The Current State of Shareholder Activism

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Discussion Topics

- The Current Shareholder Activism Environment
- Who are the EconomicActivists and What are their Tactics
- Some Emerging Themes
- What to do Before and After an Activist Shows Up
- Dealing with a Proxy Contest and Proxy Advisors
- Dealing with an Activist on your Board
The Current Shareholder Activism Environment

2015 in Review: Key Themes

- Growth in activist assets under management has led to increased focus on large cap companies
- Mainstream investors, including index funds, are becoming more active and engaged with companies
- Strong historical performance no longer immunizes against activism
- Negotiated settlements are occurring more frequently and faster
- Corporate structural defenses continue to erode

Source: Thomson, 13F filings, GS Internal
Companies Are Settling Earlier and More Often

**Activist Paths to Board Seats**

- **At Least One Seat Gained**: 80% (n=132)
- **No Seats Gained**: 20% (n=132)

**Situations w/ At Least One Seat Gained**

- **Settled Before Nomination**: 67% (n=105)
- **Settled Before Filing**: 20% (n=105)
- **Went to Vote**: 7% (n=105)
- **Settled Before Vote**: 7% (n=105)

**Board Representation & Time to Settlement**

<table>
<thead>
<tr>
<th>Year</th>
<th>Campaigns Where Seats Gained¹</th>
<th>Average Days to Settlement²</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>20</td>
<td>101 Days</td>
</tr>
<tr>
<td>2013</td>
<td>26</td>
<td>146 Days</td>
</tr>
<tr>
<td>2014</td>
<td>28</td>
<td>93 Days</td>
</tr>
<tr>
<td>2015</td>
<td>31</td>
<td>60 Days</td>
</tr>
</tbody>
</table>

Source: FactSet, Activist Insight, Public sources

¹Includes activist campaigns announced from 2012 – 2015; targeting companies with equity market capitalization >$500mm; including private and public settlements for board seats; involving activists on FactSet’s “SharkWatch50” list; excluding activism directed at funds.

²Represents time elapsed between initial public agitation and the date at which board seats were granted.
Volatility Creates Both Challenges and Opportunities for Activists

Activists Have Recently Underperformed

Key Considerations

- Major funds have been hit hard by long-only exposure, low oil prices, and weak equity markets
- Volatility has placed increased pressure on select funds, resulting in redemptions
- However, state of the market also creates new investment opportunities for those with dry powder
- Activists may take more aggressive actions to generate returns
- Activists will continue to play a dual role as both a catalyst for, and an obstacle to, M&A execution

Source: 13F filings, Hedge Fund Research, GS Internal as of 8-Mar-2016
A Closer Look at Recent Hedge Fund Performance and Behavior

**Hedge Fund Outflows Accelerating**

- Q1 2015: 52%
- Q2 2015: 42%
- Q3 2015: 58%
- Q4 2015: 62%

**Stocks Least Owned by HFs Outperforming**

- Dec-2013: 95%
- Jul-2014: 100%
- Mar-2015: 105%
- Oct-2015: 7.4%

Source: Hedge Fund Research, GS Research
Historically, Redemptions Have Peaked During Periods of Market Stress…

Hedge Fund Net Flows

VIX Volatility Index

Source: Hedge Fund Research, Bloomberg
...Causing Hedge Funds to De-risk Their Portfolios

Hedge Funds Have Been Cutting Long Exposure...

Hedge Fund Net Long Exposure

...with Short Interest Climbing

Source: GS Research
Sentiment Shifting… Investors No Longer Anticipating Capitalized Synergy Value Directly Incremental to Market Cap

Acquirer Indexed Stock Price Reactions

Annualized Arb Spreads Widened Over 2015

Source: CapIQ, Bloomberg, Thomson
Note: Includes all transactions with a public acquirer, US target or acquirer, deal value >$1bn, announced in 2015.

1 One day indexed stock price reaction measured as the change from the undisturbed date to one day post announcement relative to the S&P 500. Excludes statistical outliers.

2 Reflects the median annualized arb spread as of month-end for pending all cash deals >$1bn with a US public acquirer / target.
Activists Have Benefited From A Strong M&A Market… Where Do We Go From Here?

