

Corporate Governance & Accountability

UPDATE™

NEW SEC PROCEDURE FOR COMPENSATION REVIEW BEFORE FILING

As the second year of reporting executive compensation under the new rules approaches, the **Securities & Exchange Commission** (SEC) has established a new procedure for early staff review of corporate *Executive Compensation Disclosure* (for the 1994 proxy season).

Issuers may submit the executive compensation disclosures for staff review prior to filing with SEC.

The SEC staff should be provided with all of the disclosure required by Items 402 and 404 of Regulation S-K and Item 10 of Schedule 14-A at least 20 days prior to filing.

Submissions should be directed to: **John Bernas**, Division of Corporation Finance, SEC, Mail Stop 3-7, 450 Fifth Street, NW, Washington, DC 20549. Fax line: 202-272-7546. Confirm SEC receipt by calling **John Bernas** or **Herb Scholl** at 202-272-3097.

Public Policy and Corporate Concern: **DOES CORPORATE STRUCTURE AND GOVERNANCE PRACTICE DETERMINE WHETHER AMERICA CAN COMPETE EFFECTIVELY WITH JAPAN AND GERMANY?**

*Industrial Policy, Global Trade, Competitiveness
and the role Corporate Governance plays*

HIGHLIGHTS:

How much of a factor in global competition are the means by which a nation's corporations are organized, structured and governed? Does the relationship between government and the private sector determine the competitiveness of a nation's industry? The **General Accounting Office** (the investigative arm of Congress) devoted months to studying these questions—watch for discussions to broaden appreciably in the coming months after recent publication of the GAO study.

The GAO research was performed at the request of U.S. Senator **Ernest F. Hollings**, Chairman, Committee on Commerce, Science and Transportation, and Senator **Richard H. Bryan**, Chairman, Subcommittee on the Consumer Committee. The director of the study was GAO's **Allan I. Mendelowitz**, Director of International Trade, Finance & Competitiveness. A number of agencies provided counsel.

Over the past 20 years, U.S. industries have lost significant market share abroad, especially companies in automotive and steel. As American global economic preeminence erodes there is growing concern in Washington about the present and future competitiveness of the U.S. economy.

The GAO looked at government policies regulatory and industrial policies, corporate structures, corporate governance practices, and financial and operating business practices of three competing countries—the U.S.A., Japan and Germany. The GAO examined the effects government can have (and have had) on the business environments in the *Big Three* global traders and at the characteristics of each nation's corporate governance practices. No recommendations for legislation were advanced—the GAO hopes to stimulate dialogue.

Japan, Germany and the USA

Corporate Structure and Governance and the Effects on Global Competitiveness

BACKGROUND:

"Competitiveness" is the ability of a nation to achieve and sustain overall levels of productivity increases that can sustain a rising standard of living in the global economy. U.S. industries not only compete abroad, as they have since the heady days at the end of WW II when America accounted for half of all global trade but increasingly, in our home market, as foreign competition inside the United States increases -- the U.S. share of world trade has declined to about 25%.

Productivity in the industrial nations relies on the complex interaction of government policies, financial relationships, corporate structure, corporate and public sector governance, and the business practices unique to each nation. No one of these influences by itself explains "national productivity," but the interaction of all creates the business environment, or infrastructure, and each system has its advantages and disadvantages.

These advantages and disadvantages are often most clearly defined in corporate structure and public and private sector *governance practices*. And the structure, governance and accountability of a nation's corporations often are major determinants in the global marketplace. This will be at the heart of the debate on America's ability to achieve higher levels of productivity -- and productivity itself will be at the heart of many CEO's ability to lead the corporation to greater performance (to meet the expectations of its shareowners).

American CEOs are finding that governance and accountability issues are central to their own ability to lead, manage, inspire, persuade and govern the large enterprises which they steward. No issue will be more critical in this decade as the U.S. and its NAFTA partners compete with the European Union (what was the EC) and the re-emerging peacetime Japanese *Greater Co-Prospersity Sphere of the Pacific*.

INDUSTRIAL POLICIES ARE KEY

Industrial policies can be critical to a nation's success. The United States doesn't have a coordinated policy toward business — that is, a clearly stated, unified industrial policy similar to the policies of virtually all other industrial competitors. The United States evolves its industrial policies one at a time, often for one sector at a time (a policy for agriculture, another for federally-funded university-based medical or biotechnology research, a third for U.S. airlines, etc.). The U.S. government's overall policy toward business is more adversarial than the policies of either Japan or Germany towards their business sectors.

