Robbins Geller Rudman & Dowd LLP

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The Importance of Alert and Active Institutional Investors

With each passing day it becomes more and more apparent that the financial crisis was no mere accident. Rather, investigation reveals widespread financial fraud and misconduct on the part of numerous lenders, investment banks, and credit rating agencies. One tragic result has been the decimation of pension fund assets and the erosion of trust in financial markets.

Who will now take the lead in rebuilding? To create a climate for wise reform and ensure the soundness of financial and equity markets in the future, active institutional investors have an essential role to play. Although numerous barriers exist, institutional investors and public funds are equipped with both the incentives and the resources to deter future fraud, monitor corporate behavior, and reform dysfunctional boards. If there is to be a path out of the current mess, institutional investors are going to light the way.

The ongoing Wall Street meltdown represents the third major wave of massive financial frauds during the last three decades. The latest financial catastrophe follows the Savings & Loan debacle of the late 1980s and the dotcom collapse of the early 2000s, in which $7 trillion of shareowner value was lost. Both of these crises occurred after aggressive industry deregulation, similar to the targeted take-down of the post-Depression financial reforms preceding the current crisis. If anything has been learned from the first two waves of fraud, it is this: an energetic response from active institutional investors can contribute to corrective changes that address not only the cause of the disasters, but decrease the likelihood that such disasters will re-occur. Consequently, both Main Street and Washington are once again looking to institutional investors to lead the way out of the current financial crisis.

Corporations, including investment banks such as Merrill Lynch and Bear Stearns and insurers like AIG, are at the heart of the recent disaster. When corporations paid out billions in bonuses, and short-sighted and incompetent CEOs took unconscionable risks, tanked their companies and skedaddled, shareholders were left holding the bag. But who is truly responsible for these actions? Since shareholders are the true owners of a corporation, it goes without saying that they must act in that capacity, no matter what the challenges. As shareholder activist Robert A.G. Monks argues, “Without informed and empowered shareholders playing their part, the corporate system simply has no equilibrium.” Alert and active ownership acts as a counterbalance to executives’ “otherwise unaccountable, value-destroying power.”

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The Future of Corporate Reform 2010 Public Funds Forum

September 14-16, 2010 • Montage Resort • Laguna Beach, California

Tom Brokaw
Former Anchor and Managing Editor, *NBC Nightly News*

Condoleezza Rice
66th U.S. Secretary of State
Professor, Stanford University

Ben J. Stein
Attorney, Economist, Hollywood Personality

Two years into the global financial crisis, public funds are beginning to reclaim their power to help mend critical weaknesses in the regulation of U.S. capital markets. After suffering heavy losses due to what former Fed Chair Alan Greenspan euphemistically called "a breakdown in market discipline," institutional investors are regrouping and stepping up to new and more active roles in monitoring corporate malfeasance, reforming dysfunctional corporate boards, and safeguarding investor assets.

This September, representatives from public funds across the country will meet in Southern California at an exclusive three-day educational conference to explore new tools critical to helping create a future that includes robust oversight and accountability in corporate practice and financial markets. Attendees will share analyses with corporate governance thought leaders and enjoy informal networking opportunities at events centered around the natural beauty of Laguna Beach's Pacific coast.

The Corporate Library, recognized internationally for its independent corporate governance information and analysis, will be hosting the second annual The Future of Corporate Reform Public Funds Forum from September 14-16 at the Montage Resort in Laguna Beach. Sponsors of the conference include Robbins Geller Rudman & Dowd LLP, the premier plaintiffs' securities litigation firm, and Gilardi & Co. LLC, class-action administration experts. The exclusive conference is designed to give representatives of public pension systems the knowledge and tools to help repair the markets, reshape corporate reform, and create and protect long-term value.

Speakers at this year's conference will include Tom Brokaw, former Anchor and Managing Editor of *NBC Nightly News*, Economist and Hollywood Personality Ben Stein, and former U.S. Secretary of State Condoleezza Rice. Investor, industrialist and philanthropist Warren E. Buffett will also be participating as a speaker by videotape. Opening remarks will be given by Robert A.G. Monks, co-founder of The Corporate Library. Monks, considered by many to be one of the foremost shareholder activists in the world, will reflect on how the long-term wealth-creating engine of the publicly held corporation can be preserved for the benefit of all. Speakers will explore a variety of topics, including the lessons public funds can learn from the financial meltdown, the new rules on director nomination, election and say on pay, the future of public and private action, emerging fiduciary issues for public funds, protecting public fund assets and securing remedies through securities litigation, and global opportunities and challenges facing public funds.