Implied 2016 Volume (Based on 20-yr Average M&A % of Mkt Cap of 6.9%)

Global M&A Volume ($tn)

M&A as % of Mkt Cap

Source: FactSet, Thomson, Bloomberg, as of 11-Mar-2016
### Shareholder Activism Threat Level Is High – Size & Performance Are No Defense

<table>
<thead>
<tr>
<th>M&amp;A Activity and Favorable Credit Markets Create Opportunities for Activism</th>
</tr>
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<tbody>
<tr>
<td>• Record number of situations and activists</td>
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<table>
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<tr>
<th>Increased Capital Available to Activist Hedge Funds</th>
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<tbody>
<tr>
<td>• Assets invested in activist strategies rose to historical levels.</td>
</tr>
<tr>
<td>• The success of activist hedge funds has led to activism becoming a fast growing asset class of its own</td>
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<table>
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<tr>
<th>Shareholders Increase Pressure as Economy Recovers, even at High Performers</th>
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<tbody>
<tr>
<td>• “Split-the-Company” activism</td>
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<tr>
<td>• “Return-the-Cash” activism</td>
</tr>
<tr>
<td>• “Operational Improvement” activism is also common</td>
</tr>
<tr>
<td>• Institutional investors increasingly teaming up or overtly supporting activists</td>
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<table>
<thead>
<tr>
<th>No Company Too Large</th>
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<tbody>
<tr>
<td>• Apple, Microsoft, DuPont, Dow, AIG, Macy’s, Alcoa, United</td>
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<tr>
<th>Recent Success in Proxy Fights Encourage Activists</th>
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<tr>
<td>• A 55%/45% outcome where the company prevails is not a ‘win’</td>
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<tr>
<th>Support from Advisory Services Have Emboldened Activists</th>
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<tr>
<td>• ISS and Glass Lewis generally support minority dissident slates but not necessarily outcome-determinative</td>
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<tr>
<th>High Levels of Governance-Related Activism Fuel Economic/Value Activism</th>
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<tr>
<td>• More tools are available for activists as large cap companies continue shedding takeover defenses</td>
</tr>
<tr>
<td>• Governance issues – combined with ISS voting policies and other factors – create meaningful “levers” for shareholder activists to compel events at target companies</td>
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Governance activists paved the road for economic activists

- Principal areas of reforms include:

<table>
<thead>
<tr>
<th>Risk Management</th>
<th>Executive Compensation</th>
<th>Board Structure</th>
<th>Director Elections</th>
<th>Takeover Defenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Enhanced Risk Management Disclosure</td>
<td>• Say-on-Pay</td>
<td>• Separate Chair/CEO</td>
<td>• Majority Voting</td>
<td>• Eliminate Shareholder Rights Plans</td>
</tr>
<tr>
<td>• Board Responsibility for Risk Management and Risk Failures</td>
<td>• Say-on-Golden Parachutes</td>
<td>• Director Independence</td>
<td>• Shareholder Proxy Access</td>
<td>• Eliminate Classified Boards</td>
</tr>
<tr>
<td>• Mandatory Board-level Risk Committees</td>
<td>• Cut Backs on Golden Parachutes/ Eliminate Gross-Ups</td>
<td>• Elimination of Classified Boards</td>
<td>• Eliminate Broker Discretionary Voting</td>
<td>• Lower Threshold for Shareholder-Initiated Special Meetings</td>
</tr>
<tr>
<td>• CEO Succession Planning Disclosure</td>
<td>• Clawbacks</td>
<td>• Enhanced Board Structure Disclosure</td>
<td>• Enhanced Candidate Qualifications Disclosure</td>
<td>• Permit Shareholders to Act by Written Consent</td>
</tr>
<tr>
<td></td>
<td>• Enhanced Compensation Disclosure</td>
<td>• Board Diversity Policy Disclosure</td>
<td></td>
<td>• Eliminate Supermajority Voting Provisions</td>
</tr>
<tr>
<td></td>
<td>• Independent Compensation Committees and Consultants</td>
<td>• Direct Shareholder Communication with Independent Directors</td>
<td></td>
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</tr>
</tbody>
</table>

- Evolving governance regime is derived from federal legislation, SEC rulemaking, state corporate legislation, stock exchange rules, shareholder proposals, “best-practice” standards and judicial decisions, principally those of the Delaware Court of Chancery.