In **Japan**, business and government cooperate and join forces to promote key technologies and export industries. Business and government view their relationship as cooperative and collaborative, built on harmony and consensus. The Japanese government provides "guidance" and adheres to the ideology of market mechanism and the government encourages large industrial groups known as "keiretsu," whose practices would be considered monopolistic in the U.S.

German government and corporations are generally more collegial than in the U.S., and the German government will more often intervene in the economy. German industry and government consider the relationship to be based on negotiation and consensus building. Large industry organizations (trade associations) have official status and regularly consult with government. Monopolies are tolerated. In Germany the post office and railroads are publicly owned and the government holds stock in business enterprises (i.e., **Volkswagen, Lufthansa**); in 1991 the government held stock in 381 companies.

BANKS & INDUSTRY MOVE CLOSER

Access to capital is a top priority for corporations in all three nations, but banking practices vary widely. In the U.S., banks have loose ties to industry; in Japan, banks are among the *keiretsu* members that own stock in corporations. German banks are also significant shareholders, with active board representation. Japanese and German banks have stronger ties to industry and greater access to inside information than do U.S. banks and can intervene earlier when firms experience financial difficulty.

In Germany there are "house banks" that provide the majority of financing to a corporation and exert pressure as a shareholder. In Japan the bank from which a company obtains the majority of its debt is the "main" bank, and this institution has much greater access to inside information about the firm than do its U.S. competitors. Anti-trust regulations are different; while Japan and Germany modeled their anti-trust laws after U.S. laws, both countries have diverged in terms of interpretation and enforcement (the legal systems are different, for one thing).

CORPORATE STRUCTURE AND GOVERNANCE

Differences in corporate ownership and governance can directly affect the business environment by influencing incentives for investors and the relationship between stockholders and management, the GAO researchers found. In the U.S., ownership has been widely dispersed between individuals and institutional investors, with the institutions becoming more active in corporate governance in recent years. This appears to be distinctly an American trend.

In Japan most stock is held by corporations tightly organized in the *keiretsu* industrial groups. In Germany, banks and labor are directly involved in governance, but not individuals or large pension funds. American investors are viewed in Japan and Germany as being too concerned with the short-term performance of their investments while large Japanese and German investors view their investments as being expressions of interest in the long-term viability of the corporation or business enterprise.

The Japanese *keiretsu* groups are linked through a complex network of cross-shareholding and exchanges of personnel among member companies. The percentage of shares held by any one company is not large because there is little risk of unfriendly takeovers. Because 70% of the stock is held for the long-term, the structure blocks takeovers and makes it difficult for outsiders to make major investments in companies within the *keiretsu*.

In Japan and Germany commercial banks are considered long-term, primary stockholders. While U.S. companies are under pressure from shareholders to maximize return to shareholders, Japanese and German investors are encouraged to take a long-term strategic view when making investment decisions.

CORPORATE STRUCTURE

The three countries vary considerably in corporate structure. In the United States, power shifted from owners (who were managers) to the professional managers of corporations and the boards that appointed the managers. The owners were primarily individual investors after WW II. Investment power is shifting, with the institutional investors' equity ownership exceeding half of the equity markets and accounting for the majority of trades on the NYSE. Still, most U.S. institutional and individual shareowners remain focused on share price and ROI.

The GAO observes that the predominant Japanese and German investors — the financial institutions and corporations investing in other corporations — are more interested in developing long-term relationships and the viability of the corporation than their American counterparts.

Japan's *keiretsu* are cited as examples. There are three types (bank-centered, production, distribution); six bank-centered keiretsu groups are horizontal alliances of 188 firms in different industries linked by shareholdings and clustered around the large bank. Three of the six groups are centered around pre-war, large group *zaibatsu* members. Bank heads meet and collaborate through a President's Council, where they identify mutual interests, exchange information, discuss problems with member companies and build trust. The production keiretsu are vertically-linked companies (a large manufacturer and its suppliers and contractors). Distribution keiretsu are vertically-integrated wholesalers and retailers; these are found mostly in the auto, electrical and electronic appliance industries. These types of investments account for 15% to 30% of member companies' shares. Between 60% and 80% of Japanese corporate shares are not traded at all. Much of the wild trading on the stock exchanges occurs as individuals "unarmed" with information move in and out of stocks, creating volatility.

