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JANET ADAMS | BUSINESS FIRST

**Robert Tannous said shareholder activism is causing boards to create new communication strategies.**

— | A CONVERSATION WITH ... | —

## Robert Tannous

*Chief operating partner | Porter Wright Morris & Arthur LLP*

*Robert Tannous is chief operating partner at Porter Wright Morris & Arthur LLP in Columbus. He specializes in representing public companies in federal securities, mergers and acquisitions and corporate law issues. He also advises them on corporate governance, ongoing securities reporting and compliance, proxy statements, stock exchange compliance, mergers and acquisitions and executive compensation plans. Tannous, 49, has a bachelor's degree in business administration from Ohio State University and graduated from the Michael E. Moritz College of Law at the university. He was born in Amman, Jordan.*

### **Explain how the Dodd-Frank Act is making a mark on executive compensation.**

Executive compensation continues to be a hot corporate governance topic for companies. The passage of the act has put a spotlight on executive compensation with the implementation of a say-on-pay, which provides for non-binding stockholder advisory votes on companies' executive compensation

proposals and on the frequency at which companies' executive compensation proposals should be submitted for a stockholder vote; the focus on disclosure on the link between pay practices and performance and pay practices and disparity in relation to peer companies; additional rules on compensation committee independence and authority; and clawbacks to allow companies to recoup incentive-based compensation granted to any current

or former executive officer during a three-year period preceding an accounting restatement based on erroneous data corrected in the restatement. In essence, Dodd-Frank is giving shareholders a voice in the companies' executive compensation processes.

#### **What is changing with board composition and director qualifications?**

Boards and, more specifically, nominating committees of boards are tasked with the obligation to ensure that there is a proper mix of experience and skills among directors. Boards should periodically review the appropriate size of a company's board, taking into account that there is a sufficient number and mix of independent and qualified directors to fill the needs of each of the company's board committees. This task has been complicated by the need to ensure that a majority of the board members meet independence standards. Additionally, regulators and proxy advisory firms such as ISS have adopted stringent independence standards for directors, which have disqualified some directors from service for seemingly insignificant relationships. In 2009, the SEC adopted amendments to the proxy rules that require companies to disclose the specific experience, qualifications, skills and relationships of directors that led to the conclusion that the person should serve as a director. Companies are also required to disclose whether and how the nominating committee considers diversity in identifying director nominees. Although temporarily on hold, the outcome of the SEC's proxy access initiatives may have an impact on the number of directors and mix of directors serving on the company's board.

#### **What trends are you seeing with activist stockholders?**

Over the past several years, companies have seen a change in the role of stockholders and institutional investors. Where they once took passive roles in their investments, today we see those stockholders becoming more involved and activists in companies. These investors are continually pushing for transparency and accountability for public company boards. As such, boards and management need to develop and maintain good relationships with their stockholders. This requires the board to ensure that management is knowledgeable about the company's stockholder base and to monitor shifts in the holdings of their stockholders, including monitoring trading activity. Companies and their boards are expected to communicate more with their stockholders and need to make sure they do so in a way to

keep the stockholders engaged, to send consistent messages to their stockholder through an effective communication strategy and to do so within the legal disclosure limitations set out by the SEC under Regulation FD and under the rules of the various stock exchanges. As part of this communication strategy, companies need to determine to what extent directors should be allowed to communicate directly to stockholders. The SEC has encouraged more dialogue between directors and stockholders by recently clarifying that Regulation FD should not be a barrier to communications between directors and stockholders.

#### **With companies starting to see more takeover activity, what strategies can they employ as takeover defenses?**

After a lull in the mergers and acquisition markets, companies are starting to see more takeover activity. As a result, companies may find themselves as a target of an unwanted takeover, which, in some cases, may be exacerbated by the fact that their takeover defenses have been whittled away through stockholder activism. As such, boards need to evaluate their takeover defenses should the board decide that it is in the stockholder's best interests to repel an unwanted overture. Some of the defenses that a board must consider include poison pills, classified boards, and majority voting.

#### **What trends are you seeing with risk management at the board of directors level?**

Risk management has been in the spotlight for boards following the financial crisis. Both stockholders and regulatory agencies are requiring that boards provide greater disclosure about their risk management policies. These policies are unique to each company with regards to the operational, financial and strategic risks it faces in its company, industry and marketplace. The Dodd-Frank Act created mandated risk management procedures for financial institutions to establish a risk committee of the board, including one member of the committee who is deemed to be a risk management expert with experience managing risk at large companies. Additionally, in 2010, the SEC added new proxy statement disclosure requirements for financial and non-financial public companies to discuss the board's leadership structure and role in a company's risk oversight. While boards are tasked with an oversight role, management continues to be responsible for managing a company's day-to-day risks. Boards are also tasked with ensuring that the company's crisis management plan is up to date.