- Economic activists tend to use governance as a means to an economic end.
Key Contenders in the Economic Activist Arena . . .

- Paul Singer
- Carl Icahn
- Daniel Loeb
- Jeffrey Ubben
- Bill Ackman
- David Einhorn
- Barry Rosenstein
- Nelson Peltz
- Keith Meister
- Thomas Sandell
- Jeffrey Smith
With Many Others Giving Activism a Try...

Other Funds Deploying Activist Strategies

- Appaloosa Management
- Arcadia Capital Advisors
- Atlantic Investment Management
- Audley Capital
- Barington Capital Group
- Becker Drapkin Management
- Biglari Capital
- Blue Harbour Group
- Breeden Capital Management
- Brigade Capital Management
- Brooklyn Capital Management/Bulldog Investors
- Cannell Capital
- Casablanca Capital
- Carlson Capital
- Citadel Advisors
- Clinton Group
- Coppersmith Capital Management
- Crescendo Advisors
- Discovery Group
- Dolphin Ltd Partnership
- Engaged Capital
- Engine Capital
- EverPoint Asset Management (f/k/a SAC Capital Advisors)
- First Manhattan Co.
- Franklin Mutual Advisers
- Front Four Capital
- GAMCO Investors
- Glenview Capital Management
- Harbinger Capital
- HealthCor Management
- Highfields Capital
- Highland Capital Management
- JCP Investment Management
- Jewelcor Management
- Karpus Investment Management
- Lawndale Capital Management
- Locksmith Capital Management
- Loeb Capital Management
- Luxor Capital Group
- Marcato Capital Management
- Mason Capital
- MCM Management
- Millennium Management
- Mustang Capital Management
- Newcastle Partners
- Nierenberg Investment Management
- Norges Bank Investment Management
- Oliver Press Partners
- Pardus Capital Management
- Paulson & Co.
- Perry Capital
- PL Capital
- Potomac Capital Management
- Privet Fund Management
- Raging Capital Management
- Red Mountain Capital Partners
- Riley Investment Management
- Roark Rearden & Hamot
- Sabby Management
- Sarissa Capital Management
- Scepter Holdings
- Scopia Management
- Seidman and Associates
- SMP Asset Management
- Southeastern Asset Management
- Spotlight Advisors
- Steel Partners
- Stilwell Value
- TCI Fund Management
- Western Investment
- Wynnefield Capital Management
- York Capital

... and many more
Traditional Institutional Investors Are Becoming More Directly Engaged in Activism

Institutional investors engaged in activism

Institutional investor commentary

**T. Rowe has been a bit louder** than most mutual-fund operators, said Kenneth Squire of 13D Monitor, which tracks activist activity. **He said he "expects" the fund to make noise** if the price isn’t acceptable to it, and that can provide cover for other, smaller, holders to vote against the deal. *WSJ, February 12, 2013*

**U.S. institutional investors**, who used to shun activist investors and side with a company’s management on most controversial issues, are starting to change their tune. Philip Larrieu, an investment officer at the California State Teachers Retirement System (CalSTRS), said activist investors have won more respect as their research has improved and their campaigns succeeded. *Reuters, April 9, 2013*

It was not long ago that the "activist" moniker had a distinctively negative connotation. It was a term equated with the generally frowned upon practice of taking an ownership position to influence a company for short term gain. But that view of shareholder activists...is not necessarily the current view... **More and more, investors have become comfortable with being called an "activist" in part because of the support they have received for their goals and, in some cases, even the tactics that they use."** Mary Jo White, December 3, 2013
Shareholder Activism: Economic Activism

- Economic activism is now an established part of the capital markets, takeover and governance scene.
- Generally, economic activists do not seek to take over a company but advocate “value maximizing” activity, often short-term oriented (e.g. share repurchases, spin-offs, balance sheet and business strategy adjustments); however, more situations where activists are seeking control of the board.
- Economic activism is made more effective by governance activism, which eliminates structural defenses.

