-term pressure, resisting the urge to split the stock after a period of strong performance may be the best strategy for avoiding trigger-happy shareholders.

Berkshire Hathaway's disclosure policy is also likely to increase the bid–ask spread. As noted earlier, Berkshire Hathaway, unlike most public companies, refuses to provide quarterly or annual guidance on revenue, earnings, or other financial information; it does not hold conference calls, analyst meetings, or investor conferences. Instead, it complies with the requirements of federal securities law and, beyond that, limits its communications to shareholders mainly to the annual report and annual meeting. This approach, nearly the opposite of conventional practice and against IR best practices, seems intentionally designed to deny analysts timely access to the information they most want. This restriction on the flow of information likely increases the bid–ask spread.[178]

Another Buffett tactic for limiting liquidity may have been his indifference or aversion to the inclusion of Berkshire Hathaway in the S&P 500 index. Until its inclusion in January 2010 as a result of the stock-for-stock acquisition of Burlington Northern and the related stock split of Berkshire B shares, Berkshire was by far the largest firm not included in the index.[179] Inclusion in the index results in a great deal of trading by index funds and hedgers of index funds and index options that is not based on firm- or stock-specific information and thereby dramatically increases its liquidity.[180] Within the Amihud and Mendelson framework, inclusion in the index will predictably shift the shareholder base toward short-term holders.

Is Berkshire Hathaway sui generis, or might other publicly held firms be wise to make a similar choice? There are certainly unique aspects to Berkshire Hathaway: Buffett holds a controlling position, he seems largely indifferent to the share price, he has a long track record of success, and the company holds a large amount of cash.[181] Berkshire Hathaway does not need to raise equity capital from the financial markets and can ignore market sentiment for long periods of time.

But, given managers' perennial complaints about "short-term" shareholders and speculators, the Berkshire Hathaway strategy, understood within the Amihud and Mendelson framework, provides a

---

178 There is both theoretical and empirical support for a link between the level of disclosure and the bid–ask spread. *See, e.g.*, Douglas W. Diamond & Robert E. Verrecchia, *Disclosure, Liquidity, and the Cost of Capital*, 46 J. FIN. 1325, 1327–28 (1991); Christian Leuz & Robert E. Verrecchia, *The Economic Consequences of Increased Disclosure*, 38 J. ACCT. RES. 91, 94 (2000).

179 *See* Patterson, *supra* note 154.

180 *See* Amihud et al., *supra* note 158, at 319.

181 *See* White, *supra* note 24.

strong argument for management to reconsider whether increasing liquidity is worthwhile. Anecdotally, at least, it seems that becoming the darling of short-term investors can lead to wildly gyrating stock prices that can damage firms.[182]

F. De-recruitment: Avoiding and Eliminating "Undesirables"

The counterpart of recruiting good shareholders is avoiding bad shareholders. A private company can blackball bad players: it can deny them admission by refusing to allow them to invest; if they are already shareholders, there are a variety of ways to throw them out. What about in a public company?

1. *Getting Rid of Disruptive Shareholders*

The best-known example of de-recruitment in public companies is targeted share repurchases.[183] When used in the control context, it is also known as "greenmail."[184] In the classic situation, the board approves the repurchase of shares of a disruptive investor at market price or a premium above market because, the board claims, the investor poses a threat to the company.[185] Although Delaware law was quite permissive, greenmail in the control context has largely or entirely disappeared. First, it was not particularly effective: although the bothersome shareholder could be eliminated, paying him off attracted other equally bothersome investors. Second, the poison pill was both more effective and cheaper and became the preferred defensive tactic.[186] Third, greenmail became sufficiently distasteful that it attracted punitive tax treatment and made directors reluctant to succumb.

An extreme version of de-recruitment is a "going private" transaction in which all of the public shareholders are bought out. A standard justification of such transactions is that the pressures for quarterly results from public shareholders interfere with maximizing the value of the firm, and thus the firm is better off privately held.

---

182 *See, e.g.*, Jenny Strasburg & Susan Pulliam, *Pack Mentality Grips Hedge Funds*, WALL ST. J. (Jan. 14, 2011), http://online.wsj.com/article/SB10001424052748704361504575552462233274960.html (discussing the recent volatility of hedge funds).

183 *See* Jonathan R. Macey & Fred S. McChesney, *A Theoretical Analysis of Corporate Greenmail*, 95 YALE L.J. 13, 13–14 (1985).

184 *See id.*

185 *See* Cheff v. Mathes, 199 A.2d 548, 551–53 (Del. 1964); Kors v. Carey, 158 A.2d 136, 138–40 (Del. Ch. 1960).

186 *See* Kahan & Rock, *supra* note 81, at 875.

2. *Keeping Bad Investors Out of a Company*

Recall Buffett's warning: "Mrs. Astor could select her 400, but anyone can buy any stock."[187] Is there really no way to keep a bad shareholder out of a company? There are two aspects to this question. First, can it be done as a practical matter? Second, is it legal?

There are a number of circumstances in which a corporation excludes particular sorts of potential shareholders. For example, under the Aviation Act, only a "citizen of the United States" may carry passengers on domestic routes, where a "citizen of the United States" is defined as:

> (A) an individual who is a citizen of the United States;
>
> (B) a partnership each of whose partners is an individual who is a citizen of the United States; or
>
> (C) a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States.[188]

Foreign investors can own no more than a total of 49% of the equity of a U.S. airline.[189] As a result, it is critical for U.S. carriers to ensure that no more than 24.9% of their voting interest is held by foreign citizens. Airlines use a number of techniques to ensure that they do not lose their U.S. citizenship under the statutory definition. United Airline's certificate of incorporation limits voting rights of certain foreign persons.[190] Continental maintained two stock registers to assure that they did not lose their operating certificate.[191] U.S. Air, which

---

187 Letter from Warren E. Buffett, *supra* note 1.

188 49 U.S.C. § 40102(a)(15) (2006).

189 *See* Acquisition of Nw. Airlines, Inc. by Wings Holdings, Inc., Order No. 91-1-41, at 7–9 (Dep't of Transp. Jan. 23, 1991); *see also* 49 U.S.C. §§ 40102(a)(15), 44102(a); 14 C.F.R. § 204.2(c) (2011).

190 *See* United Cont'l Holdings, Inc., Restated Certificate of Incorporation of United Continental Holdings, Inc. pt. V, § 2, *available at* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NjQ2MTV8Q2hpbGRJRD0tMXxUeXBlPTM=&t=1 ("*Non-Citizen Voting Limitation.*"). UAL shares must contain a legend describing the voting restrictions:

> UAL's restated certificate of incorporation limits the total number of shares of equity securities held by persons who are not "citizens of the United States," as defined in Section 40102(a)(15) of Title 49 United States Code, to no more than 24.9% of the aggregate votes of all equity securities outstanding. This restriction is applied pro rata among all holders of equity securities who fail to qualify as "citizens of the United States," based on the number of votes the underlying securities are entitled to.

UAL Corp., Annual Report (Form 10-K), at 27 (Feb. 26, 2010).

191 Continental's 2009 report to stockholders explains:

imposes a cap on voting rights of 24.9% and an "absolute cap amount" of 49.9%, uses a somewhat more complex approach that includes both a voting cap and an ownership cap, with provisions to suspend voting rights and nullify nonconforming transfers.[192]

Delaware General Corporation Law section 202(b) permits these sorts of limitations:

> A restriction on the transfer or registration of transfer of securities of a corporation, or on the amount of a corporation's securities that may be owned by any person or group of persons, may be imposed by the certificate of incorporation or by the bylaws or by an agreement among any number of security holders or among such holders and the corporation. No restrictions so imposed shall be binding with respect to securities issued prior to the adoption of the restriction unless the holders of the securities are parties to an agreement or voted in favor of the restriction.[193]

Section 202(c) authorizes four types of transfer restrictions, including a provision that "[p]rohibits or restricts the transfer of the restricted securities to, or the ownership of restricted securities by, designated persons or classes of persons or groups of persons, and such designation is not manifestly unreasonable."[194]

Given the foreign ownership restrictions under U.S. law, such a provision in an airline charter would clearly not be manifestly unreasonable. Moreover, Delaware specifically permits forced redemption of shares to the extent necessary to prevent the loss of a license or franchise from a government agency.[195]

Enforcement, however, is somewhat trickier, especially given widespread patterns of custodial ownership. In the airline sector, this

---

> Our certificate of incorporation provides that no shares of capital stock may be voted by or at the direction of persons who are not U.S. citizens unless the shares are registered on a separate stock record. Our bylaws further provide that no shares will be registered on the separate stock record if the amount so registered would exceed U.S. foreign ownership restrictions. United States law currently limits the voting power in us (and other U.S. airlines) of persons who are not citizens of the United States to 25%.

CONT'L AIRLINES, INC., 2009 ANNUAL REPORT TO STOCKHOLDERS 80 (2010).

192 U.S. Airways Grp., Inc., Annual Report (Form 10-K), at 26 (Feb. 17, 2010).

193 DEL. CODE ANN. tit. 8, § 202(b) (2011).

194 *Id.* § 202(c)(5). In addition to the specific reasonableness limitation in this section, section 202 is understood to codify the prior common law rule, which had a "proper purpose" limitation. *See* Grynberg v. Burke, 378 A.2d 139, 141 (Del. Ch. 1977) (incorporating the proper purpose standard from *Lawson v. Household Fin. Corp.*, 152 A. 723, 727 (Del. 1930)); 1 EDWARD P. WELCH, ANDREW J. TUREZYN & ROBERT S. SAUNDERS, FOLK ON THE DELAWARE GENERAL CORPORATION LAW GCL-VI-7 to 22 (5th ed. 2011); Jesse A. Finkelstein, *Stock Transfer Restrictions Upon Alien Ownership Under Section 202 of the Delaware General Corporation Law,* 38 BUS. LAW. 573, 586–88 (1983).

