

Forum Report: Fair Investor Access**What Sources Should Investors Rely Upon?**

[Quality of information sources](#)

[Application to proxy advisors](#)

[Forum support of responsible sources](#)

Reacting to recently distributed reports, several Forum participants have encouraged us to consider very practical questions about what sources investors should rely upon for decision-making information. The issue has been raised on a conceptual level in evolving views of the responsibilities assigned to corporate board members and to investors,¹ and on a marketplace level in surveys that confirm what we observe about investor preferences for direct sources.² The need to eliminate confusion has also been seen in our observation of activist proposals that are designed to satisfy the interests of some investors at the expense of others,³ and particularly in the recent spectacle of a celebrity investor valuation controversy that has corrupted the trading market for the subject company's stock.⁴

Quality of information sources

Reliance should of course be based on the responsibility of the source and its ability to provide the information, and we should also consider the biases a source may have. In this analysis, it is clear that investor preferences for direct management sources of information are rational.

Corporate managers

- Responsible for maintaining and reporting all relevant information, and the primary source for all other providers of information
- Responsible for the company's management, therefore know what information is relevant
- The only source with actual responsibility to address investor interests
- Bias relating to career interests in managing the company, possibly also in stock options or similar interests in current market pricing of company securities

¹ See the reports referenced above the Forum website presentation of the [February 1, 2013, Rebecca C. Grapsas, Holly J. Gregory and Ira M. Millstein of Weil, Gotshal & Manges posting in *The Harvard Law School Forum on Corporate Governance and Financial Regulation*: "Preserving Balance in Corporate Governance"](#)

² See [January 2013, Brunswick Group: "2012 Analyst and Investor Survey: Trends in the Use of Digital & Social Media by the Investment Community"](#) and [October 6, 2010 Forum Report: Survey of Investor Communication Priorities for Voting Decisions](#) (also available in [print form](#)).

³ See [December 21, 2012 Forum Report: Candidates for an Activist "Golden Goose" Analysis](#) and [January 23, 2013 *CFO Journal / The Wall Street Journal*: "Activists Sought and Won Board Seats in 2012: Report."](#)

⁴ See [February 4, 2013 *Bloomberg*: "FTC Corrects Herbalife Statement After Probe Report"](#) and the referenced [February 4, 2013 *New York Post*: "Salve for shorts | Herbalife is the subject of 'pending' probe."](#)

Investors, including activists

- No actual responsibilities to other investors, other than to refrain from illegal lying or cheating
- Intermediary source of factual information generally available to other investors directly from company or other sources; primary source of its own analyses and views
- May have situation-specific common interests with other investors, but in fact each investor has its own interests relating to a particular holding as well as a potentially competitive relationship to other investors in securities trading or to rival portfolio managers in marketing their funds

Advisors and research providers

- May have regulatory responsibilities, depending on the nature of service being provided, but generally responsibility is limited to a commercial obligation to deliver what has been promised to the investor
- Intermediary source of factual information, with access to sources more limited than that of shareholders with rights to corporate disclosure; primary source of proprietary analyses and opinions
- Bias depends on commercial profit objectives of the service, whether subscription sales or support of related transaction services, may be influenced by interests in other relationships

Assuming most companies are managed by directors and officers who appreciate the need to win investor support, corporate managers and investors should share a common interest in (a) establishing broad respect of corporate management responsibilities for addressing investor interests, and (b) encouraging the development of more effective communication processes to support management's understanding and response to investor interests.

Application to proxy advisors

One application that deserves our thinking before the start of this year's annual meeting season is the widespread reliance on commercial sources of voting recommendations. Though these services are broadly criticized, many sophisticated and responsible institutional investors accept the limitations of bureaucratic recommendations as a very cost-efficient means of identifying situations that justify higher cost staff attention. This approach could be taken an extra step. Viewed as a matter of investor responsibility, each case of a difference between the recommendation of a proxy advisor and the recommendation of a company's management could be viewed as requiring the investor's careful review and fully informed decision. Being informed, of course, would necessarily include considering information and explanations provided directly by the company's management.

Treating any disagreement between proxy advisor and management recommendations as a requirement of decision-maker review could actually prove valuable to each of the parties. Corporate managers would be assured opportunities to communicate directly with their investors,

without filtering, and investors would have more convenient access to their preferred source of information. Even the proxy advisors might benefit from the reduced burden of responsibility for their advice, and the associated reduction in liability exposure.

For those of you concerned with the fiduciary duties of fund managers, your views of this will be especially appreciated. ***If the commercial recommendation of a proxy advisor based on limited information differs from that of fully informed corporate directors who actually have responsibilities to manage a company and address its investors' interests, can a fund manager reasonably follow the proxy advisor's recommendation without a diligent inquiry of corporate management to understand the issues and make an informed decision?***

Forum support of responsible sources

The current issues of information reliability also require fresh thinking about what the Forum could be doing to better support the responsibilities of corporate managers, not only in our communication processes but also in helping to define the issues that are relevant to investors interests. Though our policy has been to allow anyone with an interest to initiate programs, actual practice starting with the initial NYSSA programs has been to rely primarily on professional investors to define the issues we address. Some companies have followed Amazon's example in 2000 to offer leadership of programs that were requested by investors, and some corporate managers have initiated the requests themselves, but our traditional approach is clearly not designed to make the Forum's independently moderated programs a conveniently available resource for corporate managers who want to satisfy their responsibilities to investors.

Please offer your suggestions. ***What should we be doing to respect and encourage a corporate manager's response to investor interests, and to assure the orderly exchanges of information and views required for rational investment decisions?***

GL – February 6, 2013

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