For representatives of public funds such as executive directors, chief executives, administrators, general counsel, investment officers, finance officers, fund trustees, and corporate governance officers, the second annual public funds forum is once again likely to be this year's must-attend conference. Participants and speakers alike will develop new contacts and exchange views while taking advantage of networking activities, including a California beachfront barbecue, dinner and dancing at Spanish Nights, golf at Monarch Beach, and sailing on the Regatta.

Last year's edition of The Future of Corporate Reform 2009 Public Funds Forum was described by many attendees as "the best overall conference" and also featured outstanding guest speakers, including former President Bill Clinton, John C. Bogle, founder of the Vanguard Group, Inc., and Nassim Nicholas Taleb, author of *The New York Times* bestseller *The Black Swan*. With an incredible line-up of speakers and events, the 2010 Public Funds Forum is shaping up to win even greater accolades.

For the most current information about speakers, the sessions agenda and to register, please visit www.TCLconferences.com or contact The Corporate Library at (207) 874-6921.

News Brief

Partners at Robbins Geller Rudman & Dowd LLP Named as Two of the Top 500 Lawyers

Darren J. Robbins

Darren J. Robbins and **Paul J. Geller**, co-founders of Robbins Geller Rudman & Dowd LLP, were both named to *Lawdragon's* recently published list of the 500 Leading Lawyers in America. According to the legal publication, "Selecting this year's 500 – which represents far less than 1 percent of the profession – was the most challenging task Lawdragon has completed in the past five years."

Robbins was previously recognized as one of *American Lawyer's* Young Litigators 45 and Under, and also named Attorney of the Year by *California Lawyer* in 2004 for his role as lead counsel in *In re Hanover Compressor Sec. Litig.*, which resulted in a significant recovery for shareholders and landmark corporate governance reforms.

Paul J. Geller

Geller receives the *Lawdragon* honor for the second time. Rated AV by Martindale-Hubbell (the highest rating available) and twice named one of the nation's top "40 Under 40" by *The National Law Journal*, Geller has served as lead or co-lead counsel in a majority of the securities class actions that have been filed in the southeastern United States in the past several years. Throughout his career, Geller has remained deeply committed to legal remedies that result in better corporate governance reforms.

Commented Geller, "We are honored to be recognized, but it would be wrong to consider this an individual distinction. Every case we bring is litigated by a team of lawyers, paralegals, accountants, investigators and the best staff around. The successes that Darren and I have achieved for our clients result directly from the teams we have. We don't prosecute these cases alone."

Public Funds and the Future of Environmental, Social and Governance Regulation

"If something is true in practice," a wise colleague of mine said some years ago, "it must be true in theory." He was pointing out that many investors had come to understand that environmental and social issues – climate change foremost among them – had potentially huge impacts on their portfolios. Dominant portfolio management theories, however, continued to view these issues as "externalities" that could not or should not be incorporated into investment decisions.

In recent years, both the theory and practice of responsible investment have advanced considerably. The UN Principles for Responsible Investment have 758 signatories representing $20 trillion in assets; the Investor Network on Climate Risk has $9.8 trillion behind it; and the focus on environmental, social and governance (ESG) issues has spread into new asset classes such as private equity and real estate. The financial crisis of 2008 has further awakened more and more people to the invaluable nature of governance information for predicting investment risk, and demand is rising for research to support shareholder engagement, active proxy voting, and portfolio screening on ESG issues.

Public funds have been among the key players in ESG integration, and they are ideally positioned to lead its further development for at least three reasons. The first and most obvious reason is that ESG issues often have their greatest impact over the long term, and public funds are long-term investors. A portfolio manager thinking about quarterly or even annual returns may not have to take climate change into account, but a state fund that is charged with providing a secure retirement to today's 19-year-old police recruit or 22-year-old teacher will need to do so. Being forced to consider the next generation concentrates the mind. As a friend of mine said recently, "2050, the date they give for all those potential climate disasters, seemed far away" until she realized that her daughter would only be 42 that year.