195 DEL. CODE ANN. tit. 8, § 151(b)(2).

is largely handled by requiring transferees to certify compliance with the alien transfer restrictions.[196]

Could a firm use section 202 transfer restrictions to, for example, prohibit hedge funds from acquiring shares? To start with, because transfer restrictions are not binding on shares issued prior to the adoption of the restriction, except when holders agree or vote in favor of the restriction, any such transfer restriction would have to be in the IPO charter.[197] For the sake of the hypo, assume that situation is the case. Would such a restriction be "manifestly unreasonable"?[198] There is some authority that such a restriction would be evaluated under the business judgment rule and that a reasonable business purpose would suffice.[199] In the airline context, such a standard would clearly be satisfied. But would a charter provision banning sales to hedge funds also pass muster?

In an interesting case arising under the common law, *Greene v. E.H. Rollins & Sons, Inc.*, the chancellor considered a charter provision that gave the board of directors a right of first refusal to buy any shares "to insure the harmonious conduct of the business of the Corporation and to prevent the introduction of any Common Stockholder for any reason deemed unsuitable."[200] In rejecting the corporation's demurrer, the court found that the restriction on alienation was excessively broad and the reason given insufficient:

> They amount to no more than this—that the corporation ought at all times to have a body of stockholders among whom there should never be any whom the directors find not agreeable, for it is to be remembered that it is the directors whose judgment is final in passing on the suitability of the stockholder.[201]

A provision barring hedge funds could be attacked on the same basis, although obviously a firm would counter that hedge funds are disruptive forces with interests that are not aligned with those of the shareholders as a whole and therefore pose a threat to legitimate corporate interests.

Another model for excluding certain shareholders can be seen in companies worried about retaining their net operating losses (NOLs). Under section 382 of the Internal Revenue Code, a company's ability to shelter income from taxation by using NOLs can be lost if it under-

---

196 *See* Finkelstein, *supra* note 194, at 581.

197 *See id.* at 578.

198 DEL. CODE ANN. tit. 8, § 202(c)(5).

199 *See* Finkelstein, *supra* note 194, at 588 (citing Fixman v. Diversified Indus., Inc., No. 4721, 1975 WL 1947, at *9–10 (Del. Ch. May 5, 1975)).

200 2 A.2d 249, 250 (Del. Ch. 1938).

201 *Id.* at 252.

goes an "ownership change."[202] Under section 382(g)(1), a corporation undergoes an ownership change if:

> [A]fter any owner shift involving a 5-percent shareholder or any equity structure shift—
>
> (A) the percentage of the stock of the loss corporation owned by 1 or more 5-percent shareholders has increased by more than 50 percentage points, over
>
> (B) the lowest percentage of stock of the loss corporation (or any predecessor corporation) owned by such shareholders at any time during the testing period.[203]

Although the exact method of calculating whether an ownership change has occurred for purposes of section 382 is quite complex, the critical feature is that only 5% blocks count in the calculation.[204] As a result, the creation of any new 5% block holders is of significant concern because it can jeopardize the valuable NOLs. Indeed, the simple acquisition of a 5% block could irreversibly invalidate billions of dollars' worth of NOLs.

This risk is handled in different ways. United, which as of April 2010 had more than $9 billion in NOLs, has a provision in its certificate of incorporation prohibiting sales by or to existing 5% stockholders or sales that would create new 5% stockholders without prior approval of the board.[205] The certificate imposes restrictions on recording any prohibited transfer and provides measures for unwinding prohibited transactions.[206] As discussed earlier, these restrictions are likely valid under Delaware General Corporation Law section 202.

An alternative means of excluding shareholders who may jeopardize NOL carryforwards is an NOL poison pill with a 4.99% trigger. This is the sort of poison pill recently upheld by the Delaware Supreme Court in *Versata Enterprises, Inc. v. Selectica, Inc.*[207] The advantage of the NOL poison pill over a charter amendment is that it can be adopted by board action.[208] It can be adopted immediately, rather than having to wait for or schedule a shareholder meeting, and will apply to all shares, not just subsequently issued shares. Because NOLs cannot be reclaimed once forfeited, it can be important to act quickly to prevent the creation of a 5% block.

---

202 *See* I.R.C. § 382(g) (2006).

203 *See id.* § 382(g)(1).

204 *See id.*

205 *See* UAL Corp., Definitive Proxy Statement (Form DEF 14A), at 46 (Apr. 30, 2010) (explaining the reasons for extending the ownership limit first adopted in 2006); UNITED CONT'L HOLDINGS, INC., *supra* note 190, at pt. V, § 5 ("*5% Ownership Limit.*").

206 *See* UNITED CONT'L HOLDINGS, INC., *supra* note 190, at pt. V, § 5.

207 5 A.3d 586, 608 (Del. 2010).

208 *See, e.g.*, *id.* at 595 (discussing how a board of directors passed a resolution adopting the poison pill without reference to amending the corporate charter).

But could a poison pill be used to exclude specific, potentially disruptive shareholders based on their identity instead of their size? Would a pill deployed against hedge funds as a group, rather than against any investor who passes the threshold, pass muster? This is an open question under Delaware law.

III
Tools for Crafting the Shareholder Base: Transforming Shareholders into Good Shareholders

The direct strategies take shareholder type as given, seeking to recruit shareholders of the good type and avoid shareholders of the bad type. But shareholder type may not be immutable. In this Part, I consider strategies and structures by which a firm can transform investors into shareholders of the desirable type. The core intuition is Winston Churchill's: "We shape our buildings, and afterwards our buildings shape us."[209]

A. Control-Shareholder Ownership Structure

Corporate law has long recognized that the presence of a control shareholder in a firm directly affects the corporate governance challenges that are presented.[210] An alternative way of understanding the impact of a control shareholder is that it is an important factor in determining the role of noncontrolling shareholders in the governance of the firm. When a control shareholder is present, shareholders necessarily are cast into a substantially more passive role than in a corporation whose shares are dispersed. In a controlled corporation, the controlling shareholder typically elects all the directors, effectively chooses executive management, sets management compensation, determines the direction of the firm, sets dividend policy, decides whether or not the firm should be sold, and carries out any other decision it wants to.

This means that a noncontrolling shareholder's ability to act is sharply constrained. Whatever an investor's typical preference for involvement, in a corporation with a control shareholder, the other shareholders have minimal say. Indeed, the one area in which shareholders of the controlled firm play a significant role is in policing interested-party transactions, either through decision rights or through litigation.[211]

---

209 Winston Churchill, Prime Minister of the U.K., A Sense of Crowd and Urgency (Oct. 28, 1943), *in* Winston S. Churchill, Never Give In!: The Best of Winston Churchill's Speeches 358, 358 (2003).

210 *See* Gilson & Gordon, *supra* note 82, at 785–86.

211 *See* Kahan & Rock, *supra* note 17, at 1037–39.

The potential benefit of opting to create such a shareholder base by adopting a controlling-shareholder ownership structure is that a good "Buffett-like" controlling shareholder can act effectively and without interference in ways that benefit the noncontrolling shareholders. The downside is equally obvious: bad controlling shareholders may use their control to take non–pro rata distributions at the expense of the noncontrolling shareholders, or the bad controlling shareholders may be incompetent.

But there is another potential downside. By casting shareholders in this distinctive and subordinate role, the structure may discourage "responsible" shareholding at the same time as it encourages noncontrolling shareholders to challenge actions by the controlling shareholder as self-dealing.

Moreover, corporate law's construction of the role of noncontrolling shareholders will have a selection effect. Shareholders whose specialty or preference is to take an active role in influencing the direction of the firm will tend to stay away from controlled companies, while shareholders who specialize in detecting and prosecuting self-interested transactions will be drawn to such companies. Hedge funds that specialize in challenging going-private transactions provide a particularly clear example.[212]

B. Choice of Domicile or Stock Exchange

Choice of corporate domicile, combined with choice of exchange, likewise exerts a powerful influence on the sort of shareholders a firm has. Above, we discussed the clientele effects of choice of stock exchange. But the choice has a broader influence.

Consider a venture choosing between incorporating in Delaware with the ultimate aim of going public on NASDAQ, on the one hand, and incorporating in the United Kingdom with a London listing on the other. How will the choice affect the shareholder base? As has long been noted, Delaware is a board-centered jurisdiction while the United Kingdom is shareholder-centric. These differences emerge in a variety of ways: The center of decision making under U.K. law is the shareholders acting in the general meeting; in Delaware, the center of decision making is the board of directors.[213] With respect to directors, U.K. shareholders have the power to elect directors, and importantly they have the power to remove directors with or without cause

212 *See id.* at 1037–39 (discussing tactics taken by hedge funds—including litigation, shareholder revolts, exercising appraisal rights, and negotiating the share price—to improve the terms of a merger or acquisition).