<table>
<thead>
<tr>
<th>“Value Maximization” Demands</th>
<th>Other Strategic Demands</th>
</tr>
</thead>
<tbody>
<tr>
<td>• “Break up” plays: spin-offs, split-ups, sell divisions / non-core assets</td>
<td>• Management change</td>
</tr>
<tr>
<td>• Return of capital (share repurchases; special dividends; leveraged recapitalization)</td>
<td>• Board change (&quot;withhold vote&quot; campaign or short-slate / full-slate proxy contest)</td>
</tr>
<tr>
<td>• Advocate for sale of company</td>
<td>• New business strategies/initiatives</td>
</tr>
<tr>
<td></td>
<td>• New capital structure / capital allocation</td>
</tr>
<tr>
<td></td>
<td>• Compensation reform</td>
</tr>
<tr>
<td></td>
<td>• Monetize assets (e.g., real estate; IP) through complex structuring</td>
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<tr>
<td></td>
<td>• Block a transaction or initiative (or new terms)</td>
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</tbody>
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# Activist Themes and Tactics

<table>
<thead>
<tr>
<th>Investment Thesis</th>
<th>Goal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Potential M&amp;A Target</td>
<td>Sale of Company</td>
</tr>
<tr>
<td>Underperforming Companies</td>
<td>Change in Management / Board/Structure</td>
</tr>
<tr>
<td>Businesses with Divestible or Non Core Assets</td>
<td>Change in Operations / Business Strategy</td>
</tr>
<tr>
<td>Balance Sheet Capacity/Cash-Rich Situations</td>
<td>Return Cash to Stockholders</td>
</tr>
</tbody>
</table>

## More Sophisticated Tactics

- Submit shareholder proposals
- Lobby shareholders for public support early in process
- Enlist high quality directors as potential nominees
- Hire investment bankers to prepare sophisticated presentations
- Willingness to incur substantial campaign expenses
- Make 220 Demand or Litigation to access board minutes
- Wage multi-year campaigns
- Make proposals to acquire Company
## Factors Considered by Activists

<table>
<thead>
<tr>
<th>“Screening” Criteria</th>
<th>Potential Questions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Perceived consolidation opportunity</td>
<td><strong>Is the company a logical target for a strategic?</strong></td>
</tr>
<tr>
<td>Stock price performance/relative valuation</td>
<td><strong>What is the absolute stock price performance? What is my cost basis?</strong></td>
</tr>
<tr>
<td></td>
<td><strong>How is the stock performing vs. peer and/or industry?</strong></td>
</tr>
<tr>
<td>Capital structure</td>
<td><strong>Is there excess cash with a poorly defined strategy for deployment?</strong></td>
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<tr>
<td></td>
<td><strong>What is the level of net cash relative to market cap? Debt / EBITDA vs. peers?</strong></td>
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<tr>
<td></td>
<td><strong>Is cash/debt funded repurchase accretive?</strong></td>
</tr>
<tr>
<td>Candidate for break-up, restructuring or other outsized returns; operational changes</td>
<td><strong>Is the company trading below the sum-of-the-parts value?</strong></td>
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<tr>
<td></td>
<td><strong>Are there opportunities for divestitures or restructuring?</strong></td>
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<tr>
<td></td>
<td><strong>Opportunities for significant cost savings or other operational initiatives?</strong></td>
</tr>
<tr>
<td>Poorly understood strategy</td>
<td><strong>Has the company clearly and consistently articulated its strategy?</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Is company’s strategy well understood by the market?</strong></td>
</tr>
<tr>
<td>Research analyst criticism/negative press commentary</td>
<td><strong>Are there any reports or press calling for sale of the company or subsidiary?</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Any rumors about the board, management team or company’s operation?</strong></td>
</tr>
<tr>
<td>Takeover defenses</td>
<td><strong>Is the company vulnerable from a structural defense standpoint?</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Can I remove directors without cause?</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Can I act by written consent or call a special meeting?</strong></td>
</tr>
<tr>
<td>Shareholder base</td>
<td><strong>Are there other activists in the stock that I can team with?</strong></td>
</tr>
<tr>
<td></td>
<td><strong>What percentages of institutions do hedge funds and index funds comprise?</strong></td>
</tr>
<tr>
<td></td>
<td><strong>How significant is the retail ownership?</strong></td>
</tr>
<tr>
<td>Corporate governance</td>
<td><strong>Has ISS recommended any ‘withhold’ votes for directors at their other directorships recently?</strong></td>
</tr>
<tr>
<td></td>
<td><strong>What are the ISS and Corporate Library scores? Any notable downgrades?</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Is there a history of shareholder proposals?</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Are the company’s directors long-tenured, old or over-boarded?</strong></td>
</tr>
<tr>
<td>Management Stability</td>
<td><strong>Has there been a change in CEO or other top execs, or perception that CEO has stayed too long?</strong></td>
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<tr>
<td></td>
<td><strong>Has the company had difficulty filling key vacancies?</strong></td>
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Emerging Themes