In Germany, corporations are considered more socially conscious than in the U.S. and are active investors in other corporations (40% of corporate shares are owned by other corporations, with 60% of shares held by pension funds, banks, individual investors, foreign investors, and insurance companies). Banks are often agents for individual investors and vote their shares.

Most German companies are not publicly traded. Germany has 2,700 domestic joint stock corporations, with 521 trading on stock exchanges. In 1991, just 50 German companies accounted for 85% of all domestically traded shares. According to the **German Monopolies Commission**, 38% of the value-added in manufacturing came from industries where the three largest firms contributed at least 50% of output. This type of domination is not formally sanctioned by the U.S. government.

GOVERNANCE SYSTEMS

Corporate governance systems also greatly differ among the world's three most economically powerful nations. Direct control of the corporation in the United States is given over to the CEO and the senior management team, who are appointed by the directors (elected in turn by the shareholders). A few people (the CEO, CFO, COO, etc.) are ultimately accountable to a very large and diverse base of shareholders and to a broad array of stakeholders (the community, labor, the press, public interest groups, environmentalists, government, employees, retirees, even the media).

In Japan and Germany, it is the *few being responsible to a few* — most stockholders are principals with substantial economic links to the companies in which they own shares. Management is accountable to a small group of insiders, who are both owners and directors. Shareholding and stakeholding interests are much more closely aligned than in the United States.

It is difficult for American investors to acquire enough control to influence corporate management (U.S. law limits the amount of equity that bank holding companies can acquire in individual companies, so banks are outside the struggle). Institutional investors, by banding together in common interests, are influencing more control than in previous years. Banks are prohibited from closer corporate involvement by the *Glass-Steagall Act of 1933*, which prohibits banks from underwriting or purchasing securities for their own accounts and other restrictions that put a Chinese wall between commercial banking and securities industry type relationships with corporate customers.

Japanese company shareholders are involved in business relationships with the companies in which they hold shares. Insiders are appointed to the boards. More than 90% of Japanese board members are full-time managers and 40% of companies have no outside directors. Quite often the retiring senior banker is placed in a second career as a senior officer and director of the bank's borrowing clients.

TWO BOARDS GOVERN IN GERMANY

Under the German governance system, there are three entities involved in managing the enterprise: a board of managing directors, the supervisory board and the shareholders general meeting. The board of managing directors operates the firm and serves for up to five year terms. The supervisory board is a controlling body that oversees the managing board (no employees or managers allowed). The shareholders elect the supervisory board at their general meeting; this board elects a chairman (coming from the shareholder side) and a deputy (from labor). If the firm has more than 2,000 employees, half of the board must be representatives of the employees.

Germany has a long tradition of providing a comprehensive social welfare system to employees and the nation may be said to have a "social market economy." The primary goal of the company is perpetuity; if the existence is not threatened, the company strives for compromise to achieve internal and external consensus.

It is not unusual to see bank representatives from several German banks all sitting on the same company board. Both

German and Japanese bankers have considerably more insider information than their U.S. counterparts, and this information is of much higher quality, often obtained before troubles arise. (In December, **Deutsche Bank** and **Dresdner Bank** stepped in to aid **Metallgesellschaft**, a metals group in financial difficulty. The new corporate supervisory board chairman is also an executive of Deutsche Bank; it was this board that dismissed the former supervisory board chairman after certain U.S. investments soured.)

SHAREHOLDER INVOLVEMENT

While shareholder involvement is changing significantly in the U.S., there are not the same type of dramatic changes taking place in Japan or Germany. In the U.S., management is often seen as entrenched or recalcitrant — and, therefore, it becomes increasingly necessary to forcefully mount an external challenge to remove the CEO and (frequently) install the outsider. The frenetic pace of the takeover era of the 1980s was one way this was accomplished. Shareholder activism has accomplished this more recently at such major companies as **IBM, GM, American Express, Westinghouse, Borden and Eastman Kodak**.