213 *See* DEL. CODE ANN. tit. 8, § 141 (2011); PAUL L. DAVIES, GOWER AND DAVIES' PRINCIPLES OF MODERN COMPANY LAW 423 (8th ed. 2008).

before the expiration of the director's term.[214] This power is important because shareholders also have the power to call a general meeting without board acquiescence or a special provision in the articles of incorporation.[215] These provisions prevent the entrenchment provided by staggered boards.[216] By contrast, Delaware shareholders have no power to call a meeting, and when there is a staggered board, directors can only be removed for cause.[217] In the United Kingdom, shareholders may force the company, at company's expense, to circulate resolutions to be voted on at the annual general meeting, which, if adopted, are binding.[218] Shareholders of a Delaware corporation may only enact bylaws, and the scope of permissible bylaws is sharply limited.[219] The shareholder-centric character of U.K. corporation law is particularly striking in the control context. Under the City Code, directors must remain largely passive when a tender offer is made for the shares of the company and cannot take any "frustrating action" without shareholder approval.[220] U.S. shareholder activists dream about such a provision.[221]

The exchange rules parallel these doctrinal differences: the board of a Delaware corporation listed on the NASDAQ or NYSE can adopt, for example, a poison pill or agree to breakup fees with a favored bidder, while a U.K. company listed on the London Stock Exchange is subject to the City Code and its no-frustration, no-assistance rules.[222] These differences may affect how shareholders act, even if shareholders' preferences, skills, or investment in activism stay constant. Thus, institutional investors like Fidelity or TIAA-CREF might

---

214 *See* Companies Act, 2006, c. 46, § 168(1) (Eng.).

215 *See id.* §§ 303–05.

216 *See* John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why?—The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1737 (2007).

217 *See* DEL. CODE ANN. tit. 8, § 141(k).

218 *See* Companies Act, 2006, c. 46, §§ 338–40.

219 *See, e.g.*, CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 232 (Del. 2008) (noting that shareholders lack management power and have limited ability to adopt bylaws).

220 THE PANEL ON TAKEOVERS & MERGERS, THE CITY CODE ON TAKEOVERS AND MERGERS, Rule 21 (10th ed. 2011), *available at* http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/code.pdf; *see also id.* at Gen. Principle 3 (stating that the board "must not deny the holders of securities the opportunity to decide on the merits of the bid"). *See generally* Armour & Skeel, *supra* note 216, at 1729 (explaining that the United Kingdom's self-regulation system protects investors by preventing management from engaging in defensive efforts to block a takeover).

221 *See* Bebchuk, *supra* note 16, at 896 ("[S]hareholders [should have] the power to adopt binding resolutions instructing management not to block a particular tender offer.").

222 *See* Armour & Skeel, *supra* note 216, at 1735–77. For an overview of U.K. takeover regulation, see generally *id.*

do more as shareholders in U.K.-incorporated or LSE-listed firms simply because they *can* do more things.[223]

Relatedly, investors may choose to invest more in activism because there is a greater payoff to activism. A U.S. investor who is largely passive in the U.S. could hire experts in shareholder activism to work on their U.K. portfolio because there is greater scope for activism in the United Kingdom.

Finally, there may be a selection effect. Investors may choose to invest because a situation affords them the ability to be more active. When a body of corporate law provides a minority veto in a freezeout, that veto right may provide an attractive investment opportunity.[224]

Thus, although there is evidence that hedge funds pay attention to corporate law rules when choosing investments, there is little evidence that institutional investors like Fidelity are more active in the United Kingdom or invest more in activism because of these differences.[225]

C. New Investor Relations: Strategic Engagement with Key Shareholders

It is now accepted that the shareholder base has been transformed: ownership is more concentrated than ever; shareholders vote on ever more matters; shareholder activism is a fixture of the corporate governance landscape, with proxy contests, short-slate proxy contests, and "just vote no" campaigns relatively common; Institutional Shareholder Services (ISS) has emerged to play a critical role, either as a catalyst, a conduit, or an initiator, depending on one's perspective; and shareholder passivity seems to be a vestige of the past.

While some bemoan these changes, others recognize the opportunities that arise out of these developments in the corporate governance landscape. A few pioneers with deep contacts among institutional investors have begun to play an intermediary role between issuers and their shareholders. In contrast to traditional IR efforts (the continuous communication function described above)—this "New Investor Relations" function tends to be more episodic, led by high-level outside actors, and involves the highest levels of the company. This version of "managing the shareholder relationship" takes seriously the current importance of empowered shareholders and

223 Fidelity U.S. and Fidelity U.K. have some overlapping ownership (the Johnson family owns just under half of each) but are independent firms. For a long time, Fidelity U.S. delegated the selection and management of U.K. investments to Fidelity U.K. *See* Telephone Interview with Eric Roiter, former Gen. Counsel, Fidelity (Sept. 14, 2011).

224 *See* Marina Strauss, *Desjardins Heads to the Sears Checkout; Outspoken Sears Canada Minority Investor Quietly Sells Its Stake After Hedge Fund's Bid to Take It Private Fails*, GLOBE & MAIL (Canada), Apr. 25, 2007, at B5.

225 *See* Telephone Interview with Eric Roiter, *supra* note 223.

seeks to shape that relationship.[226] It can thus be understood as a potentially important part of the second type of shareholder eugenics; namely, the shaping of shareholders of a bad or unknown type into shareholders of a good type.

Examining a couple of the pioneers of the New Investor Relations will help bring the role into better focus. Wilcox is now the chair of Sodali, a European-based consulting firm whose "mission is to help companies anticipate, understand and deal effectively with the expectations of investors, minority shareholders and the financial markets. To this purpose, it provides strategic advice, governance education, research, communications and transactional services designed to optimize Companies' responsiveness towards their debt and equity holders."[227]

Wilcox comes to this role with a long, deep relationship with the shareholder community. For many years, he was a senior figure (and chairman) at Georgeson & Company, a leading proxy solicitation firm. He subsequently moved to TIAA-CREF, a leading institutional investor, where he was Senior Vice President and Head of Corporate Governance.[228] He thus brings contacts from the institutional investor world to his new role of helping firms improve their relationships with their shareholders.

In arguing that IR and corporate governance are converging, Wilcox explains that:

> Shareholders now want to know how board decisions serve their long-term interests. The board's willingness and ability to explain its decisions, disclose its procedures and clearly articulate its policies and goals are particularly important with respect to the following issues: remuneration, "tone at the top," CEO leadership, ethics, entrepreneurial spirit, internal equity and employee morale, integrity, business standards, social policy and community relations. If the board's explanation of its policies and decisions is clear and convincing, shareholder support will not waver.
>
> The barriers to the convergence of IR and CG are primarily behavioral and practical, not legal. The reasons include: unwillingness to change old ways and habits, defensiveness, outdated assumptions, ego, bad advice, peer pressure, inertia, privilege, vested interests, fear.[229]

---

226 *See generally* Bushee & Miller, *supra* note 96 (discussing how firms' use of IR strategies can lead to a larger, more knowledgeable shareholder base and an improvement in the firms' market valuation).

227 SODALI, http://www.sodali.com (last visited Mar. 11, 2012).

228 *John Wilcox*, SODALI, http://www.sodali.com/aboutus/boardmember/johnwilcox.htm (last visited Mar. 11, 2012).

229 John Wilcox, Presentation Outline: Is There a Convergence of Investor Relations and Corporate Governance?, SODALI (Jan 19., 2010), http://www.nevir.nl/att_documents/Sodali%20-%20IRGR%20-%20Amsterdam%20-%202010.03.23.pdf; *see also* Richard H.

Christopher Young provides another glimpse over the horizon. In 2004, Young joined ISS as Director of M&A and Proxy Fight Research.[230] In that capacity, his role was to build ISS's analytic capacity in evaluating contested transactions and proxy fights to provide better voting advice to ISS's investor clients.[231] He came to this role with a background in investment banking and M&A law. While at ISS, he played a role in nearly every high profile deal or proxy fight and developed contacts with a wide range of leading institutional investors.[232]

In the spring of 2010, Young left ISS for Credit Suisse to become head of the Takeover Defense practice within the M&A group.[233] To his new role, Young brings a Rolodex full of shareholder contacts and a strong sense of their concerns. This knowledge puts Young in a position to alert companies to emerging shareholder dissatisfaction and allows him to work with companies to better explain themselves to their key shareholders. The idea seems to be that investors, who know and trust Young from his days at ISS, will still be willing to return his phone calls.

This is an "investor relations" function, but with a twist. It focuses on contentious or potentially contentious situations; becomes crucial when there is a proxy fight over a transaction or a board election; is directed at the highest levels of the company and investor community; and, when it works, is a spring board for an investment-banking relationship with the company. What is so interesting about the role is that it takes shareholder empowerment as a given and asks how firms can improve relationships with their shareholders so that the shareholders will be supportive rather than resistant.

Wilcox and Young are both betting on a new corporate governance landscape in which influential shareholders are a salient feature. With that starting point, they are carving out roles facilitating productive engagement between firms and their shareholders—engagement that goes beyond "check the box" corporate governance and can shape the shareholders' involvement in the firm. That engagement is in the interests of both firms and shareholders and will sometimes be decisive.

Koppes, *Structural Strength: A Team Approach Provides the Best Support for the Triangle of Corporate Governance*, 6 INVESTOR REL. Q., no. 3, 2004 at 4, 4 (suggesting that the IR officer should participate in corporate governance).

230 *See* Press Release, Credit Suisse, Chris Young to Join Credit Suisse as Head of Takeover Defense in its Investment Bank (Apr. 14, 2010), *available at* https://www.credit-suisse.com/news/en/media_release.jsp?ns=41456.

231 David Marcus, *Ready for Battle*, DEAL MAG. (June 4, 2010, 11:57 AM), http://www.thedeal.com/magazine/ID/034597/dealmakers/weekly-movers-and-shakers/ready-for-battle.php.

