

Good grief! What's with the SEC and exec pay?

This government is continuing to insert itself unwisely in boards' confidential decisions. Where is the outrage?

BY GERARD F. HURLEY

THE SEC IS FORCING a sampling of 350 public companies to more specifically disclose the compensation, benchmarking, and forecasting decisions of their boards and compensation committees. This insistence on increased disclosure — in the “public interest of helping investors better discern” this information — bodes ill for all fiduciaries, whether public, private, or not-for-profit.

This intervention must be turned back by the corporate community before critical leadership prerogatives have been destroyed forever.

Where is the outrage that this government is continuing to insert itself in boards' confidential decisions on “how the company arrived at particular levels and forms of compensation”?

Isn't the ROI of a CEO's compensation measured, with other factors, in the corporation's ability to make

a year-end profit ... even to grow? That's the key investor measure, not salary numbers and perks. *How* the company's management and board (representing the shareholders) generate that net profit is the magic of competition.

Do we need, much less want, bureaucrats — who have no skin in the game — to comment on inside decisions outside their expertise? This, frankly, is none of their business under any pretext.

“But, a lot of investors want more information,” I'm told. I don't want to be rude, but “So?” Does that desire trump everything? Have you considered what

director independence and latitude is being further eroded by these intrusions?

Item 402 of SEC Regulation S-K, according to the Commission, requires a company to provide “clear, concise and understandable *disclosure* of all plan and non-plan compensation awarded to, earned by, or paid to the named executive officers ... and directors ... by any person, for all services, rendered in all capacities” (emphasis added).

What is meant by *disclosure*? What is required to satisfy that? This disclosure effort has been around for some time, but how did we let it get to this level of predicament?

Reportedly from other sources, the SEC is also concerned about the disparity of the compensation levels between the No. 1 and No. 2 executives. Is that a public interest? Who are any of us outside a company to prevent

its board from being either profligate or penurious, or even silly, regarding CEO/COO compensation?

Study the 10-page Corporate Finance Division's “Staff Observations in the Review of Executive Compensation Disclosure” memo drafted in October 2007, with its “how we can all play better with others” tone. The SEC staff urges us, please, to use “plain English ... no boilerplate.” On the filings from the 350 firms, “some were clear and understandable, yet not meaningful ... (while others were) ... responsive in content, but not clear and understandable.”



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This staff memo is frontloaded with assurances, such as “we suggested ... we encourage ... should be ... our goal ... to help the reader ... we sought a broad range” And get this, to disarm: “No one (among the 350 firms) should interpret (its selection) as any indication of our view regarding the quality of that company's disclosures.”

Even more: “Throughout our long history” — you know *us!* — “we have found that, where a company emphasizes material information, investor understanding of (a) company's disclosure is improved ... more concise information regarding compensation, related-person transactions, beneficial ownership and corporate governance matters can *facilitate more informed investing and voting decisions* in the face of complex information about these important areas” (emphasis added).

Our economy relies on a rational, transparent capital system. How public corporations thrive, within the law, is their competitive secret. Even considering that one can ask for confidentiality, such demands for disclosure will not only undermine competition by disclosing corporate decisions but will, in short order, set up averages, ranges, standards, predicates, justifications, and maximums/minimums most likely leading to “under this combination of circumstances companies are expected to” Such will then, for certain, be imposed under pain of fines, exclusions, denials of board and CEO latitude, you name it. Play out the scenario. Where will it end?

We are continually reminded that independent directors are fiduciaries fulfilling their responsibilities on behalf of shareholders, and that CEOs work for those board directors. Let the directors fiduce. Let shareholders inform themselves once inside the lodge. Let potential investors who want seats at the table do their own homework. And let the SEC realize it is getting inappropriately “interested” in the competitive dynamics of compensation decision making. ■

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