Second, public funds are universal owners – they hold the market – and as a result, they are acutely aware of interactions among their holdings. For example, public funds know that climate change is a risk not just to companies in heavily emitting industries (which may face carbon regulation or competition from cleaner alternatives), but also to property and casualty insurers experiencing more storm-related claims, agricultural businesses dealing with more floods and pests, paper mills and chipmakers struggling with water scarcity, and so on. For these investors, it's not an option to avoid affected companies or industries – they have a stake in assuring that the underlying problem is mitigated.

A third, much less discussed reason that public funds play a key role in ESG integration is that they are more likely to view their investments as part of a "holistic economics." By "holistic economics" I do not mean the trade in yoga mats and herbal tea (vibrant though that may be), but rather something like what used to be called political economy: the way that production and consumption, broadly defined, function within and among states. Trustees of public funds are uniquely well-positioned to understand the effects of companies' externalization of social and environmental costs. If a large retailer in a state fund's portfolio offers employees no health insurance, it's the state that will have to pick up the costs of medical care for many of them; if a lead processor poisons a town's soil so that its children have learning disabilities, the state will pay the increased educational costs. Any profit the state makes in its pension fund by holding the securities of such firms could thus be offset by the costs that same firm is imposing on the state budget in other areas.

Kimberly Gladman
Director of Research and Ratings,
The Corporate Library

Similar phenomena can be seen over the longer term on the international scale. If multi-nationals contribute to impoverishment, environmental degradation, and disease in the developing world, they are destroying their own future markets. These actions may limit the future returns of public funds invested in these companies, as well as the tax revenues states receive from corporate profits. Public fiduciaries understand all of this and want their investments to prosper from the creation of value, not the externalization of costs onto society.

The current political and economic climate is a particularly favorable one for increasing the incorporation of ESG factors in investment strategy. The recent BP crisis, which is potentially the worst environmental catastrophe of all time, only highlights and strengthens the importance of ESG investment strategy. Mary Schapiro's Securities and Exchange Commission seems poised to increase corporate disclosure on at least some ESG issues, and a Democratic Congress is likely to change the legislative landscape on climate change, health care, and a number of other social and environmental issues with business and financial impacts. In this context, public funds are best equipped to lead the investment community to a more sophisticated approach to ESG integration.

This article was authored by Kimberly Gladman of The Corporate Library. Gladman currently oversees The Corporate Library's research practice and leads a group of analysts responsible for governance ratings. Gladman earned a B.A. from Yale University in 1990 and a Ph.D. from New York University in 2001. Dr. Gladman also holds the Chartered Financial Analyst designation.

"The recent BP crisis, which is potentially the worst environmental catastrophe of all time, only highlights and strengthens the importance of ESG investment strategy."

Litigation Update

“[C]orporate defendants … cannot hide behind the financial crisis and other general macroeconomic forces to evade liability for the devastating harm caused by their own fraudulent conduct.”

Motion to Dismiss Ambassadors Group

On June 2, plaintiffs scored a victory against Ambassadors Group and its senior executives, defeating the defendants’ motions to dismiss the class action suit. Judge Justin Quackenbush of the Eastern District of Washington held that a conference call announcement made by the Executive Vice President that the company’s 2008 marketing campaigns would be “similar in timing and delivery as previous years” was materially false and misleading in light of the loss of a key mailing list, which represented up to 45% of the company’s customers.

Ambassadors Group’s principal business involves direct mail marketing to sell summer travel to middle and high school students. Plaintiffs allege that the absence of the key mailing list forced the company to take significant and costly measures to compensate, including loosening the demographic criteria for its targeted mailings to include broader but historically less responsive age and income groups, hiring additional personnel to generate new potential lists, and drastically lowering the registration fee for participants. The court concluded that these factual allegations demonstrated that Ambassadors Group’s marketing for 2008 would be marked as dissimilar to previous years.

The court also found that the significance of the lost mailing list could not have escaped the company’s executives, given the small size of the company and the crucial role the list played in its business. Consequently, the court held that the complaint alleged a sufficient inference of scienter, or evidence of an intent to deceive. In reliance on the core operations doctrine, the court held that “some events are so integral to the operations of a company that knowledge [of the devastating loss of the names list] cannot be denied by senior executives.” The court also noted the sale of over $4 million of personal stockholdings by the company’s CEO and Executive Vice President to further support its finding of scienter, and noted that these curiously timed trades had led to an investigation by the Securities and Exchange Commission.