The increasing power of the U.S. institutional investors (owners of 38% of outstanding shares of publicly traded companies in 1981, 54% ownership in 1993), and especially the public pension funds, is now making a difference in the governance of many U.S. corporations. Institutions have focused on both social issues (South Africa) and governance issues (executive compensation, voting rights). Some socially responsible investors are now combining the two -- investing in companies with good environmental records, for example, is thought to be good business judgment, for these companies will be less apt to incur heavy clean-up costs that affect the bottom line.

LONG TERM RELATIONSHIPS EMERGING

Columbia University's Institutional Investor Project detected a sea change in attitude on the part of U.S. institutional investors, whose trustees and boards of governors recognize the value of developing long-term relationships with the corporations in which they hold shares -- more along the lines of the Japanese and German institutional shareholders. Fewer large funds are doing the "*Wall Street Walk*"; they are choosing to stand and do battle with management and boards to improve performance, versus selling their shares.

In Japan, the network of *keiretsu* cross-shareholdings may be weakening, due in part to the collapse of the real estate and stock market (which has lost 60% of value since 1988). New bank capital requirements, based on the *Basel Accord* structured by former **Treasury Secretary James Baker** in 1985, are causing some banks to sell their *keiretsu* cross-held shares to build cash reserves. Life insurance companies are demanding large dividends from the companies they hold, now that the Japanese *Bubble Economy* real estate boom is over.

German corporations have experienced the least change — there have been proposals to change the proxy voting system, but these find little support among shareholders. There are suggestions to limit some non-bank activities, but these, too, find little support. Germans want more certainty about who could or would control their big companies before they embark on a corporate governance revolution.

WHAT DOES THE FUTURE HOLD?

As different as the corporate structures and governance systems are within each country, changes both subtle and dramatic are coming to all three countries. U.S. institutional investors are beginning to export their corporate governance movement to other lands, including Germany. As German shares begin trading here, German managers will be hearing from their U.S. shareholders. U.S. institutions must go abroad to maintain their returns; now proactive as investors, they will not easily accept the traditional German barriers to being active and involved shareholders.

European single market initiatives enable German corporations to compete in other countries in Europe, but also open the door to competition inside Germany. German companies are now subject to European Union anti-trust policy, losing some home court advantage. (EC laws prevail in cases where corporate practice or agreement violates EC law regardless of whether the practice violates German law.)

The U.S. regulators may force adoption of new accounting systems that more closely resemble American methodology (if German companies seek expanded U.S. investment through either ADRs or direct listings on stock exchanges).

U.S. firms are in turn adopting enterprise operations that borrow from the Japanese *keiretsu* practices (such as reliance on cooperation among a group of manufacturers, suppliers, financiers). The Japanese *keiretsu* are beginning to relax ties with suppliers. What is ahead for Japan? The introduction of unfriendly, American-styled takeovers? More common stock being offered to the individual investor? More frequent turnover of stock by corporate holders? Perhaps, but no one is predicting the broad opening of Japanese equities to foreign shareholders.

The United States is finally recognizing that indeed, *de facto* industrial policies do exist, and the federal government is encouraging consortia similar to those of the Japanese (SEMATECH is an example). **President Bill Clinton** has proposed a formal R&D effort with the nation's automobile manufacturers.

America's institutional investors are recognizing that long-term, patient investments in major corporations make for better investment than churning their portfolios. Also, since most funds are indexed, it is better to get a larger number of corporations going in the direction of better performance, rather than doing the *Wall Street Walk* when performance slips at an individual company. This message is being spread aggressively by shareowner activists.

The U.S. Congress and the Clinton Administration are revisiting the laws surrounding commercial banking and there may be a relaxation of the Chinese wall between some banking services and investing by banks (the Federal Reserve just relaxed some discount rules and restrictions for **First Union Bank of NC**) U.S. bankruptcy laws may be changed to enable American banks to intervene earlier in the firms in which they have substantial funds loaned.

DEFINING STAKEHOLDER INTERESTS

Finally, the definition of the objectives of the corporation and their obligations to stakeholders in each of the countries is beginning to change. German managers now strive to satisfy the aims of the owners, employees, customers, suppliers, and the public in Germany. (These constituencies are known as "stakeholders," in the U.S.A.) American companies are under pressure to balance "shareholder" and "stakeholder" views. German firms are true multi-nationals and will have to take a broader "world view." Japan's top managers have viewed the ultimate goal as being the enhancement of the welfare of employees. With lifetime employment ending in Japan, and the pressure on for shorter-term ROI, this focus may rapidly change to create more shorter-term income for investors.

