Remembrance of Things Past: A Walk Through 2013

By Greg Saitz, Whitney Curry Wimbish, BoardIQ, December 17, 2013 [subscription required]

If independent director anxiety had a seismographic readout, the spikes in 2013 would be numerous. The Securities and Exchange Commission and the plaintiff's bar both brought cases involving independent directors and mutual funds. On top of that, new regulations and guidance – or the lack thereof – kept boards guessing whether they would need to change practices to avoid scrutiny.

In the Capital

Two of the biggest spikes on the seismogram happened in quick succession early in the year. One occurred in May when the SEC sanctioned five directors of the **Northern Lights Fund Trust** for contract renewal and disclosure failures. Another came in June when the regulator found that **Morgan Keegan** fund directors caused certain funds to violate laws related to fair valuation.

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The upshot of the cases for directors elsewhere, attorneys and others say, is that no matter how much a board relies on the advice of others, it can't outsource ultimate responsibility for its decisions. The two cases also highlighted the sense independent directors have had in recent years that the commission's surveillance of their activities has grown more focused and may result in action against them even if the tagged behavior is common practice.

"It's pretty clear to me that – and this is true of this year and next year – there's going to be a heightened commission focus on directors and their performance," says Niels Holch, a founding partner of **Holch & Erickson** and the executive director of the Coalition of Mutual Fund Investors. "Clearly, they're looking at a more granular level, how robust is their oversight… the SEC is clearly holding directors to a higher standard."