

 **CORPORATE WAVELENGTH**
The Corporate Governance, Risk, and Compliance Web Series

Brought to you by Corporate Secretary and Foley & Lardner LLP

Ongoing Governance Reforms: Are They Effective and What More Should Be Done?

Julie Smith
Foley & Lardner LLP

Robert Lamm
FGIC Corporation/Financial Guaranty Insurance Company

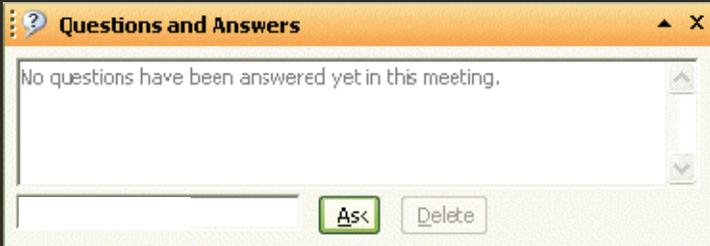
 

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Today's Speakers

Julie Smith
Partner, Foley & Lardner LLP

- Member of the firm's Securities Litigation, Enforcement & Regulation Practice
- Practice focused on securities enforcement, representing individuals, public companies, investment companies and investment advisers in connection with investigations by the SEC and other government agencies
- Previously with the SEC as senior counsel in the Legal Policy Group of the Office of the General Counsel and also as senior counsel in the SEC's Division of Enforcement

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Today's Speakers

Robert Lamm
Managing Director, Associate General Counsel and Secretary,
FGIC Corporation/Financial Guaranty Insurance Company

- Responsible for corporate legal matters, including securities compliance and corporate governance
- Previously served as Senior Vice President – Corporate Governance and Secretary of Computer Associates International, Inc; Shareholder and Chair of the Securities and Corporate Governance Practice Group at Gunster, Yoakley & Steward P.A.; and Senior Vice President, General Counsel and Secretary of Hvide Marine Incorporated

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Today's Moderator

Brendan Sheehan
Executive Editor, *Corporate Secretary*

- Editorial mission: To provide innovative and insightful analysis for corporate secretaries, general counsel and compliance officers
- *Corporate Secretary* is the leading source of information on matters relating to the SEC, Sarbanes-Oxley, D&O insurance, shareholder communications, proxy solicitation and voting, director education and compensation, listing requirements and entity management

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Corporate Governance, Public and Private – Threshold Questions

- Is the Public Company Model of Governance Becoming a Universal Model?
 - Private companies in regulated industries depart from the public company model at their peril.
- Is It the Right Model?
 - Costs of the Public Company Model.

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Has “Governance” Become “Compliance?” At What Cost?

- No freedom to experiment or deviate from public company “best practices,” even for private companies.
- Sometimes rote application of public company standards or “best practices.”

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Shareholder Activism

- Large, traditionally active pension funds, such as California Public Employees Retirement System (CALPERS) and the Teachers Insurance and Annuity Association-College Retirement Equities Fund (TIAA-CREF) –
 - Remain influential in monitoring and enforcing their views of best practices in corporate governance.

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Shareholder Activism (cont'd)

- Published corporate governance guidelines on their websites:
 - <http://www.calpers-governance.org/alert/selection/screen.asp>
 - http://www.tiaa-cref.org/pubs/pdf/governance_policy.pdf
- Institutional advisory firms Institutional Shareholder Services (ISS) and Glass, Lewis & Co, LLC.
 - Recommend positions for shareholders on corporations proxy proposals.

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Shareholder Activism (cont'd)

- Institutional shareholders and hedge funds are increasingly engaging corporations in discussions of their perspectives on matters affecting the corporation, such as capital structure, use of capital, strategic investments and acquisitions.

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Shareholder Activism (cont.)

- Areas of focus for activist shareholders this year include proposals to:
 - Adopt majority voting for election of directors and majority voting by-laws that cannot be amended without shareholder approval.
 - Elect all directors on an annual basis.
 - Separate the roles of CEO and chairman.
 - Eliminate supermajority voting requirements and adopt simple majority voting.



Shareholder Activism (cont.)

- Require shareholder approval for adoption or renewal of “poison pills.”
- Compensation-related measures.



Proxy Access – Trumped by E-Proxy?

- The Dueling SEC Proposals.
- E-proxy.

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Online Shareholder Forums

- To encourage the use of technological advances as an alternative means for discussion of shareholder issues, the SEC has proposed use of an online forum for shareholders to discuss matters among themselves on a real-time basis.
- The SEC has also clarified liability rules with its proposal to ensure that corporations would not be held liable for statements made by independent parties in these discussions.

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And, If Shareholders Are Empowered, Can Fiduciary Duties Be Far Behind?

- **Fiduciary Duties for Activist Shareholders.**
 - Lynn A. Stout and [Iman Anabtawi](#), UCLA School of Law, forthcoming in the Stanford Law Review. Article was recently discussed in the [Financial Times](#).
 - Argues that the rules of fiduciary duty traditionally applied to officers and directors and, more rarely, to controlling shareholders, should be applied to activist minority investors as well.

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Recent Developments in Corporate Governance Reform

- Bebchuk proposals on the adoption of poison pills adopted by Safeway, CVS/Caremark, others.

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NYSE and NASDAQ Listing Standards – Corporate Governance Developments

- Many companies now familiar with delisting procedures through inability to file audited financial statements because of stock options issues.
- At least one NASDAQ company has been delisted as a result of stock options-related filing delays – Coherent, Inc. (SEC Dec. 17, 2007).

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Recent U.S. Securities and Exchange Commission Pronouncements and Rules

- Bear Stearns buyout – unusual step of posting an FAQ about Bear Stearns and the SEC’s role in the buyout discussions.
- Executive Compensation.

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Delaware Law Developments

- Attorney-Client Privilege and special committees.
- Zone of Insolvency – duty to creditors rejected last year.

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Issues on the Horizon

- Preferential Access to Information?
 - Recent academic study suggests that investment banks advising on M&A deals use confidential information to their advantage.
 - [*The Dark Role of Investment Banks in the Market for Corporate Control*](#), [A. Bodnaruk](#), [M. Massa](#), and [A. Simonov](#).
 - Firms in which the advisors to the bidder hold a stake are 45 percentage points more likely to become targets.
 - Where an investment bank advising the bidder holds a stake in the target, the bidder will pay a higher premium for the target relative to deals in which the advisor holds no target stake .

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On the Horizon (cont.)

- Two advisory committees on financial reporting are expected to report later this year:
 - SEC Advisory Committee on Improvements to Financial Reporting to examine the U.S. financial reporting system with the goals of reducing unnecessary complexity and making information more useful and understandable for investors.



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On the Horizon (cont.)

- The Treasury Department's Advisory Committee on the Auditing Profession to examine, among other things, audit market competition and concentration and the impact of the independence and other professional standards on this market and investor confidence.

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Thank you for your participation

For more information on the Corporate Wavelength web conference series, visit Foley.com/corporatewavelength

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