232 *See id.*

233 *See id.*

In the New Investor Relations, the legal framework of traditional IR discussed above—Regulation FD, the 2003 Global Research Settlement, and federal securities law—is beside the point. Instead, two rather different features of the legal landscape are more prominent. The first feature, ERISA, provides some of the motivating force behind shareholder activism and the prominent role of ISS. Over the last decade, the recognition that ERISA requires that covered fiduciaries treat corporate votes as an asset, and therefore manage them prudently, has pushed institutional investors to fulfill those duties by relying on, or at least subscribing to, outside recommendations from proxy advisory firms. The idea has been that it is reasonable for an ERISA fiduciary to rely on an expert proxy advisory consultant. From this perspective, the fees paid to ISS and Glass Lewis can be thought of as rather minor "ERISA insurance" premiums.[234]

The second feature of significance is the entrenched liability-focused culture of the U.S. boardroom. The overall shape of U.S. securities law—with multiple rules, detailed requirements, and robust public and private enforcement—has engendered a compliance-focused mentality. This mentality, as Wilcox has argued,[235] stands in the way of productive, informative communication between public companies' boards and their shareholders. It is difficult to imagine managers and directors of a U.S. public company sitting down with major shareholders to discuss their strategic vision openly and directly in a setting unscripted by lawyers. Such a dialogue, common in the private equity or venture capital world of privately held corporations, can clearly be of great value to both firms and investors, but is nearly unimaginable in the current environment.

D. Alternative Capital Structures as Shaping Strategies

A variety of other strategies may significantly shape the shareholder base within the U.S. system. In this regard, consider two options that firms may use in shaping their capital structure: dual-class shares and tenured voting.

---

234 *See* Alan R. Palmiter, *Mutual Fund Voting of Portfolio Shares: Why Not Disclose?*, 23 CARDOZO L. REV. 1419, 1442–43 (2002) (stating that the Department of Labor "has recognized that proxy votes have economic value and that pension managers have fiduciary responsibilities in voting portfolio shares").

235 *See* Wilcox, *supra* note 109, at 3–4 (arguing that "textbook compliance with governance rules [does] not guarantee good governance in practice" and suggesting that boards of directors increase and improve communication with shareholders).

1. *Dual-Class Shares*

Dual-class shares—a capital structure in which one class of shares is low- or nonvoting while the other class of shares is high-voting[236]—will shape the shareholder base both by shaping the shareholder's role and through the resulting selection effects. When a single shareholder or group holds the high-voting shares, the effect on the investors holding low- or nonvoting shares will be identical to the controlling shareholder structure described above. As with controlling shareholder structures, a dual-class capital structure largely eliminates low-voting shareholders' ability to influence the course of the company through the normal ways, such as electing directors or voting on significant decisions or transactions. As such, dual-class shares tend to turn shareholders into passive shareholders, except insofar as low-voting shareholders play a special role in regulating related-party transactions (which may make some shareholders hyperlitigious).

In principle, although rarely in practice, a company may have a dual-class capital structure but no controlling shareholder or group.[237] In this context, the shaping function of the structure and its selection effects would be quite obvious: shareholders who wished to be active could opt into the high-voting shares; those who wished to be passive could opt into low-voting shares. The fact that such a structure is either rare or nonexistent is good evidence that the use of dual-class capital structures is tightly linked to maintaining control with less than a majority of the equity in the firm. As such, in terms of the effect on the shareholder base, dual-class structure can be analyzed in the same way as control shareholder structures.

The evidence of the agency costs created by dual-class structures is quite robust.[238] This raises the principal downside of dual-class structures: they allow a controlling shareholder to maintain control without continuing to own a majority of the equity in the company. This, in turn, exacerbates the divergence of control rights and cash

---

[236] *See* 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S CLOSE CORPORATIONS AND LLCS: LAW AND PRACTICE § 3:21 (rev. 3d ed. 2011).

[237] *See, e.g.*, FAQs, TRONOX INC., http://www.tronox.com/reorganization/rorg_emerge/rorg_emerge_faq.htm (last visited Mar. 11, 2012) (explaining the company's current capitalization, which converts prebankruptcy shares of common stock into two different series of warrants); *Tronox Emerges From Chapter 11: Exits Bankruptcy as a Much Stronger Company with a Right-Sized Capital Structure*, TRONOX INC., http://www.tronox.com/reorganization/rorg_emerge/news_Tronox_Emerges_Chpt_11.htm (last visited Mar. 11, 2012) (stating that the company has emerged from bankruptcy with a "new capital structure").

[238] *See generally* Paul A. Gompers, Joy Ishii & Andrew Metrick, *Extreme Governance: An Analysis of Dual-Class Firms in the United States*, 23 REV. FIN. STUD. 1051, 1053–81 (2010) (analyzing the impact of ownership rights on firm value and finding that maintaining insider control reduces the value of the firm); Ron W. Masulis, Cong Wang & Fei Xie, *Agency Problems at Dual-Class Companies*, 64 J. FIN. 1697, 1697–1722 (2009) (finding that firm value declines as insiders gain more control rights because of the agency problem).

flow rights, creating incentives to take private benefits of control. Yet, at the same time, some of the most successful companies in the United States have dual-class structures, including Berkshire Hathaway, Comcast, Ford, Google, Liberty Media, News Corp., Turner Broadcasting, and Viacom.[239] Evidently, in large companies with substantial need for equity capital, dual-class structures are a useful and perhaps essential way to maintain a controlling-shareholder structure. The success of these companies suggests that the benefits of controlling-shareholder structures may sometimes outweigh the costs that accompany dual-class capitalization.

2. *Tenured Voting*

Tenure Voting (TV), also known as time-phased voting, is a strategy for giving long-term shareholders more votes than short-term shareholders.[240] It can be implemented in a variety of ways. At Potlatch Corp., a forest products company that adopted TV as an antitakeover measure in 1985, shareholders who held for four years or longer received four votes per share, while shareholders who held for a shorter period could cast one vote per share. Upon adoption in 1985, Potlatch presumed that each shareholder had held for more than four years and received four votes per share. As shares were sold, they dropped down to one vote per share.[241]

As a technical matter, implementation was straightforward: record shareholders were presumed to have held the shares for the period shown in the share registry; nominees were presumed to have held shares for less than four years, unless otherwise certified on the voting instruction form (subject to verification by Potlatch). Potlatch provided exceptions, *inter alia*, for shares acquired pursuant to certain employee benefit plans and shares acquired by gift, inheritance, or under the terms of a trust.[242]

---

239 *See* Paul Schultz & Sophie Shive, Mispricing of Dual-Class Shares: Profit Opportunities, Arbitrage, and Trading 57–60 (Oct. 29, 2009) (unpublished manuscript), *available at* http://ssrn.com/abstract=1338885 (listing dual-class firms through 2006); *see also, e.g.*, News Corp., Annual Report (Form 10-K), at 114 (Aug. 6, 2010) (stating that the company has two classes of common stock); Elinor Mills, *Google Sticks with Dual-Class Structure*, CNET NEWS (May 11, 2006, 5:45 PM), http://news.cnet.com/2100-1030_3-6071494.html.

240 *See* 1 ARTHUR FLEISCHER, JR. & ALEXANDER R. SUSSMAN, TAKEOVER DEFENSE: MERGERS & ACQUISITIONS § 6.04 n.77 (7th ed. 2011).

241 *See* Potlatch Corp., Definitive Proxy Statement (Form DEF 14A), at 31 (Mar. 30, 2005) [hereinafter Potlatch Corp. Proxy Statement 2005]; Potlatch Corp., Definitive Proxy Statement (Form DEF 14A), at A-1 (Apr. 5, 2004) [hereinafter Potlatch Corp. Proxy Statement 2004].

242 *See* Potlatch Corp. Proxy Statement 2005, *supra* note 241, at A-1.

Alternative models are available. The line between short-term and long-term can be adjusted.[243] Shares can gain increased votes more gradually (e.g., by one vote per year to a maximum of four votes). The ratio in voting power between short-term and long-term shares can vary.[244] It can be entirely prospective so that all shareholders start out with short-term shares and only those who hold end up with long-term shares. Each implementation can have a different effect on the shifting of influence among the shareholding population.

In all of its versions, however, the effect of TV is to give long-term shareholders (however defined) a bigger say. As such, it is a particularly interesting shaping strategy. Consider the following shareholder profile, which provides a rough example of a widely held company:

x < 1 year: 25%
1 year < x < 2 years: 25%
2 years < x < 4 years: 25%
4 years < x: 25%,

where x is the holding period. Assuming the company has 100 shares outstanding, without TV there would be twenty-five votes in each category. Under TV with a four-year trigger, by contrast, the voting rights would be distributed as follows:

x < 1 year: 25 votes
1 year < x < 2 years: 25 votes
2 years < x < 4 years: 25 votes
4 years < x: 100 votes.

In other words, under TV, shareholders who held for less than a year would have to convince at least a portion of the 4+ year shareholders to vote with them to carry the day. If a single shareholder is the 4+ year holder (e.g., a founder), TV will give that shareholder voting control.

Unlike mechanisms that shift the focus of decision making from shareholders to the board of directors, like the poison pill, TV shifts decision-making power within the shareholder group. In shifting decision-making power to long-term shareholders, it provides greater incentives to longer-term shareholders to invest in making those decisions and greater incentive to remain shareholders to enjoy the increased voting rights. If length of ownership is a reasonable proxy for being a good shareholder (a highly contestable proposition on which I take no position), then TV shifts power from bad shareholders

---

243 For example, at Milacron, the holding period was three years. Williams v. Geier, 671 A.2d 1368, 1372 (Del. 1996).

244 At Milacron, the ratio was 1:10. *Id.* (shareholders received one vote per share until they had held their shares for three years, at which point they received ten votes per share). At Potlatch, it was 1:4. *See* Potlatch Corp. Proxy Statement 2005, *supra* note 241 (long-term shares received four votes while short-term shares received only one).