The court also found that the complaint had alleged sufficient facts to hold the company’s CFO, Chadwick Byrd, liable both as a primary violator and as a control person. Although Byrd himself did not utter the false statement that formed the basis of the §10(b) violation, the court recognized that the CFO had participated in the conference call in which the false statement was made, and, as a result, bore responsibility for failing to correct it. In so holding, Judge Quackenbush adopted the reasoning of the Fifth Circuit in *Barrie v. Intervoice-Brite, Inc.,* and Judge Sweet in the Federal District Court for the Southern District of New York in *Freudenberg v. E*TRADE Financial Corporation*. In both cases, the courts similarly ruled that corporate officers may be held liable for failing to correct false statements made during conference calls, even when they were not the speakers. Citing the lessons learned from the economic catastrophes of the last two years, the court stressed that corporate executives cannot ignore their obligations to their company’s shareholders: “Mr. Byrd may not cloak himself in his silence and avoid liability for the misleading statements of his co-defendants made to public stock analysts during a conference call at which he was present.”

Said plaintiffs’ counsel **John K. Grant**, a partner at Robbins Geller Rudman & Dowd LLP, “The lesson from Judge Quackenbush’s decision is simply that corporate executives have a duty to speak honestly, and if they don’t, they should expect to be held responsible. Where investors’ savings and retirement assets are at risk, executives have no excuse for being anything other than honest.”

Plumbers’ Union Local No. 12 Pension Fund v. Ambassadors Group, et al., No. CV-09-00214, Memorandum Opinion and Order Denying Motions to Dismiss (E.D. Wash. June 2, 2010).

Motion to Dismiss Ratings Agencies Liable in Rhinebridge

The Honorable Shira A. Scheindlin of the Southern District of New York issued an order on April 26 refusing to dismiss fraud claims against two ratings agencies, Moody’s and Standard & Poor’s, in connection with their rating of the structured investment vehicle Rhinebridge SIV – “the shortest-lived ‘Triple A’ investment fund in the history of corporate finance.” Plaintiffs **King County, Washington** and **Iowa Student Loan Liquidity Corporation**, who lost millions of dollars after the Rhinebridge SIV collapsed, filed the lawsuit in October of last year.

In upholding the investors’ fraud claims against Moody’s and Standard & Poor’s, the court soundly rejected the ratings agencies’ arguments. Defendants argued that the global liquidity crisis was to blame for Rhinebridge losses, rather than the ratings agencies’ own false and misleading “investment grade” credit ratings given to the fund. Judge Scheindlin also rejected the ratings agencies’ claims that they lacked “motive and opportunity to commit fraud.”

“This watershed opinion rejects the ratings agencies’ efforts to blame others for the collapse of the Rhinebridge SIV,” said **Daniel Drosman**, a partner at Robbins Geller Rudman & Dowd LLP who is prosecuting the case. “The court correctly recognized that the false and misleading ratings were a cause of the collapse.”

Relying on the allegations in the complaint, Judge Scheindlin explained that the Triple A ratings that both Moody’s and Standard & Poor’s assigned the Rhinebridge SIV’s Senior Notes “conveyed to investors that the Notes were highly credit worthy, that Rhinebridge’s ability to meet its financial commitments was exceptionally strong, and that the Senior Notes were nearly as safe and secure as United States Treasury Bills backed by the full faith and credit of the United States Government.” In reality, however, “these Ratings concealed that Rhinebridge’s portfolio actually consisted of toxic assets that were heavily concentrated in the structured finance and subprime mortgage industries and thus

[were] likely to default." The truth regarding the toxicity of the Rhinebridge SIV's assets was revealed when, only four months after the Senior Notes were issued with Triple A ratings, Standard & Poor's and Moody's "abruptly downgraded" these same Senior Notes to "'junk' status." Following the ratings agencies' sudden downgrades, the Rhinebridge SIV "unraveled in a matter of days," and the Senior Notes "collapsed" in value, causing investors to lose hundreds of millions of dollars as a result.

"Judge Scheindlin's ruling is an important victory for investors and a message to corporate defendants that they cannot hide behind the financial crisis and other general macroeconomic forces to evade liability for the devastating harm caused by their own fraudulent conduct," said **Luke O. Brooks**, a partner at Robbins Geller Rudman & Dowd LLP who joins Drosman in prosecuting the case.