- Activists are publicly launching campaigns with little or no notice to company
- More “wolf pack” attacks
- Small stakes in large companies can be effective for an activist who has institutional investor support
- Pervasiveness of smaller funds aggressively agitating for board representation and company change
- Activists are “the tip of the spear”
- Focus on directors with long tenure
- Shareholder proposals to breakup company and / or return capital
### Activist Investor Tactics Typically Follow a Pattern

<table>
<thead>
<tr>
<th>Build Stake</th>
<th>Apply Pressure</th>
<th>Take Action Against Board</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Accumulate initial stake (may include “hidden” economic ownership amassed through derivatives)</td>
<td>• Request meetings with management and/or board</td>
<td>• Threaten &quot;withhold the vote&quot; campaign</td>
</tr>
<tr>
<td>• Make Hart-Scott-Rodino filing</td>
<td>• Send private letters threatening public action</td>
<td>• Demand board seats</td>
</tr>
<tr>
<td>• Continue to build stake</td>
<td>• Issue open letters to board</td>
<td>• Enlist potential director nominees</td>
</tr>
<tr>
<td>• File 13D (once 5% is acquired) or go public even if below 5%</td>
<td>• Become aggressive with management on analyst calls</td>
<td>• Submit “non-binding” proposals for shareholder action</td>
</tr>
<tr>
<td>• Team up with other institutional or activist shareholders – or partner with a strategic player</td>
<td>• Aggressive 13D disclosures</td>
<td>• Launch short-slate or full-slate proxy contest</td>
</tr>
<tr>
<td>• Aggressive use of derivatives (“riskless voting”)</td>
<td>• Threaten to agitate against board’s preferred strategic alternatives or to vote against board-approved M&amp;A activity</td>
<td>• Call a special meeting (where available)</td>
</tr>
<tr>
<td></td>
<td>• Seek to stir up third-party interest and rally other investors (“wolf pack&quot; phenomenon)</td>
<td>• Take action by written consent (where available)</td>
</tr>
<tr>
<td></td>
<td>• Launch litigation to access board records and materials</td>
<td>• Make public bear hug</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Commence tender offer</td>
</tr>
</tbody>
</table>
Activists Can Accumulate Substantial Stakes Without Prior Notice

Key Signs of Activist Accumulation

- **Trading Volume Increases**
  - Accumulations of large stakes are marked by significant increases in volume vs. historical levels (and vs. peers).

- **Changes in Top Traders**
  - A new trading firm becoming a top trader of the company's shares can signal an accumulation, particularly if the firm is often used by activists.

- **Monitor Composition by Shareholder Type**
  - Look for accumulations by activists, hedge funds, new institutional shareholders as well as unusual 13G filings that may signal status as a counterparty to a significant derivatives trade.

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Source: *SharkRepellent, public filings.*

Notes: All positions accumulating using derivatives, except National Express.

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Investors frequently structure ownership positions to avoid regulatory filing requirements (e.g., structured derivatives).
Accumulation Strategies: Reporting Regulations and Loopholes

<table>
<thead>
<tr>
<th>Key Existing Regulation</th>
<th>Key Loopholes and Tactics</th>
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<tbody>
<tr>
<td>Rule 13d-1:</td>
<td>• Accumulations during 10-day window</td>
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<td></td>
<td>• Derivatives</td>
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<td></td>
<td>• 13G reporting</td>
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<td></td>
<td>• Informal concerted action</td>
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<tr>
<td>Rule 13f-1:</td>
<td>• Lengthy delay period</td>
</tr>
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<td></td>
<td>• 13F confidential treatment requests</td>
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<tr>
<td>HSR:</td>
<td>• Passive-investor exemption (acquisitions of up to 10% of target company stock are exempt from notification and waiting requirements)</td>
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<td>• Disaggregation (multiple entities acquire stakes)</td>
</tr>
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</table>

- Wachtell Lipton filed a rulemaking petition with the SEC in 2011 seeking to shorten Section 13(d) reporting deadline and expand definition of beneficial ownership. Academics filed a counter-petition in 2011, and activists are strongly opposing the measure.