(and, in doing so, rendering them more passive) to good shareholders or to shareholders who, by virtue of their greater power, will become good. TV can thus shift the character of the shareholder base.

The downsides are the inverse of the upsides. TV may cement control in a group of insiders with a smaller equity stake thereby creating or aggravating a divergence of decision-making power and share of cash flows. Long-term shareholders may be less responsible than short-term shareholders if long-term shareholders are typically index funds who, in competing on price, resist portfolio firm-specific investments, while short–term shareholders include hedge funds with focused financial incentives because of lack of diversification.

3. *Regulatory Treatment*

As a matter of substantive corporate law, Delaware has long permitted both dual-class and TV capital structures, so long as they were clearly spelled out in the charter.[245] At present, it is also permissible under federal securities regulation. The most significant legal barrier arises from stock exchange listing requirements: all the major exchanges prohibit midstream adoption of either.[246]

Federal securities law takes no official position regarding departures from one-share, one-vote. In general, voting rights are considered a part of state corporate law defining the fundamental rights that shareholders have.[247] In the late 1980s, in response to a wave of dual-class restructurings perceived as abusive, the SEC departed from this general view and adopted rule 19c-4, which mandated that stock exchanges adopt a rule prohibiting the listing of shares of any company that "issues any class of security, or takes other corporate action, with the effect of nullifying, restricting or disparately reducing the per share voting rights of holders of an outstanding class or classes of common stock of such issuer registered pursuant to section 12 of the Act."[248] The text of the rule and discussion made clear that this prohibited any "corporate action to impose any restriction on the voting power of shares of the common stock of the issuer held by a beneficial or record holder based on the length of time such shares have been held by such beneficial or record holder," namely, TV.[249] The stock

---

245 *See* DEL. CODE ANN. tit. 8, § 151 (2011). In *Williams v. Geier*, the Delaware Supreme Court explicitly recognized the validity of Milacron's charter amendment to adopt a "tenure voting" system in which shares held for three years received ten votes per share. 671 A.2d at 1372.

246 *See* Robert B. Thompson, *Delaware, the Feds, and the Stock Exchange: Challenges to the First State as First in Corporate Law*, 29 DEL. J. CORP. L. 779, 794–97 (2004) (detailing the SEC's and the exchanges' relationships to dual-class voting).

247 *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89 (1987).

248 Voting Rights Listing Standards, 53 Fed. Reg. 26,376–01 (July 12, 1988).

249 *Id.*

exchanges complied. Subsequently, although the SEC rule was held invalid,[250] the stock exchanges proposed, and the SEC approved, nearly identical rules.[251]

The NYSE listing requirements provide that:

> Voting rights of existing shareholders of publicly traded common stock registered under Section 12 of the Exchange Act cannot be disparately reduced or restricted through any corporate action or issuance. Examples of such corporate action or issuance include, but are not limited to, the adoption of time phased voting plans, the adoption of capped voting rights plans, the issuance of super voting stock, or the issuance of stock with voting rights less than the per share voting rights of the existing common stock through an exchange offer.[252]

The current state of play, then, is that firms may go public with dual-class and TV capital structures but may not amend their charters to adopt it midstream.

The basis of the prohibition of midstream changes was a concern that disorganized shareholders, in a version of the familiar prisoner's dilemma, could be manipulated to vote in favor of a midstream change that is not in their interests. For example, by tying a sweetener to the value-reducing change, disorganized shareholders could rationally vote for a change that reduces the value of their shares.[253]

In an age of empowered shareholders, in which firms should think about selecting and shaping an optimal shareholder base, prohibiting a key design tool is inappropriate. With everything else we let shareholders vote on—exculpating directors under Delaware General Corporation Law section 102(b)(7), say on pay, 14a-8 proposals, director elections, mergers—not trusting them to vote intelligently on midstream changes to capital structure is unnecessary. This

---

250 Bus. Roundtable v. SEC, 905 F.2d 406, 417 (D.C. Cir. 1990).

251 *See* Notice of Filing of Proposed Rule Changes by New York Stock Exchange, Inc., et al., Relating to the Exchanges' and Association's Rules Regarding Shareholder Voting Rights, 59 Fed. Reg. 42,614–01 (Aug. 18, 1994).

252 *NYSE Rule 313.00 Voting Rights*, NYSE, http://nysemanual.nyse.com/LCMTools/PlatformViewer.asp?selectednode=chp%5F1%5F4&manual=%2Flcm%2Fsections%2Flcm%2Dsections%2F (last visited Mar. 11, 2012). The NASDAQ and Amex rules are to the same effect. *NASDAQ Rule 5640. Voting Rights*, NASDAQ (Mar.12, 2009), http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F4%5F2&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2Dequityrules%2F; *NYSE Amex Rule Sec. 122. Common Voting Rights*, NYSE AMEX, http://wallstreet.cch.com/AMEXtools/PlatformViewer.asp?SelectedNode=chp_1_1_1&manual=/AMEX/CompanyGuide/amex-company-guide (last visited Mar. 11, 2012).

253 *See* Jeffrey N. Gordon, *Ties That Bond: Dual Class Common Stock and the Problem of Shareholder Choice*, 76 CALIF. L. REV. 1, 48–49 (1988); *see also* Ronald J. Gilson, *Evaluating Dual Class Common Stock: The Relevance of Substitutes*, 73 VA. L. REV. 807, 832–34 (1987) (illustrating how public shareholders will participate in dual-class transactions due to incentives, even though the transaction is not in their collective best interests).

is not to say that shareholders or firms will choose these structures: Potlatch eliminated its time-phased voting system in 2005 in response to institutional shareholder pressure, organized by ISS.[254] But firms and shareholders should at least have the option to experiment with different ways of shaping the shareholder base.

Conclusion

Shareholders occupy one vertex of the corporate governance triangle. As the metaphor suggests, and as I have argued above, the identity of the shareholders and their fit with the board of directors and the managers (the other two vertices) are potentially important to firm value. What, then, are the implications of this analysis for legal policy and firms? Are there practical takeaways? I think there are several.

First, rather than passively accepting whatever shareholder base emerges and then complaining about it, public companies should think about who they want as shareholders and why. As I show above, companies can do quite a lot to select and shape a productive shareholder base.

Second, once companies decide what sort of shareholders they want, they should think systematically about how to create the desired shareholder base. Given the potential effect of shareholder base on firm value, crafting the optimal shareholder base is a strategic decision for the firm. Choice of corporate domicile, stock exchange, public image, disclosure policy, stock price and liquidity, and many other factors affect what sorts of shareholders are attracted to a given company. For example, before splitting shares, a board should think about how it will affect the composition of the shareholder base, and, in particular, whether the benefits of increased liquidity will offset any harms from a shift to shorter-term shareholders.

Third, the IR function, in its various forms, is a key part of shaping a shareholder base. Building relationships around fundamental issues of corporate strategy and policy rather than quarterly earnings reports holds the potential for changing an adversarial relationship into a more cooperative and productive one. There are a variety of proposals for how this might be done. A "Directors' Discussion and Analysis" section of the proxy statement or annual report would be a starting point. Regular meetings between the board and major investors on topics such as corporate strategy, risk control, compensation, ethics, CEO succession, and ESG (environmental, social, and corpo-

[254] *See* Potlatch Corp. Proxy Statement 2005, *supra* note 241, at 31; INSTITUTIONAL S'HOLDER SERVS., PROXY ANALYSIS, POTLATCH CORP. 10 (May 3, 2004); INSTITUTIONAL S'HOLDER SERVS., PROXY ANALYSIS, POTLATCH CORP. 10 (May 2, 2005).

rate governance) could be a useful way to create good shareholders.[255]

Fourth, corporate architecture can be a powerful force. If a firm's structures empower (or pacify) shareholders in particular ways, it will attract particular sorts of shareholders and shape the ones it attracts. A legal rule that casts shareholders as the monitor of conflicted transactions will produce shareholders willing to sue over conflicted transactions. We should remove regulatory barriers that block architectural experimentation such as the prohibition on midstream adoption of departures from one-share, one-vote.

Fifth, the law needs to avoid chilling communication and transforming the shareholder–board relationship into a lawyer-driven, sterile interaction. For example, creating a safe harbor from Regulation FD for a defined set of "high level" topics would facilitate productive communication. The model should be the sort of relationship that exists between private equity funds or venture capitalists and the managers in a private company, with the exclusion of price-sensitive information like earnings.

Sixth, managers, boards, investors, and regulators need to rein in their distrust of all things new or unusual. We need not be suspicious of every communication between boards and shareholders. Directors are not necessarily going behind the CEO's back. Investors are not necessarily seeking to trade on material nonpublic information. Large investors do not necessarily disadvantage small investors when they get privileged access to directors and managers.

Seventh, productive relationships between investors and companies are likely to be company specific and thus unlikely to be susceptible to "check-the-box," "one-size-fits-all" solutions. "Best practices" may be a useful starting point, but investors and companies should be open to alternative approaches.

Finally, intermediaries (e.g., lawyers, bankers, consultants) may want to find ways to profit from the transformed landscape of corporate governance in which shareholders are more active and advisory firms give advice.