King County, Washington v. IKB Deutsche Industriebank AG, et al., No. 09-Civ.-8387, Opinion and Order (S.D.N.Y. Apr. 26, 2010).

Supreme Court Agrees with *Change to Win* Amicus Brief on Statute of Limitations for §10(b) Claims

On April 27, the U.S. Supreme Court held in *Merck v. Reynolds* that the two years investors are afforded in which to file a securities-fraud claim begin to tick only at the moment when investors should have discovered all the facts essential to a violation of Securities Exchange Act §10(b) – including the critical fact that a defendant possessed fraudulent intent, or scienter.

The holding echoes arguments presented by Robbins Geller Rudman & Dowd LLP clients **Change to Win** and the **Change to Win Investment Group** in an *amicus curiae* or "friend of the court" brief that was filed in the proceedings. The *amicus* brief insisted that because fraudulent intent is a critical element of every claim for securities fraud under §10(b), the two-year limitations period for filing such claims cannot begin to run until a defendant's fraudulent intent should be apparent. Neither the fact that statements were actually misleading, nor even the mere possibility that they were fraudulently so, can trigger an obligation to file suit if facts demonstrating fraudulent intent are not yet available.

The underlying action involves Merck's public statements concerning the cardiovascular side effects of its anti-inflammatory drug Vioxx following study results reported in the spring of 2000, which showed that participants taking Vioxx had suffered more heart attacks compared to participants using the comparator naproxen. Merck officials did their best to downplay the possibility that Vioxx might cause heart attacks by suggesting that the comparator naproxen had actually somehow reduced heart attack rates, and that as a result, the study's negative conclusions against Vioxx had been interpreted incorrectly. This foundationless claim had the effect of propping up Merck's stock price, which was based in significant part on expected revenues from its blockbuster drug. When Merck eventually announced that despite its prior denials, Vioxx was in fact connected to increased risk of heart attacks and would thus be withdrawn from the market, Merck stock plunged 27% in a day.

When investors who had purchased stock at inflated prices filed claims for securities fraud, however, the district court dismissed their action as "untimely." The district judge ruled that investors should have suspected fraud more than two years before they filed suit, based mainly on the existence of vigorous public debate concerning what the publicly reported study results really meant, and the September 2001 release of a letter from the FDA warning Merck that corporate statements defending Vioxx were "false, lacking in fair balance, or otherwise misleading."

When a federal court of appeals reversed the district court's dismissal, reasoning that public disagreements about scientific data do not necessarily signal fraud, Merck sought review from the United States Supreme Court. That gave Change to Win and the Change to Win Investment Group an opportunity to file an *amicus* brief addressing what is required to trigger the two-year limitations period on commencing proceedings for relief under §10(b).

The *amicus* brief emphasized that the applicable statute's requirement that any private litigant's claim for violations of §10(b) be filed within two years "after the discovery of the facts constituting the violation" is one that must be read in light of the Supreme Court's opinion in *Ernst & Ernst v. Hochfelder*, holding that scienter is needed to establish any §10(b) violation. In *Aaron v. SEC*, the *amicus* brief added, the Court had held that "scienter is an element of a violation of §10(b) and Rule 10b-5, regardless of the identity of the plaintiff or the nature of the relief sought." From this it followed that the time to file suit could not begin to run until investors should have known both that the defendants had made false or misleading statements, and also that they did so with the required fraudulent intent.

The Supreme Court agreed. Its recent opinion opens by stating that the case "was timely if filed no more than two years after the plaintiffs 'discover[ed] the facts constituting the violation'.... Construing this limitations statute for the first time," the Court held that "the 'facts constituting the violation' include the fact of scienter, 'a mental state embracing intent to deceive, manipulate, or defraud'" (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976)).

Interestingly, the Change to Win *amicus* brief quoted from the nineteenth-century English case *Edgington v. Fitzmaurice*, 29 Ch. D. 459, 483 (C.A. 1885), in which Lord Justice Bowen declared that the "state of a man's mind is as much a fact as the state of his digestion." The Supreme Court embraced this ruling. "Scienter is assuredly a 'fact,'" it held, and "this 'fact' of scienter 'constitute[s]' an important and necessary element of a §10(b) 'violation'....We

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For more information on these and other cases, check out our website at rgrdlaw.com

Institutional Investors continued from page 1

> "When institutional investors lead, regulators, lawmakers and public opinion will follow."