- In February 2013, NYSE, Society of Corporate Secretaries and Governance Professionals and NIRI filed joint rulemaking petition with SEC seeking prompt updating of reporting rules under Section 13(f) and supporting a comprehensive study of beneficial ownership reporting rules.

- Brokaw Act introduced on March 17, 2016 would deal with 13D window, derivatives and wolf-packs.
Increasing Scrutiny of Directors
The Impact of Activism on Board Composition

Directors are Coming Under Fire

- Lack of Industry Expertise
- Long Tenure
- Perceived or Real Conflict of Interests
- Other Boards
- Lack of Share Ownership

Activists are increasingly assembling slates of directors with a mix of seasoned executives, corporate governance notables, and others with “investor” perspective.
Advance Preparation Is Critical

- Stay one step ahead
  - Core hedge fund strategy is to create a wedge between the company and its shareholders through embarrassment or suggestion of ideas that management supposedly missed
- Look at your business during “peacetime” the way a short-term financial investor would
  - What past decisions (e.g., acquisitions) is the activist likely to focus on?
  - What value could the activist perceive; what approach could the activist propose for “unlocking” value?
  - Analyze “capital allocation” strategies and alternatives (“excess cash” on balance sheet)
  - Review business portfolio and synergies / dissynergies
  - Assess and address vulnerabilities (including operational/strategic weaknesses, cash position relative to allocation priorities, structural defenses, corporate governance policies, and key proxy deadlines)
- Track peer performance and activist involvement at peers or similar industries
- Have a well-defined business strategy that is fully supported by all directors
- Build and maintain credibility with shareholders and analysts before activists surface
- Maintain robust shareholder communications program and stay close to shareholders by:
  - Tracking ownership, trading volumes and other indicia of activity
  - Maintaining an open dialogue with shareholders
  - Monitoring conference call participants, one-on-one requests and transcript downloads
  - Continuing regular temperature taking calls pre- and post- earnings and conferences
  - Objectively assess what you’re hearing – are you receiving candid feedback?
  - Engaging with portfolio managers as well as proxy/voting departments
Advance Preparation Is Critical (cont’d)

- Consider need to ramp up IR/PR efforts and sharpen roadshow presentation
  - Use planned events (e.g. earnings) to reinforce progress against benchmarks and metrics
  - Consider increasing frequency of momentum (“positive”) announcements—operating milestones, key hires, new guidance, etc.
- Monitor third-party governance ratings and reports for inaccuracies and/or flawed characterizations
- Is rationale for company’s strategy and asset portfolio / business mix clearly and thoughtfully articulated?
- Identify and cultivate third party supporters
  - Institutional investors, sell-side/industry analysts, customers, business partners, politicians, regulators, business/trade organizations, traditional shareholder advocates
- Refresh media relationships and monitor media
- Identify Company spokespeople and conduct training as appropriate
- Be alert to early warning signs, such as:
  - Extremely pointed questions during Q&A
  - Analyst reports suggesting structural changes or adverse shareholder sentiment
  - Changes in shareholder base
  - What has the activist done in the past?
- Establish and leverage core team of management, lawyers, bankers, IR/PR, proxy solicitors and conduct regular update calls
- Be ready for the first phone call
Steps to Consider After an Activist Surfaces

- Meet with the activist
  - Usually advisable to meet, but may depend on identity of the activist, history and other factors
  - Careful preparation for any such meeting is important; may be a precursor to a proxy contest or other adversarial action

- Consider the activist’s proposals
  - If proposals make sense or consistent with existing company initiatives, may want to explore whether to implement

- Make independent decision
  - It is the board’s responsibility to make decisions it believes are in the best interests of the company and shareholders

- Avoid “sound bites”
  - Your words will be used against you . . . .
Addressing a Threatened Proxy Fight