Although there are good reasons to believe that the composition of the shareholder base and the firm–shareholder relationship matter, concerns with the shareholder base have largely fallen outside of the corporate governance debate. This Article is an attempt to bring these matters into the discussion. Indeed, once one starts thinking about how firms shape their shareholder base, it turns out that there are numerous ways to do so. Sometimes the law helps; sometimes it hinders. In this preliminary inquiry, I have sought to map the land-

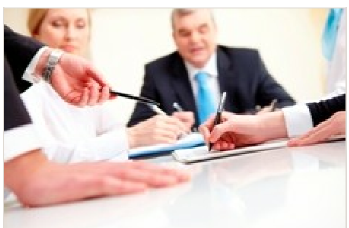
255 *See* Wilcox, *supra* note 109, at 4.

scape and to appreciate some of its salient features. As Buffett suggests, contrary to first impressions, shareholder eugenics is not an entirely hopeless undertaking.

CODICE ETICO

Finanza e Etica: Code of Business Conduct

Alessio Brotto, ACIPR Financial Times Group, Mergermarket 08 maggio 2012



Un'istituzione finanziaria senza etica è un rebus di improbabile soluzione. In tempi di crisi occupazionale sembra sempre più importante che la classe dirigente europea e internazionale affermi e costruisca una condotta eticamente giusta e onesta.

La comunità finanziaria si pone delle domande dopo il terremoto che ha generato Greg Smith ex-Goldman Sachs con le sue dichiarazioni sulla banca americana. Dopo aver lasciato il suo posto dirigenziale, ha descritto la sua esperienza in un editoriale pubblicato sul New York Times (http://www.nytimes.com/2012/03/14/opinion/why-i-am-leaving-goldman-sachs.html?_r=3).

Interpellato sullo stesso tema, anche Lynn Turner ex-economista alla SEC, esprime la sua opinione sul sistema finanziario ormai in cerca di un codice di autoregolamentazione. Fra le varie iniziative di autodisciplina, John Wilcox, presidente di Sodali, ha introdotto il *Code of Business Conduct* che sta risquotendo ottimi consensi tra gli operatori del settore. Il codice vuole reintrodurre l'etica nella finanza e evitare conflitti di interesse come quelli sorti ai tempi di Stephen Friedman alla FED e a Goldman.

I recenti scandali che hanno coinvolto Goldman non sono casi sporadici che si limitano a una sola banca, basti pensare all'esempio di un altro direttore James Johnson, ex CEO di Fannie implicato in uno scandalo quando Obama lo voleva includere nella sua squadra. John Wilcox nel suo Codice ha voluto fortemente un paragrafo fondamentale sul conflitto d'interessi, perchè proprio la reputazione, deve essere a cuore di ogni società finanziaria.

Mai come nei periodi di transizione si assiste al sorgere di fenomeni nuovi che si presentano, al contempo, come cause e indicatori dei mutamenti in atto. Goldman Sachs è da sempre considerata come la più importante banca d'investimento al mondo e le parole di Greg Smith che descrive la banca come tossica e distruttiva hanno mosso il palazzo. Invece, le iniziative come il codice, vogliono far ritornare l'integrità e lo spirito di umiltà nel settore finanziario. John Wilcox vorrebbe che questo documento così fondamentale per ristabilire la fiducia dei clienti fosse implementato in un codice di autodisciplina approvato dal Comitato per la Corporate Governance delle società. La governance delle società in questo senso può recepire il codice, ma varierà in base all'*industry* e alla regione, basti pensare alle complicazioni date dalla corruzione nei mercati in via di sviluppo soprattutto in *Oil&Gas* e *Healthcare*.

Infine, un altro paragrafo importante del codice è la riservatezza. Sodali ci tiene a poter mantenere le informazioni degli investitori in totale sicurezza proprio quando invece si legge dalla stampa che alcuni proxy servers sono stati coinvolti in fuga di notizie riservate in cambio di denaro. Ovviamente le diverse giurisdizioni hanno già indicato quello che le società devono e non devono pubblicare o regolamentare. Il sistema americano, anglosassone e italiano sono sicuramente in momenti diversi della loro evoluzione e solamente nei mesi successivi sapremo cosa sarà introdotto nella regolamentazione vigente.

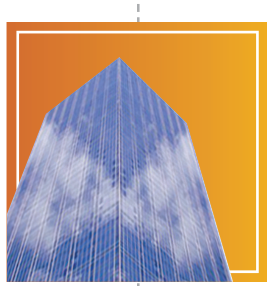
- Investors are seeking more input into board decisions than ever before
- Board should limit communications with shareholders to governance issues
- Policies should be made public through proxy statements and websites
- Information learned from listening to shareholders can be invaluable

By Peter Firestein

Should directors engage investors directly?

Large investors are expressing interest in talking to corporate boards with an intensity that has seldom, if ever, been seen before. At the same time, there is little precedent to prepare directors to address such challenges.

The emerging prominence of boards presents a stark departure from the traditional corporate culture in which boards were often seen to be part of the CEO's team rather than the body that held him or her accountable. And it has always been the CEO and other members of the executive team who have provided investors with perspective on the company, not the board. Now, an evolution of the relationship between directors and investors is under way. And it is appropriate: if one of the board's fundamental purposes is to represent the interests of shareholders, it would appear that part of its obligation is to be transparent to those shareholders.



This new level of interchange is equally appropriate from the shareholder side. As John Wilcox, chairman of international consultancy Sodali, observes: 'When the shareholders elect directors, they're supposed to be making an informed decision – but how can they if there's no communication? Investors' own commitment to act responsibly requires this dialogue.'

The trend toward greater communication between boards and investors is, in part, being fostered by new regulation. Dodd-Frank rules now enable non-binding say-on-pay votes, forcing boards to consider investors' opinions on executive compensation. In the past, there was no reason for those views to enter the boardroom.

The notion of shared responsibility for good governance among boards and investors has taken shape in the UK with an investors' Stewardship Code. It constitutes an agreement among investors to promote good governance in direct interaction with companies, particularly in areas too subtle for regulation, such as corporate culture, risk assessment and allocation of resources.

The reasons behind these changes are not hard to discern. It is no coincidence that investors' interest in engaging board members has followed the financial meltdown. The 2008 crisis raised enormous questions about governance, not only among financial institutions but throughout the entire corporate sector. Over the last decade, increased interest in corporate impact on the environment and workers' rights has attracted additional attention to the principles that underlie corporate strategy and action.

For these and other reasons, governance has grown in investors' minds as a risk factor. As part of this evolution, the points of interaction investment companies present to corporations are no longer confined to portfolio managers and equity analysts. Increasingly, they include governance professionals who make decisions on investors' proxy voting. This can have far-reaching ramifications for any company.

But why would any director want to submit himself or herself to the scrutiny of investors? Is it a path to anything but increased criticism and liability? In fact, directors can find success in addressing the demand for greater engagement by coming to understand why investors find such conversations of interest – and the contexts in which they are appropriate.

Rules of engagement

There is no reason for a board to engage with investors other than to address subjects that lie in the board's domain rather than the executives'. Conversations with investors should therefore be restricted to the process of governance. While this may seem limiting, there is in fact little of interest to investors that the process of governance does not touch.

Perhaps most obvious is the subject of executive compensation. Investors know, for example, that many CEOs have been incentivized to assume outsized risks – a factor that may become evident only after the boss has departed. Is a CEO's pay calibrated to earnings per share growth (a short-term measure) or to return on capital (considered to have a longer-term orientation)? You can't really talk to the CEO about this; it has to be the board. And it is an issue that has everything to do with the company's sustainability.

> 'Shareholders are supposed to make an informed decision, but how can they if there's no communication?'

Nor can you speak to the CEO about a plan for his or her successor. That is a subject for the board, and even then, it is a matter of considerable delicacy. Directors are not obliged to discuss likely names, particularly in view of the possible effect on individuals in the company who consider themselves contenders. But directors are in a position to reassure investors that there is a rigorous process in place that will access the right talent at the right time.

The relevance of any subject to the governance process is the primary determinant of whether it is appropriate for discussion. Confining the discussion to process offers directors their primary source of protection in conversations with investors. Comprehensive training is therefore essential.

Yet preparing directors for such engagement has less to do with 'coaching' (though that's a must) than it does with the ways in which governance is carried out at the company generally. This means the company must have processes of good governance in place and must adequately describe its policies through proxy materials and its website. 'This creates an umbrella of publicly available information,' says Catherine Dixon, a partner at law firm Weil Gotshal & Manges. 'It enables you to talk about anything already fully and fairly disclosed.'

Disclosure matters

Many board members' biggest concern lies in the fear of violating Regulation Fair Disclosure (Reg FD) rules by inadvertently revealing information to parties present in a meeting that, under SEC rules, should be disclosed to the entire market at once. Sticking to process – rather than strategy, or even the most innocuous references to future performance – will generally protect directors against Reg FD vulnerabilities.

Another protection is the presence of corporate counsel who can guide the conversation when necessary and, in the worst case, issue a press release containing any mistakenly disclosed information to bring the company back into compliance with Reg FD.

Common sense in approaching an investor meeting means requiring investors to submit their agenda ahead of time, along with the names and functions of the individuals who will be present. Are they from the proxy side of the institution, the investment side, or both? Requiring submission of the agenda also enables the board to prepare content and to decide which of its members are most appropriate for the meeting.

Helping investors understand the company's governance processes represents no more than half the value the board can derive from the meeting. Listening to investors constitutes the rest. Investors are under no disclosure restrictions with regard to saying how they feel about the company, how they value it and even how they regard it personally. What the board can learn from listening to such opinions is unpredictable, but often invaluable.

