

# SEC's Gallagher says Harvard liable for proposals

*CQ Roll Call*

By Alexandra Higgins

December 12, 2014

Daniel M. Gallagher, a Republican commissioner at the Securities and Exchange Commission, said the agency could bring enforcement action against Harvard University alleging that a law school project presented materially false or misleading data in shareholder proposals to declassify company boards.

Harvard Law School's Shareholder Rights Project, which works on behalf of shareholders seeking to improve corporate governance, has assisted shareholders in submitting almost 130 proposals to companies requesting that their board members face reelection annually. Those proposals were misleading, Gallagher said in a paper co-written with Stanford Law School professor Joseph Grundfest.

Classified boards have a third of directors stand for election every three years, a practice that opponents say makes directors less accountable to shareholders than annual elections. Supporters counter that classified boards provide needed bargaining power to extract higher bids in hostile takeover situations, advancing shareholder interests.

Academic studies have been published in support of both sides of the issue, but Gallagher and Grundfest said the Harvard project's failure to include studies supporting classified boards in its analysis can be characterized as a material omission that violates securities regulations. They said the project cites only one study reaching a contrary conclusion and dismisses that study's analysis.

"The Harvard proposal can therefore be criticized as cherry picking the literature in order to generate the false and misleading impression that the data supporting its position are far stronger than is in fact the case," the paper said.

That type of material omission would violate Rule 14a-9 of the Securities Exchange Act of 1934, providing a legal basis for the SEC to prevail in proceeding against Harvard seeking an injunction or cease and desist order, Gallagher and Grundfest concluded.

Lucian Bebchuck, a professor at Harvard Law School who directs the Shareholder Rights Project, said the investor proposals backed by the project were "entirely consistent with SEC rules."

Of the 129 proposals submitted at companies between 2012 and 2014, 121 companies agreed to move toward annual elections, according to the project's website.

Bebchuck said the claims against the project are "so weak" that none of the companies receiving the shareholder proposals, many represented by some of the nation's premier law firms, raised such a claim.

That's not telling, Grudfest countered, telling a reporter that the SEC "significantly narrowed" companies' ability to exclude such shareholder proposals on grounds that they are false or misleading in 2004, so companies are reluctant to attempt such exclusions.

Gallagher said in response to Bebchuk's statement, "I am comfortable to let the article and its analysis speak for itself."

Bebchuk added that he is "disappointed that, rather than focusing on investor protection, the commissioner is urging about 100 S&P 500 and Fortune 500 companies to consider using the outlandish strategies he invented to try to invalidate board declassifications."

Bebchuk said those declassifications were put forward by company boards and approved by large shareholder majorities.

"Gallagher's attack is unworthy of a sitting SEC commissioner," Bebchuk said.