

Spat Over Staggered Corporate Boards Pits Wachtell Against Harvard's Bebchuk

American Lawyer Daily

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March 21, 2012

On Wednesday morning, [Wachtell, Lipton, Rosen & Katz](#) issued a sharply worded memo in which four of its top partners attacked a Harvard Law School initiative aimed at pressing large corporations to drop their staggered boards of directors. By day's end, Harvard Law professor [Lucian Bebchuk](#) was firing back.

In the memo, Wachtell—whose profits per partner rank at the [top of the Am Law 100](#)—objected to this week's announcement by [The Harvard Law School Shareholder Rights Project](#) (SRP) touting its success in [persuading a significant number of S&P 500 companies to move to annual elections](#) by declassifying their staggered, or classified, boards.

Both [The New York Times's DealBook](#) and [The Wall Street Journal's CFO Journal](#) reported on the joint press releases in which the SRP and five institutional investors noted that nearly half the 87 board declassification requests made to the [management of S&P 500 companies have tentatively been granted](#).

Wachtell was not pleased. [In a one-page memo](#), four of the firm's most prominent partners lashed out at the SRP, writing that "staggered boards have been part of the corporate landscape since the beginning of the modern era." The firm further noted that the SRP's "efforts to dismantle staggered boards is unwise and unwarranted, and—given its source—inappropriate."

Shareholders rights activists often note that gaining the support of a majority of directors on a staggered board can take almost two years, as only a third of directors are up for election in a given year. As a result, critics of staggered boards claim such bodies are resistant to change at the director level.

In this week's joint statements—issued with the [Illinois State Board of Investments](#), the [Los Angeles County Employees Retirement Association](#), the [Nathan Cummings Foundation](#), the [North Carolina Department of State Treasurer](#), and the [Ohio Public Employees Retirement System](#)—the SRP says its success in getting S&P 500 companies to accept declassification proposals suggests the argument against them is prevailing.

"Annual elections [for declassified boards] are widely viewed as corporate governance best practice," states the SRP. "A move to annual elections could make directors more accountable and thereby contribute to improving performance and increasing firm value."

That argument runs counter to the position favored by proponents of staggered boards, who frequently cite such panels' strong anti-takeover provisions—[including the poison pill mechanism created by Wachtell founding partner Martin Lipton](#)—and the fact that to succeed, hostile takeovers require potential bidders to increase their offers, increasing shareholder value in the process.

In the memo blasting the SRP, Lipton, executive committee cochair Daniel Neff, litigation partner Theodore Mirvis, and corporate partner David Katz state that there is "no persuasive evidence that declassifying boards enhances stockholder value over the long-term" and that in their experience the

"absence of a staggered board makes it significantly harder for a public company to fend off an inadequate, opportunistic bid, and is harmful to companies that focus on long-term value creation."

Wachtell and Harvard Law are hardly strangers. Mirvis, an expert on takeover defense, is a Harvard Law alum and has served as a regular lecturer at both the law school and Harvard Business School.

The firm has other ties to Harvard. Wachtell's missives regularly appear on [Harvard Law's blog about corporate governance and financial regulation](#). And a federal tax return filed by a private foundation operated by Wachtell shows that in 2009 the firm [donated \\$100,000 to Harvard Law and \\$25,000 to the Harvard Law Fund](#), along with a number of contributions to other leading law schools and academic institutions.

Former Wachtell partner [John Coates IV](#), a Harvard Law professor of law and economics, [spoke to the Daily Deal last month](#) about drafting M&A agreements and leaving Wachtell in 1997 for life in academia. Coates and Bebchuk, the director of both the SRP and the law school's program on corporate governance, have penned a series of [papers on takeover defense](#) and [staggered boards and shareholder rights](#).

Still, Mirvis and Wachtell's distaste for the SRP's position on staggered boards is evident in Wednesday's memo. (The memo's pointed tone is not unusual. In previous memos, Wachtell has castigated Senator Chuck Schumer over his [proposed Shareholder Bill of Rights Act in 2009](#), and [browbeat the SEC into taking action against short-sellers three years ago](#).)

"It is surprising that a major legal institution would countenance the formation of a clinical program to advance a narrow agenda that would exacerbate the short-term pressures under which American companies are forced to operate," the Wachtell partners write. "This is, obviously, a far cry from clinical programs designed to provide educational opportunities while benefiting impoverished or underprivileged segments of society for which legal services are not readily available. Furthermore, the portrayal of such activity as furthering 'good governance' is unworthy of the robust debate one would expect from a major legal institution and its affiliated programs."

The memo goes on to call the SRP's success in persuading public companies to pledge to move toward board declassification a "testament to the enormous pressures from short-term oriented activists and governance advisors that march under the misguided banner that anything that encourages takeover activity is good and anything that facilitates long-term corporate planning and investment is bad."

Contacted for comment by The Am Law Daily, Bebchuk—who was labeled "[The Activist Professor](#)" in a 2007 Daily Deal profile—said via e-mail that Wachtell is the only firm that has criticized the SRP's work during the 2011-2012 academic year, its first of operation. [The SRP is a clinical program](#) through which Harvard Law faculty, staff, and students assist public pension funds and charitable organizations to improve corporate governance at publicly traded companies in which they are shareholders, according to Bebchuk.

He defended the SRP's work as being within the guidelines of [Harvard's large clinical education program](#), noting that it provides "legal assistance in connection with issues on which reasonable people could disagree," work that isn't limited to the "impoverished or underprivileged" segment of society suggested in Wachtell's memo. (Bebchuk added that he doesn't expect the work of the SRP will "hurt the good relationship that Harvard has with Wachtell.")

While acknowledging that the SRP believes board declassification is the ideal, Bebchuk argued that such views "have broad support among investors," citing statistics that show more than 75 percent of votes cast between January 1, 2010 and June 30, 2011 were in favor of shareholder proposals to declassify boards at S&P 500 companies.

Countering one argument made by the Wachtell partners' in their memo, Bebchuk also noted that the five institutional investors the SRP has been advising—four of them pension funds—are all long-term investors that expect to remain shareholders of the companies to which they submitted proposals seeking board declassification. That these investors back such proposals, he said, reflects "their view that a move to annual elections would serve long-term shareholder value."

The SRP's current advisory board consists of Harvard Law professors [Jesse Fried](#) and [Reinier Kraakman](#), Columbia Law School professor [Jeffrey Gordon](#), California Public Employees' Retirement System general counsel [Peter Mixon](#), hedge fund manager and former SEC commissioner [Richard Breeden](#), and [Michael McCauley](#), senior officer for investment programs and governance at the Florida State Board of Administration, which manages the assets of the Florida Retirement System Trust Fund.

[Scott Hirst](#), executive director of Harvard Law's corporate governance program, serves as the SRP's associate director. [June Rhee](#), a Harvard Law graduate, serving as the project's counsel.

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