There are other invaluable benefits from such personal interaction. 'Engaging with investors may be one of the best ways to soften situations that might otherwise end up as undesired proxy proposals or lawsuits,' says Carolyn Brancato of the Conference Board. CS

Peter Firestein is president of Global Strategic Communications in New York

IR Magazine | Inside Investor Relations, March 29, 2012 article

INSIDE INVESTOR RELATIONS brought to you by IR magazine

Prep and planning on pay and performance

by Janet Dignan | 29 Mar 2012

A look ahead to the 2012 proxy season

The incoming proxy season will mean different things for different companies, but most should see it as a season of observations and preparation – an opportunity to prepare better responses to critical governance issues by refining, researching or reconstructing their strategies for next year and beyond. That's the view of Matthew Scott, editor of *Corporate Secretary*, the sister publication of *IR magazine*.

In the US, for example, almost all companies get a reprieve on pay disclosure issues because the SEC's final rules on clawbacks, chief executive pay ratios, pay for performance and hedging by employees and directors have been delayed until 2013.

'Companies in effect have another year to look at how others handle these disclosures, decide how they want to proceed and get help if they need it,' notes Scott.

'Moreover, when it comes to say on pay, observations of firms that received passing votes last year should have provided enough information to improve companies' chances of getting their votes through this proxy season.'

US companies also have this proxy season to observe how shareholder proposals filed under the new proxy access rules play out with regulators.

'The shareholder proposals that have already been filed should be studied extensively to determine what was done right or wrong,' Scott advises.

'Most of these proposals give companies insight into governance mistakes to avoid – now it's up to them to engage their investors and change policies to make sure they are not targeted in the same way next year.

'If any of the current proposals comes to an actual vote, it will instantly become the blueprint shareholder groups will use to influence proxy votes in the future.'

So 2012 may well turn out to be something of a watershed, setting the tone and clarifying the likely nature of debate in coming years. John Wilcox, chairman of Sodali, former head of governance at TIAA-CREF and past chairman of Georgeson, says he's noticed a lot more preparation going on in advance of the 2012 proxy season.

'That in itself is interesting,' he observes. 'Companies are now thinking ahead. In the old days they'd go blindly into the AGM assuming they'd get the vote.'

Now they do much more advance planning. ‘I see companies now being more savvy and figuring out where they’re likely to have problems – for instance, on compensation or split chair/chief executive roles or other corporate governance issues,’ Wilcox adds.

Major challenge

SEC rules or not, everyone – from the Occupy movement to members of government and religious groups – now endorses the need for shareholders to step up to the plate on this.

In the UK the coalition government is planning to introduce a binding vote on pay for shareholders, although this won’t actually come into force until 2014. The Netherlands, Norway and Sweden, on the other hand, already have binding votes.

So might this be replicated in the US, where last year was the first in which even an advisory vote was required, under Dodd-Frank?

‘I don’t think they’ll ever have a binding vote in the US,’ says Wilcox. ‘Shareholders are much more comfortable with an advisory vote; they want to be able to use it to express concern or disapproval and to get explanations.

‘They want companies to justify their decisions and explain what strategic goals are advanced by their incentive schemes, or how these will translate into increased shareholder value. But they recognize they don’t have the detailed knowledge to make the business decisions.’

For Wilcox, the idea that companies should do a better job of explaining their business decisions will be ‘one of the great governance themes of the next decade’.

These explanations will have to be ‘good, detailed and company-specific’ – which, Wilcox suggests, won’t be too big a deal for European companies, since they already live in a principles-based, comply-or-explain world.

He cites the UK’s Stewardship Code, which genuinely aims to enhance the quality of engagement between companies and shareholders, for instance by requiring investors to publish their voting policies. This helps companies understand the concerns of their key shareholders.

This development will, however, be ‘a very big challenge for US companies because of the legal restraints,’ says Wilcox. He points out that governance in the US is all about rules, whether at state level, SEC level or as established by the courts.

The compliance and governance space is populated with lawyers and rooted in the legal system; and the legal community is very cautious about allowing directors to speak to shareholders with candor.

Rather, ‘they are advised to disclose only what’s required by the rules,’ notes Wilcox. ‘That makes it difficult for boards to tell the story of how decisions are made and why they’re in the best interests of shareholders.’

For Wilcox it’s important there be a board role in compensation discussions and there needs to be discussion and dialogue about the advisory vote. ‘Companies fought tooth and nail against [the introduction of the vote] rather than managing it,’ he says.

‘It’s not been an efficient approach. It has made things more adversarial, which is unfortunate. My advice to companies has always been to have a non-confrontational approach.'

Under review

Perhaps this is one reason why only the US, of the 12 countries worldwide (see *Countries requiring a vote on pay*, below) now requiring some kind of shareholder vote on compensation, saw so much controversy over the mechanics of say on pay.

But the US is now in step and, significantly, companies there have to disclose in their compensation discussion & analysis whether and how they have taken into account the results of their last say-on-pay votes in determining their current compensation policies.

For ISS, that means companies with more than 30 percent opposition in 2011 (Glass Lewis' cut-off is 25 percent) will have to give a clear response on improvements to their pay practices if they want a 'yes' vote this year.

James Barrall of lawyers Latham & Watkins says the ISS policy 'puts 164 companies on the Russell 3000 Index in the crucible, including 50 S&P 500 companies.'

The most exposed, says Barrall, are the eight S&P 500 companies and the 38 Russell 3000 firms that got a 50 percent (or lower) support level.

GMI dubbed these results 'maybe on pay'; and Paul Hodgson of GMI suggested that where votes in favor were very low, this often prompted investors who had voted yes 'to take another look and see whether they were missing something.'

What they are typically looking for is any disconnect between pay and performance or between one company and the others in its peer group. But what does that peer group comprise and who decides this?

Anne Sheehan, director of corporate governance at CalSTRS, acknowledged in a Harvard Law School blog in late February 'the challenges companies face when selecting a peer group and that peer groups are entwined with performance measurement and compensation.'

But she charges that in some cases companies' justification for selecting a particular peer group 'is unacceptable because the number of companies in the group is too large, the sheer size of the companies is mismatched, or the peers are in an unrelated industry.'

Change in policy

ISS plans to evaluate CEO pay and relative performance against a peer group of its own choosing. This is a new policy for ISS, which says it will select peer groups of 14-24 companies on the basis of size (market cap, revenues, assets) and industry (the relevant Global Industry Classification Standard group).

It will also test the connection between pay and performance over the past five years, in another change from its past approach.

So companies have their work cut out for 2012. They will need a strong, clear narrative in their proxies on the question of pay for performance; and those in any doubt about the likelihood of getting a positive vote through should be engaging in active dialogue with shareholders sooner rather than later.

They might also think to include an executive summary at the beginning of the proxy statement, which proved popular with both shareholders and the SEC last year.

This year will at least be easier than 2013, when the SEC will have finally issued its disclosure rules on pay for performance.

In the meantime, in 2012, and for many years to come, the challenge for companies will be to bring their IR professionals and legal teams together to help senior managements and boards, wherever possible, to engage in constructive dialogue with shareholders – and just maybe find solutions in the common interests of both.

PIAZZA AFFARI RIVOLUZIONE DELLE REGOLE PER AZIONISTI E MANAGER

Canta vittoria l'investitore

La stagione delle assemblee si apre con soci stabili alla ricerca di alleati, più donne nei consigli amministrazione, fondi esteri all'attacco. E poi voto online, stop alle nomine incrociate...

ANDREA DUCCI

Prossima fermata le assemblee primaverili. Ad attendere il convoglio del vecchio capitalismo di relazione questa volta, però, non sarà una stazione di transito, ma un capolinea. Lo sfondo della stagione assembleare 2012 a Piazza Affari avrà due quinte: le nuove regole di partecipazione introdotte lo scorso anno e un quadro economico che ha minato il valore delle partecipazioni italiane. «Tradotto vuol dire che sono cambiati i pesi e gli attori in campo», spiega **Alvise Recchi**, fondatore e amministratore delegato della società di consulenza Sodali. «Nelle assemblee delle grandi aziende quotate l'intervento degli azionisti stranieri è destinato a crescere in modo esponenziale. A questo si aggiunga che i vecchi azionisti stabili di una volta, quelli, cioè, che contavano su solide maggioranze grazie agli amici e ai pattisti di turno, si ritrovano oggi con quote ridotte che talvolta faticano a superare la soglia del 30%». Un primo assaggio della rivoluzione si è toccato con mano lo scorso anno in Telecom, quando la lista di amministratori di minoranza depositata da Assogestioni, che ha capitalizzato il voto degli investitori stranieri, ha rischiato di avere la meglio sulla lista di maggioranza presentata da Telco. Uno scenario da brividi per la compagine formata da Telefonica, Mediobanca, Generali e Intesa Sanpaolo, che governa i destini del gruppo presieduto da **Franco Bernabè**. Ma lo sbarco in forze dei big stranieri ha avuto un secondo effetto: ha sbattuto fuori la lista presentata da **Marco Fossati**, che attraverso Findim risultava il primo singolo azionista esterno a Telco. L'ex proprietario del brodo Star è rimasto, insomma, escluso dal consiglio di amministrazione. Il punto è che analogo destino potrebbe toccare a molti altri abituati a sedersi al tavolo e a comandare anche grazie al machiavellismo italiano. A cambiare le regole del gioco è stata l'introduzione della record date. In pratica, per partecipare all'assemblea basta risultare come socio nel dossier titoli fino al settimo giorno precedente alla data assembleare. Un tecnicismo che ha sgombrato il campo da due paletti: oggi è possibile presentarsi senza essere azionisti (si possono vendere le azioni il giorno prima dell'assise)