CEOs in the U.S. will continue to be challenged to meet the demands for improved "performance" by institutional investors, especially the public pension funds. Stakeholder interests must be balanced with shareholder interests. While boosting performance—often by reducing forces—managers are assaulted by stakeholders who don't have a direct investment in the firm. "Capitalism," American-style, will continue to be defined by the creative tension between shareholders and their representatives, the board of directors, and the professional managers of large corporations.

STAY TUNED:

Watch for the GAO study results to surface in Congressional hearings, in the press, in policy statements by the Clinton Administration, and by Cabinet members. There has already been one PBS network program on the subject (produced by Hedrick Smith), *Stay tuned!*

PUBLIC PENSION ACTIVIST FAREWELL AND FORECAST: NYCPERS' CAROL O'CLEIREACAIN ON PENSION FUND ACTIVISM

In the November 1993 elections, New York City Comptroller **Elizabeth Holtzman** was defeated by NYS Assemblyman **Alan Hevesi**. The City's budget director, **Carol O'Cleireacain** is also stepping down. Holtzman and O'Cleireacain are among the nation's most active players in the broadening institutional shareholder activist movement. In recent proxy seasons the pair targeted such companies as **Sears; Federal Express; Champion International; Polaroid; GM; Dow Chemical; Goodyear Tire & Rubber; Dial Corp; Grumman Corp; McDonnell Douglas; Westinghouse Electric; General Dynamic; Aetna Life & Casualty; IBM; Occidental Petroleum Corp.**

Farewell words: In December 1993 budget director and pension fund trustee Carol O'Cleireacain addressed the members of the New York City Chapter of the **National Investor Relations Institute**. Her comments:

"What I say today is not 'forever,' for in corporate governance, many events are determined by economic realities — what is going on in the markets, in the national economy. The newspapers are filled with governance challenges — a recent story is the called off merger between **Volvo** and **Renault**. There are many aspects to this story; in France, as the government privatizes companies (**Renault, Rhone Poulenc**), there are questions about pension liabilities. There is a shortage of capital, in terms of the scope of the deals. Where do the French go? To large U.S. pension funds.

"I've been observing these intriguing connections of such issues for the past five or six years and I have learned that we must place various events in the context of being *reactions* or *actions*, or *macro* and *micro* forces at work. The state of the markets and the economy determines some events in corporate governance. Modern portfolio theories — such as indexing funds — will determine some of the events. Experience gained by active large public funds — the New York City and California state funds, for example — creates more activism. Information is shared with smaller public funds. All funds learn how to deal with corporations. The public environment is changing rapidly.

MARKETS AND ECONOMIES AND GOVERNANCE

"The markets and the economic picture are different in 1993 than in 1980s, the years when you made money as if by accident. During the 1980s the institutional investor came of age. Four trillion dollars is now invested, representing 1/4 of all NYSE equities and 50% of the daily trades. The rate of return on the institutional holdings was 12% to 15% annually in a time of 5% inflation. The institutional holdings grew dramatically -- by three times in the 1980's.

"Negative forces were turned loose — corporate raiders, hostile takeovers, greenmail, development of poison pills and golden parachutes, the proliferation of junk bonds, overleveraged LBO's, among these. Share value was affected. Disequilibrium developed. The relationships of bonds, equity and debt [to each other] became confused. The traditional lines between ownership and management were equally blurred. The funds began to feel vulnerable, unprotected by management. In 1984 three funds took the lead in calling on corporations to avoid *greenmail* — the **New York City Funds, CalPERS** and **New Jersey Pension Fund**. This was the beginning of today's pension fund activism.

"At first, activism was not widespread and was more on a case-by-case basis. There was no consensus opinion on takeovers. The fund managers' fiduciary responsibilities were met by doing an analysis — not by the outcome.

"That changed after the 1987 crash. The *Standard & Poor 500* performance fell to 7% in 1992. Pension fund investments were huge in individual companies and as a percentage of the equity marketplace. The *Wall Street Walk* was not so simple. While in the 1980s some funds concentrated on social issues — South Africa, the environment, equal opportunity — soon the pension funds were converging on the same major corporations to affect performance.