Yet, shareowners face significant barriers to bringing meaningful accountability and reform to the current financial crisis. Adolf Berle and Gardiner Means, who authored *The Modern Corporation & Private Property* in 1932, identified the basic problem: the structure of the publicly held corporation itself creates a "collective action" problem where ownership (by shareholders) and control (by private managers) are kept separate. This structural arrangement of dispersed and disempowered ownership makes it difficult and expensive for shareowners to monitor and discipline the management of corporations in which they own a stake. Complicating matters further, a large component of "ownership" is through an intermediary, such as a mutual fund, and the digital ownership of shares or options may change on a near-daily basis.

Institutional investors and public funds with large ownership stakes and a fiduciary obligation to pursue long-term value, however, hold a special niche – they are not "day traders" focused on short-term volatility, but rather investors with an abiding interest in preserving the wealth-building power of the corporation. With so much "skin in the game," institutional investors are keenly motivated to assure that the investment marketplace is governed by sensible "adult supervision" in the form of governance, accountability, laws, and legal recourse. Additionally, when value and assets are stripped or looted from investors, as occurred in the S&L crisis, Enron, and again in the Wall Street meltdown, shareowners incur a responsibility to stand up and take action. Although it can be academically argued that other parties should "do something," the sad fact is that institutional investors may be the only ones willing and able to join the fight. Regulatory entities have been neutered, captured, or deliberately underfunded. Mutual funds, rife with conflicts, often will not act. Small investors simply do not have the muscle. Only institutional investors are armed with both the incentives and resources to bring both public and private actions, which can lead to meaningful change. Indeed, a significant number of studies show that institutional ownership of a corporation is a predictor of better corporate governance and fewer instances of financial fraud.

There are many successful examples of active and alert ownership by institutional investors over the last several years. The alacrity shown by the **The Regents of the University of California** and other public funds in their prosecution of Enron, its accountants and co-conspirator banks for securities fraud is perhaps the most notable. This action led to both an unprecedented recovery of $7.3 billion for the injured shareholder class and stimulated the passage of more comprehensive disclosure laws by Congress, Sarbanes-Oxley among them. **CalPERS, the California Public Employees' Retirement System**, has also worked to build a reputation as a shrewdly active fund unafraid to pursue initiatives that satisfy the intertwined goals of strengthening corporate governance practices and maximizing investment returns. Indeed, a 1996 CalPERS report acknowledged that "shareholder activism, when successful, results in a statistically significant increase in shareholder wealth." The most successful CalPERS investments have been in Relational Investors, LLP, founded by Ralph Whitworth. Whitworth has focused his role on reforming corporate boards of directors, demonstrating that strong and able principals serving as directors defend and strengthen the basic profit-making process of the modern corporation. States, including Ohio, have also been pro-active in bringing forward actions against the worst abuses perpetrated by the credit-rating agencies.

It is not easy to be a watchdog on the markets or on corporate boards. Vigilance is rather expensive, and many have argued that the cost of moving institutional investors into a disciplinary role is too great. However, the three major waves of corporate malfeasance of the last three decades suggest the contrary – it has become too costly to do nothing. The current dysfunctional regulatory and corporate governance regime provides the incentives for institutional investors to expand their role in corporate governance. As public funds team up with experts, including institutional shareholder services and resourceful legal counsel, their power grows. When institutional investors lead, regulators, lawmakers and public opinion will follow. ■

EYE ON WALL STREET

Richard Fuld

In 2008, Lehman CEO Richard Fuld was called before Congress. Duly sworn, Fuld testified that he was paid a total of $310 million and did not sell the "vast majority" of his Lehman shares for the period of 2000-2007. Allegations are now emerging that Fuld may have lied, concealing millions of dollars of restricted stock compensation.

Former Lehman counsel Oliver Budde is now blowing the whistle on Fuld and contradicting Fuld's sworn statements. Based on Budde's direct experience drafting the now-collapsed bank's compensation disclosures, Budde calculates that Fuld actually received $529.4 million, including $469 million Fuld gained by sales of stock during the period in question. These numbers neatly match those independently produced by Lucian Bebchuk, an executive compensation expert at Harvard University.