Domenico Siniscalco

A fianco, la scultura di Maurizio Cattelan davanti a Piazza Affari, nella rielaborazione di Claudio Orlando: lo sfottò si tramuta in un segno di vittoria

e, inoltre, la partecipazione non prevede più il blocco dei titoli. Un congelamento, quest'ultimo, che scoraggiava gli investitori stranieri a esercitare i propri diritti. «Il risultato è stato un tasso di partecipazione tra il doppio e il triplo dei fondi internazionali», racconta **Domenico Siniscalco**, ex ministro dell'Economia e presidente di Assogestioni. «Sono intrigato da quanto sta accadendo. Si tratta di regole nuove che ci stanno traghettando fuori dal nostro vecchio modello di capitalismo. Abbiamo, in sintesi, degli ottimi ingredienti che ora dovranno essere cucinati da cuochi capaci. Dobbiamo, cioè, conquistarci la fiducia passo dopo passo. Assogestioni lo sta facendo indicando candidati di primo livello e privi di conflitto». L'esplosione della votazione da parte degli istituzionali stranieri si accompagna con la comparsa di più liste di amministratori da votare. «E quando ci sono tre liste qualcuno può restare a bocca asciutta e non ottenere neanche un posto in consiglio», sottolinea Recchi. Un caso che potrebbe verificarsi, per esempio, in Unicredit, dove l'idea di una governance dotata di un board più snello preoccupa le fondazioni azioniste di Piazza Cordusio. Non a caso da qualche settimana i vertici di Manodori, Cassamarca e Bds si tengono in stretto contatto con quelli delle fondazioni più grandi (Crt, Cariverona e Carimonte) nel timore di vedersi escluse da un consiglio leggero e opzionato da big stranieri come il fondo sovrano Aabar Investment che punta ad una o più poltrone nella stanza dei bottoni di **Federico Ghizzoni**.

A CHI VA IL FLOTTANTE

Assogestioni non ha ancora compilato un elenco definitivo delle liste da presentare, ma la certezza tra gli osservatori e gli addetti ai lavori è che tra le 115 aziende quotate con i consigli in scadenza sono in pochi a ritenersi al riparo da incursioni straniere e liste di minoranza. E l'arrivo del flottante nelle assemblee in appoggio alle liste alternative alla maggioranza si affianca alla consapevolezza che la discussione andrà oltre la scelta degli organi societari. In ballo non c'è soltanto la possibilità di contendere qualche posto ai

ENGAGEMENT MAGGIORE COINVOLGIMENTO DEI BIG DEL RISPARMIO GESTITO

L'invasione degli ultrafund

In francese e in inglese il significato è più o meno lo stesso. La parola engagement sottintende un forte impegno e coinvolgimento. Esattamente quello che i grandi investitori, un tempo silenti e invisibili ancorché interessati alla redditività, chiedono oggi come condizione per partecipare in modo stabile all'azionariato delle quotate italiane. Giganti come BlackRock e Fidelity dispongono di interi team che si occupano di corporate governance il cui compito è confrontarsi con le aziende per avere maggiore visibilità sul funzionamento degli organi societari, sui meccanismi che regolano le strategie e l'attività del board, così come sulle politiche di remunerazione. Niente di ostile, per carità, ma quando una signora come **Michelle Edkins** (*foto*) capo del team per la corporate governance and responsible investment di BlackRock, si fa viva per confrontarsi sulle best practice e approfondire con il management le strategie, sono in molti a tremare. Questi appuntamenti periodici servono pure a stabilire l'approccio da adottare in occasione delle assemblee. Un dettaglio che in Italia ormai non sfugge più a nessuno visto che gli stranieri a differenza del passato votano e che per fare approvare delibere particolari servono i due terzi dell'assemblea. Meglio, quindi, assecondare la voglia di engagement dei fondi internazionali. ***A.D.***

vecchi soci stabili di un tempo. «Chi non ha più una maggioranza stabile e deve fare approvare una delibera particolare su argomenti come un'operazione fra parti correlate o un aumento di capitale a sostegno di un piano di remunerazione può rischiare moltissimo», specifica Recchi. Gli effetti di questa nuova ventata sono, dunque, destinati a farsi sentire in maniera permanente visto che una partecipazione più accorta e consapevole dei grandi investitori istituzionali crea le premesse per la loro permanenza in veste di soci stabili. A ribadirlo è lo stesso Siniscalco, spiegando che i giochetti e le soluzioni barocche potrebbero allontanare i capitali stranieri, «siamo di fronte a un punto di ulteriore accelerazione rispetto allo scorso anno, e un cambiamento così importante deve marciare anche sulle gambe degli amministratori attraverso l'adozione di modelli e criteri di governance ispirati alle best practice». Così, se la regola della record date ha fatto da apripista dando la spallata ad un capitalismo contrassegnato da salotti e salottini la novità introdotta dal decreto Salva Italia targato Monti contribuisce ad avvicinare la struttura delle quotate a Piazza Affari al modello anglosassone. È il caso del divieto di permanenza di banchieri e assicuratori in più consigli di amministrazione. Una norma che richiama le raccomandazioni dell'attuale sottosegretario alla presidenza del Consiglio, Antonio Catricalà, quando a capo dell'Antitrust bacchettava le interlocking directorates, cioè le doppie cariche nei board di banche, finanziarie e assicurazioni che agiscono da concorrenti nello stesso mercato.

Alvise Recchi, fondatore e amministratore delegato di Sodali

QUOTE ROSA HEAD HUNTER ALLA RICERCA DELLE CANDIDATE

Il cda vuole mettersi la gonna

A caccia di donne. Non si tratta di maschilismo, ma della sfiancante ricerca che gli head hunter di Egon Zehnder sta effettuando per conto di Assogestioni. La legge sulle quote rosa nei board, sebbene vincolante dal prossimo agosto, (stabilisce l'obbligo di rappresentare le donne con una quota di almeno un quinto) sta costringendo i cacciatori di teste ad un lavoro di ricerca e affinamento senza precedenti. A differenza degli uomini, le donne si sono rivelate più restie ad accettare incarichi al di fuori del proprio lavoro e molto più spesso dei loro colleghi maschi declinano gli inviti ad entrare negli organi societari delle quotate. Una difficoltà che ha sorpreso Egon Zehnder costringendo i cacciatori ad un tour de force in vista della compilazione dell'elenco di candidate da fornire al comitato di corporate governance di Assogestioni, quell'organismo cioè che predispone le liste di minoranza. L'obiettivo delle società, del resto, è anticipare gli effetti contenuti nella norma Golfo-Mosca cercando di rispettare la soglia di un quinto introducendo le quote rose già in occasione delle assemblee di primavera, evitando così di farsi trovare inadempienti. I numeri in campo sono, secondo il focus elaborato da Assonime, imponenti e indicano che a parità di dimensione degli organi dovranno essere inserite nei board delle quotate italiane almeno 469 donne. Non basta, perché quando, alla fine del prossimo triennio, la norma si farà più stringente serviranno altre 351 donne per fare salire la quota rosa a un terzo. In attesa delle debuttanti a fianco di signore già avvezze alle liturgie di cda e note alle cronache finanziarie come **Monica Mondardini**, **Marina Berlusconi**, **Gina Nieri**, **Daniela Bracco** ed **Emma Marcegaglia** vale segnalare il rumor che vorrebbe il consigliere di Unicredit **Lucrezia Reichlin** (*foto*) come papabile futuro presidente dell'istituto al posto di **Dieter Rampl**. Probabilmente una boutade che però segnala che il vento è cambiato. ***A.D.***

VIETATI I DOPPIONI

Una fitta trama di incroci che **Mario Monti** e l'ex garante delle Concorrenza hanno inteso smantellare fissando il divieto a partire dal prossimo 25 aprile. Tanto che qualcuno come **Carlo Pesenti** e **Franco Gaetano Caltagirone** si sono già, rispettivamente, dimessi dai consigli di Unicredit e Mps. Il primo ha scelto di restare in Mediobanca, il secondo ha optato per la vicepresidenza di generali. Va detto che la restrizione non è stata ben accolta e in seno ad Abi e Ania qualcuno ha contestato il fatto che l'articolo 36 del decreto colpisce solo banchieri e assicuratori rendendoli di fatto discriminati. Ma tant'è. Certo è che l'obbligo di scelta che imporrà a personaggi della finanza come **Ennio Doris**, **Alberto Nagel**, **Giovanni Bazoli**, **Fabrizio Palenzona**, **Vincent Bolloré**, **Dieter Rampl** e **Luigi Maramotti** la rinuncia ai doppi incarichi segnerà un ulteriore tassello nella rivoluzione primaverile di Piazza Affari.

A rendere speciale l'appuntamento assembleare contribuiranno, infine, altri due elementi di discontinuità: le quote rosa riservate alle donne e una maggiore confidenza con lo strumento del voto online che dovrebbero aumentare la partecipazione dei piccoli azionisti. «Il coinvolgimento dei cosiddetti retail, per ora, più che altro resta nell'elenco degli obiettivi da conseguire. Per cambiare bisogna introdurre gradualmente una cultura proattiva e di maggior dialogo nei confronti dei piccoli azionisti», conclude Recchi. «Ci vuole affinamento e, del resto, deve passare l'idea che andare in assemblea non significa necessariamente giocare da disturbatore, bensì da rappresentate di una piccola quota azionaria interessata ad un ruolo costruttivo».