"The pension funds' strategies were these: talk to the management, gain lots of publicity, introduce resolutions, demand changes. The targets were the biggest American corporations: **General Motors, American Express, Westinghouse, IBM, Sears**. All lost share value, were no longer competitive and were "under-performers." Ultimately, the CEOs had to go. The funds' rallying cry became performance. The analysis of performance was important, and so was the proxy vote, determined to be an asset of the fund by the **U.S. Department of Labor**.

MODERN PORTFOLIO THEORY

"Because the investments are too large, the public funds no longer have the option of walking away from investments. This would depress prices, violate fiduciary responsibilities and affect indexes and other equity investments throughout the market. Individual stock became less important; now the corporate governance movement can affect many stocks, indexes and the entire market. Funds became long-term owners of many companies. Investments became relationship and in relationship investing, corporate governance is the best tool for helping companies to improve performance.

"The lesson is this: We are here to stay. We have no choice. You have no choice. We will always own some part of your business.

"The **Council of Institutional Investors** was formed and after five years of discussion, a *Shareholder Bill of Rights* was developed. The players are now in place and they are experienced. The benefits are beginning to flow to the public funds. They are teaching others. Public funds are managed by people exposed to the electoral process who are reimposing the democratic model on the corporation. They want secret ballots, no accumulated voting, more accountability, and more democracy in the way institutions (the board) operates.

"The early struggles over South Africa and the environment have led to more issues being added — Northern Ireland, baby formula marketing, board and workforce diversity. To this social portfolio is now added financial accountability and greater performance. This greatly complicates the life of the CEO.

"Funds are the ultimate capitalists. They exercise their rights as capitalists and owners in very public ways, in the democratic traditions, harnessing the power of two other important institutions: the press and the regulators. Public funds know how to use the media. Corporate governance is to some degree corporate change effected by publicity. Boards now react faster. The **SEC** enacted rule changes that made shareholder communication more effective. The SEC is moving faster now to create more a hospitable environment for shareholders."

1994 Proxy Season

Looking ahead to the 1994 proxy season, the departing pension chief sees more pressure for adoption of points made in the **CII's Shareholder Bill of Rights**. "There will be pressure for more open boards which in themselves should be more diverse. We will ask for better boards. We will focus on the shareowner voting process. The events of 1993 were intolerable, when our votes were not counted. We must make the proxy and voting system better. Perhaps the proxy voting system should be regulated. The entire voting system must be now be reformed, I believe."

Note: For a copy of the CII's *Shareholder Bill of Rights*, contact the group in Washington.

CORPORATE RESPONSE TO SHAREHOLDER AGENDA CREATES "COMMUNICATION OPPORTUNITIES"

"I see opportunities for enhanced communication between corporations and shareholders," observes **Louis M. Thompson, Jr.**, President of the **National Investor Relations Institute**, in examining the new SEC shareholder communication rules. "The rules give institutional investors the opportunity to communicate informally out of the sunlight of disclosure. This new spirit of communication is a greater awareness in corporate America of its shareholders' desires and motivations."

Thompson addressed the *Forum on Cooperation Between Shareholders and Corporations*, sponsored by the **Investor Responsibility Research Center** in Washington. The NIRI leader's observations:

- In less than a decade, we have witnessed the transition from institutions taking the *Wall Street Walk* to protest corporate actions to one of maintaining their investments and fighting for corporate change.
- The issues have changed from social concerns to corporate governance to corporate performance and pay-for-performance (executive compensation).
- It is now important for companies to understand not only the agenda of major shareholders but also what motivates them to take a more active role.
- Investors' growing concerns over executive compensation is emphasized through the SEC's executive compensation disclosure requirements. In 1994, legislation will require shareholder approval of compensation over \$1 million should companies seek the tax deduction for executive compensation.
- To a degree, the adversarial relationship between companies and their shareholders is healthy and need not be antagonistic. There is a spirit growing between companies and investor activists to work toward resolution of issues.

Corporate America, says Thompson, should try informal means of communication: "It can be as simple as calling an investor when the company receives [its] proxy proposal and asking for a meeting to discuss the matter. This could help avoid a proxy contest in the future."

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