

Current and Former SEC Commissioners Question Legality of Harvard Declassification Proposals

Posted by Martin Lipton, Wachtell, Lipton, Rosen & Katz, on Monday December 15, 2014

Editor's Note: [Martin Lipton](#) is a founding partner of Wachtell, Lipton, Rosen & Katz, specializing in mergers and acquisitions and matters affecting corporate policy and strategy. This post is based on a Wachtell Lipton memorandum by Mr. Lipton, [Theodore N. Mirvis](#), and [George T. Conway III](#).

Today's *Wall Street Journal* [reports](#) that a current SEC Commissioner and a former SEC Commissioner (now a law professor) have published a lengthy paper challenging the scholarly bona fides—and *legality*—of the recent efforts by the Harvard Law School Shareholder Rights Project (SRP) to cause major American corporations to declassify their boards of directors. During the past three proxy seasons, the Harvard SRP has promulgated numerous stockholder-sponsored precatory resolutions calling for declassification of companies with staggered boards, and has succeeded in causing 98 companies to remove their staggered structure and have all their directors stand for election annually.

The [paper](#), authored by current Commissioner Daniel M. Gallagher and former Commissioner Joseph A. Grundfest, now a law professor at Stanford, is titled: “*Did Harvard Violate Federal Securities Law? The Campaign Against Classified Boards of Directors.*” While we have previously questioned the appropriateness of a major university’s imprimatur being hijacked by one strain of stockholder activist, the Commissioners’ article, as its title reflects, addresses a heretofore unasked question—whether the Harvard campaign has violated the federal securities laws. The answer, the Commissioners explain, is clearly yes: Thoroughly and methodically, their article establishes that the Harvard campaign has been based on a materially inaccurate description of the academic literature on the impact of staggered boards on corporate performance and value, a description that, when presented to shareholders, can fairly be viewed as violating federal antifraud rules. The authors explain that, accordingly, even apart from being guilty of shoddy scholarship, the Harvard campaign (a) subjects Harvard to possible enforcement action by the SEC as well as liability from private party suits; (b) provides a basis for the SEC staff to grant no-action relief allowing companies to exclude the Harvard campaign’s proposals from their proxy

statements; and (c) could further allow companies that have declassified their boards after being targeted by the Harvard campaign to seek judicial relief reversing that declassification.

Companies that have been or will be targeted by the Harvard campaign against staggered boards should give careful consideration to the options for legal relief laid out in the Commissioners' article. We continue to believe that, legalities aside, it is unfortunate and wrong that a major American university has allowed its name to be invoked in a tendentious, un-academic, and quasi-political campaign against staggered boards. If nothing else, the Commissioners' article makes a persuasive showing that the scholarship claimed to underlie the Harvard campaign is bogus, or at best one-sided. And by laying out in detail the specter of illegality based on fraud and attendant liability of the university, the Commissioners' article takes the debate to another level.