- Company should be realistic about chances of success
  - How receptive are shareholders likely to be to dissident platform/critique
  - How likely are proxy advisory services to recommend in favor of dissident nominees and how likely are institutional shareholders to follow them

- What steps can be taken to improve chances of success
  - Consider steps such as more fully disclosing or accelerating company’s business initiatives; adding or replacing directors; adopting some of dissident’s ideas/platform

- Should company consider settling
  - If company’s likelihood of success is low or uncertain, may want to seek early settlement
  - Settlements can occur at any time in process, even after proxy materials have been filed or mailed
  - Later settlements tend to be more costly to the target company
Influential & “Independent” Outsiders Are Often Key Voices in Determining Outcomes

- **Institutional Shareholder Services (ISS)**
  - Leading proxy advisory firm in terms of size and influence
  - More than 1,200 clients: institutions, mutual funds, corporate and public pension funds, hedge funds, college endowments and other ISS followers
  - Many institutions strictly follow ISS recommendations when voting their shares
  - Reviews issues separately with both sides in a proxy contest before releasing its recommendation to clients
  - ISS report will be issued approximately 10-14 days before meeting
  - Often ISS can significantly influence 20-30% of the vote in a proxy contest
  - Also opines on tender offers

- **Glass Lewis & Co.**
  - Major competitor of ISS, now owned by Ontario Teachers’ Pension Plan Board
  - Many of the largest institutions, mutual funds, index and public pension funds subscribe to Glass Lewis (generally also subscribe to ISS)
  - In 2010, Glass Lewis acquired the #3 player, Proxy Governance
  - Hosts a public forum called “Proxy Talk” – both sides speak to Glass Lewis clients in select proxy contests (aka public debate)
  - Glass Lewis can influence 10% or more of the vote in a proxy contest
  - May make different voting recommendations in proxy contests from ISS, but still favors minority representation for dissident shareholders

- **Egan-Jones Proxy Services**
  - Provides voting recommendations on a few companies
  - Usually does NOT meet with either side in proxy contests, but may have conference calls

**ISS has generally supported hostile transactions, recommended AGAINST management-supported transactions opposed by hedge funds or other shareholders, and recommended FOR hedge fund minority slates**
Role of Board in Proxy Contest

- Taking the “high road” on the record is key to the public relations strategy
  - Need to maintain consistency of message along with rapid response
  - Deal with responses to dissident’s attack points – initially indirectly and at times more pointedly
- Board will be kept informed of dissident activity and proxy communications
  - Press releases, media coverage, analyst reports, SEC filings, etc.
- Key strategic decisions to be made in close cooperation with the board
- Board members should join management in attending ISS meeting and select investor meetings (shareholder engagement)
- Screen phone calls (office and cell)
  - Dissidents may try to contact board members directly, all conversations are “on the record” and any comments may be used by dissidents in their proxy materials
  - Preference is for all communications to be channeled through designated spokespeople
- Board meeting schedules should remain confidential
- Individual directors may be targets of attacks
  - Like the Company, directors may be put under the microscope
  - Responses to be coordinated by Company and advisors
Board Communications

- Keep board informed
  - Consider periodic review of governance, shareholder activism and M&A activity
  - Keep directors apprised of options and alternatives analyzed by management, and business opportunities and challenges
  - Periodic reviews can help maintain board cohesiveness and preparation for dealing with any specific issues
- Consider activist requests for meeting with directors
  - In some circumstances, agreeing to a meeting with independent directors may be warranted
  - Any such meeting requires careful advance preparation
  - Use selected directors – not the entire board
Every Constituency Counts

- Constituencies communicate with each other
- Success hinges on targeting key influencers within each constituency
- Communications should be consistent, coordinated and focused on a common goal
After the Proxy Fight

- If dissidents win or are placed on the board through a settlement
  - Welcome new directors and try to integrate them into the board; if that becomes impossible, address at that time
  - In many cases, dissident nominees and companies have worked out constructive relationship

- If company wins
  - Keep “victory celebration” muted; dissident typically remains as significant investor for at least some period of time
  - Continue to try to maintain as constructive a relationship as possible with the dissident
  - Maintain ongoing dialog with the shareholder base
  - Don’t be complacent