Fuld was one of twelve Lehman executives to receive a subpoena from a Grand Jury as part of a U.S. Attorney-led criminal investigation into Lehman's securities practices involving the infamous "Repo 105" accounting deception. Fuld claimed to be ignorant of the scam, which helped conceal $50 billion of Lehman debt.

Already in hot water, Fuld's failure to disclose $230 million in pay could result in a perjury indictment. It is worth noting that none of the current crop of Wall Street corporate fraudsters has earned jail time. Fuld, already named "Worst American CEO of All Time" by CNBC, might just be the first.

Recommended Reading

13 Bankers: The Wall Street Takeover and the Next Financial Meltdown

Simon Johnson and James Kwak
Pantheon Books, 2010

One fine day in May 1998, a woman named Brooksley Born was preparing to publish a "Concept Paper" on the risks inherent in the rapidly expanding financial derivatives market, and the need for prudent "adult supervision" of these instruments, so as not to collapse the economy. The chairperson of the federal Commodities Futures Trading Commission, Ms. Born knew that her ideas were not in fashion with the banking elite, and were particularly opposed by the triumvirate of the Treasury Department's Larry Summers and Robert Rubin, and Alan Greenspan, the "Maestro" at the Federal Reserve. Born recalls what came next: a phone call from an angry Larry Summers, who shouted down the line the unforgettable threat, "I have 13 bankers in my office, and they say if you go forward with this you will cause the worst financial crisis since World War II!"

Mr. Summers' "13 Bankers" may or may not have been at his side. Even if a fable, the story embodies the critical message of Johnson and Kwak's book: Wall Street had taken over. Not a takeover of Wall Street by government, but the opposite. Mr. Summers, like his fellow "Three Marketeers," had fallen into utter thrall to the ideology which held that what is good for Wall Street is implicitly good for the nation, and promised to vehemently oppose even the public consideration of ideas that called that faith into question, as Brooksley Born had presumed to dare.

The past is prologue. Despite the failure of their laissez-faire ideology, the "thirteen bankers" and the paradigm they represent are more deeply entrenched than ever. We encounter the thirteen again in early 2009, hovering tightly around President Obama as he wrestled with issues on how to solve the financial crisis, while at the same time tiptoeing around Wall Street's hegemony. As the authors take pains to reconstruct, the capture of the policy apparatus of government by the banks has been total. Not only have the banking and financial industries been disgorging massive amounts of money on both lobbying and campaigns, the advance guard of the investment banking establishment has thoroughly infiltrated the regulatory agencies. The Secretary of the Treasury more often than not arrives fresh from CEO duty at Citibank or Goldman Sachs, and the powerful Chair of the Federal Reserve Alan Greenspan sat on the board of the venerable JP Morgan banking empire. Yet, as *13 Bankers* makes clear, the most pernicious of all is the ideological capture; when it becomes an accepted article of faith that the very idea that financial innovation is good in and of itself, and should be in the hands of a larger, less regulated and more systemically connected banking industry, you don't even have to lobby very hard.

Authors Johnson, a professor at MIT's Sloan School of Management, and Kwak, a former McKinsey & Company consultant, have done a fine service in tracing the history of how the power and ideas of the financial industry were born, gained traction, and ultimately came to rule the corridors of power. The unimpeded growth and mergers of successively larger financial institutions and the cutting and slashing of Depression-era reforms like the Glass-Steagall Act have led to the creation of bloated risk-heavy banks now "too big to fail," and a financial system held hostage by the same institutions. The consequence of this ideology has already brought the nation to a near financial meltdown, a disaster mitigated *in extremis* only through massive taxpayer-funded bailouts and subsidies.

Little of substance has been done to alter the situation, the authors conclude with dismay, holding that the window of opportunity to act forcefully was when banks were at their weakest in late 2008. Bailed out and re-capitalized on the taxpayer's own dime, the banking establishment now shows it is again ready to bare fangs at even the hint of a public challenge to its untrammeled supremacy. The stage is thus set for future bubbles, bailouts, and "the next financial meltdown." Among its stern prescriptions, *13 Bankers* insists that the large banks must be broken up into units of no larger than 4% of the total GDP, such that if they fail, their failures will not bring down the financial system itself. This will require a fight, and it will not be an easy one.

