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Feud over shareholder activism pits Martin Lipton vs Harvard prof

Alison Frankel

A little more than a year ago, we told you about a relatively inflammatory exchange of posts at the Harvard Law School Forum on Corporate Governance and Financial Regulation. As the catchy name suggests, the blog typically publishes very valuable but somewhat dry academic papers and law firm client alerts on the esoterica of corporate law. But last March, Martin Lipton and a couple of his partners at Wachtell, Lipton, Rosen & Katz livened things up with a memo chastising Harvard's Shareholder Rights Project, a clinic in which Harvard Law students assist institutional investors in pressing corporations to de-stagger their boards. The point of the project, which is led by Harvard professor Lucien Bebchuk, is to give shareholders a more prominent voice in board elections by permitting them to vote on all directors at once. Lipton and his partners argued that the de-staggering offensive exacerbated the destabilizing pressure of short-term, activist investor thinking. As we reported at the time, a Columbia Law School professor who served on the Shareholder Rights Project advisory board rushed to its defense, citing the valuable experience the clinic offers to students. We also reached out to Bebchuk, who told us that Wachtell's thesis was belied by empirical evidence of an association between staggered boards and lower corporate valuation.

On Tuesday, the war of words between Lipton and Bebchuk flared again at the Harvard blog, with dueling posts by the Harvard prof and the Wachtell partner. It turns out that they've been intermittently scrapping since that first Wachtell salvo last year. Last April, for instance, Bebchuk said in a column for Dealbook that Lipton was just peeved because the staggered board model he pioneered is being jettisoned through the efforts of the Shareholder Rights Project. Then in February, Lipton wrote a notably nasty memo accusing Bebchuk of aiding and abetting "self-seeking activists ... who troll through SEC filings looking for opportunities to demand a change in a company's strategy or portfolio that will create a short-term profit without regard to the impact on the company's long-term prospects." The Harvard professor, Lipton said, "rejects the decades of my and my firm's experience in advising corporations and the other evidence of the detrimental effects of pressure for short-term performance" because it is "inconvenient to his theories."

Bebchuk answered Lipton in Tuesday's post, titled "Wachtell was wrong about the Shareholder Rights Project." The Harvard prof called upon Lipton and his partners to acknowledge that both institutional investors such as BlackRock and corporate directors themselves have supported proposals to de-stagger boards. Of the 121 public companies petitioned by the Shareholder Rights Project, Bebchuk said, 91 agreed to move toward annual elections. Directors at "almost all" of the companies that put forward proposals to dismantle staggered boards have recommended that shareholders support the proposals. Lipton can't have it both ways, Bebchuk said. He can't argue that directors act in the best interests of their companies - except when they support dismantling staggered boards.

In response, Lipton went big: "Professor Bebchuk's hyperbole cannot disguise the fact that his shareholder-centric model promotes short-termism and that it is this short-term focus on capital allocation and other business decisions that has led to the decline of the American economy and greater unemployment," he wrote. And as for Bebchuk's point about the inconsistency of Lipton's argument, the Wachtell partner said, "Apparently, Professor Bebchuk believes that classified boards can't be bad unless directors are bad, or else they would have all committed ritual suicide rather than ever agree to declassification."

I reached out to both Bebchuk and Lipton, but only the Harvard prof responded. Bebchuk said via email that there's nothing personal in his ongoing exchanges with Lipton but the two "just differ in our views on key issues in corporate governance."

Lipton erroneously conflates opposition to staggered boards with short-term thinking about corporate goals, according to Bebchuk. "It is unreasonable for (Wachtell Lipton) to maintain, without empirical evidence, that it knows better than large majorities of institutional shareholders what is best for them in the long term, or that it knows better than the 91 corporate boards agreeing to declassify what is best in the long term for the companies they lead," he said. And Lipton's quip about ritual suicide, the professor added, fails to resolve the internal discrepancies in his firm's portrayal of all-wise directors.

I have a feeling we haven't heard the last of this debate.

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