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consequently hold that facts showing scienter are among those that 'constitut[e] the violation.'"

Commented **Eric Alan Isaacson**, a partner at Robbins Geller Rudman & Dowd LLP who acted as counsel of record for Change to Win and the Change to Win Investment Group, "It is gratifying to be able to speak on behalf of clients with an important stake, and to see that the Justices got their central point."

Patrick Szymanski, General Counsel of Change to Win, commented, "Change to Win and the Change to Win Investment Group are strong advocates for the rights of shareholders and institutional investors such as union pension plans, and if allowed to stand, this decision threatened to cut off the right to sue even before the claim actually matured, a real Catch-22. It was important for us to weigh in, and Eric [Isaacson] and [Robbins Geller Rudman & Dowd LLP] allowed us to do so with a quality brief that made the point forcefully and successfully. It was a good experience and great result."

The Supreme Court's opinion is available at the Court's website: http://www.supremecourt.gov/opinions/09pdf/08-905.pdf ■

Calendar of Upcoming Events

July 15, 2010

PIRC
The Corporate Governance and Responsible Investment Journalism Awards 2010

London, England

Featured Speaker: **Patrick W. Daniels**,
Robbins Geller Rudman & Dowd LLP

In recognition of the important contribution that journalists make in the areas of corporate governance and responsible investment, and to encourage quality journalism, PIRC and Robbins Geller Rudman & Dowd LLP are pleased to announce the inaugural Corporate Governance and Responsible Investment Journalism Awards. These awards are intended to recognize those journalists who are helping record and clearly explain the issues emerging in these vitally important areas.

For more information, visit: www.pirc.co.uk/news/corporate-governance-and-responsible-investment-journalism-awards-2010

August 22-25, 2010

National Association of State Treasurers
Annual Conference

Colonial Williamsburg Lodge
Williamsburg, Virginia

The nation's state treasurers will gather at this conference to examine both the critical issues impacting the state treasuries and the innovative programs that benefit their citizens. The government and public finance leaders of the 21st Century will debate the new dynamics that will bring about a "future of opportunity" in public finance.

For more information, visit: www.nast.org

September 13-15, 2010

Chartis' 23rd Annual Producer Conference

Stowe Mountain Lodge
Stowe, Vermont

Featured Speaker: **Paul J. Geller**,
Robbins Geller Rudman & Dowd LLP

This conference will cover how the regulatory and litigation environment continues to present challenges for directors and officers.

For more information, visit: www.chartisinsurance.com

September 14-16, 2010

The Corporate Library
The Future of Corporate Reform 2010 Public Funds Forum

Montage Resort
Laguna Beach, California

The conference is limited to an exclusive audience of approximately 200 public fund fiduciaries and is designed to unite them with leading minds from academia, public policy and political strategy. As pension funds take an increasingly active role in overhauling deficient corporate governance practices at publicly owned companies, the conference program will educate public funds on how to succeed as leaders in the future of corporate reform.

For more information, visit: www.TCLconferences.com

September 19-21, 2010

Council of Institutional Investors
2010 Fall Meeting

Hotel del Coronado
San Diego, California

The Council of Institutional Investors is a nonprofit association of public, union and corporate pension funds. Member funds are long-term shareowners with a duty to protect the retirement assets of millions of American workers.

The annual meeting will educate members, policymakers and the public about good corporate governance, shareowner rights and related investment issues.

For more information, visit: www.cii.org

September 21-22, 2010

Information Management Network ("IMN")
5th Annual Foundations & Endowments Summit

Park Hyatt Aviara Resort
San Diego, California

This event is planned to provide the latest investment strategies for institutional investors in the cutting edge foundations and endowments arena. Join IMN and immerse yourself in a discussion on the newest investment trends, best practices and innovations in the world of foundations and endowments investment management.

For more information, visit: www.imn.org

October 12, 2010

IIR & IBC Financial Events
The 8th Annual Local Government Pension Investment Forum

Jumeirah Carlton Tower
London, England

Featured Speaker: **Patrick W. Daniels**,
Robbins Geller Rudman & Dowd LLP

This annual conference is designed for, and attended by, local authority delegates – treasurers, pension investment officers, and elected members. The conference focuses exclusively on pension investment, making it very topical in today's uncertain investment climate.

For more information, visit:
www.informaglobalevents.com/event/localgovpension

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