

M&A Webcast: Shareholder Activism

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Agenda

- I. Activism is the New Normal; Objectives
- II. Preparing for Stockholder Activism
- III. Responding to Stockholder Activism
- IV. ISS – Recent Trends
- V. 14a-8 Stockholder Proposals
- VI. M&A and Stockholder Activism
- VII. Q&A

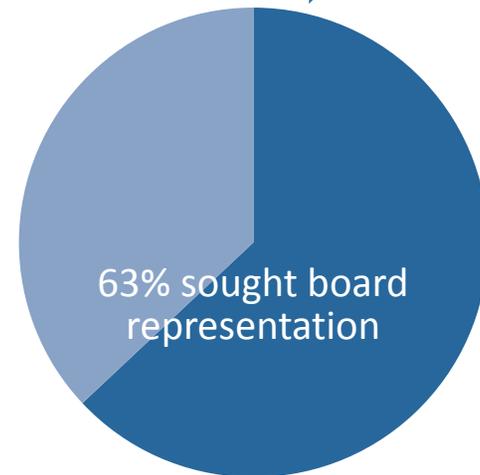
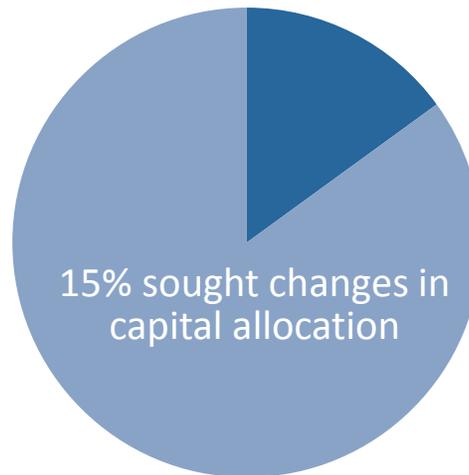
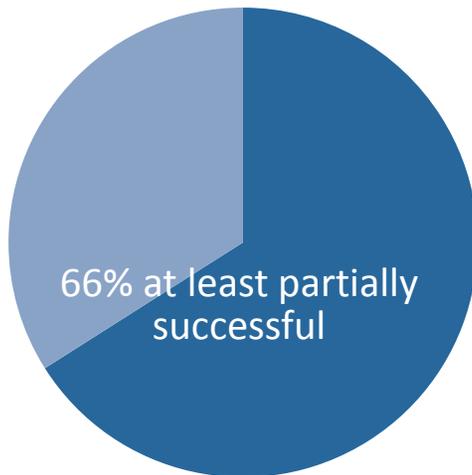
Activism is the New Normal

Activist funds gained 6.5% in H1 2014, more than double the average return of all hedge funds over the same period

In H1 2014, activists targeted 161 companies, a 7.3% increase from the same period in 2013

Pace of activism has accelerated in 2014, with targets including eBay, Symantec Corporation, and PetSmart

H1 2014 Activism by the Numbers



Sources: Activist Insight, FactSet, eVestment

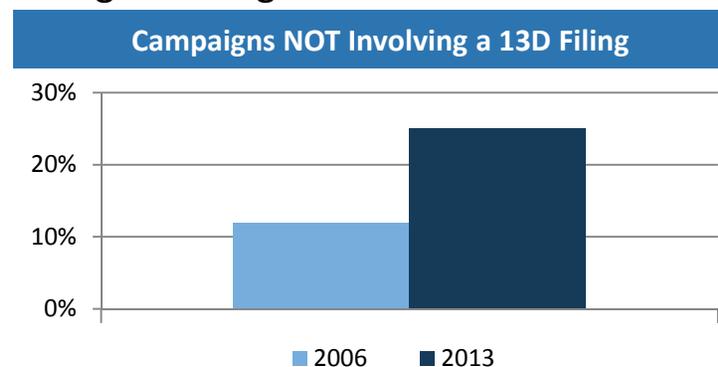
Activism is the New Normal

New disclosure tactics have resulted in more insurgents making disclosure before SEC ownership reporting requirements

- Tweets, press releases or other social and traditional media have been used to publicly announce positions and plans



- With new avenues for publicity and support from institutional investors, market caps of targets are no longer a deterrent
 - Apple, Dow Chemical, HP, Pepsi, Microsoft, and P&G – all over \$50bn
- Activists have also pursued “controlled” companies (e.g., 21st Century Fox)
- Percentage of insurgencies NOT involving the filing of a 13D beneficial ownership report has increased dramatically



Common Activist Objectives

Push for return of capital

- Increase or initiate share buybacks
- Increase or initiate dividends

Campaign against allocations of capital that do not create stockholder value

Push for spin-offs

Push for sale of company

Removal of CEO and/or board member(s)

- Add investor representative(s) to board

Review and reduce executive compensation and corporate costs

Other governance proposals

- e.g., board “independence”

Preparing for Stockholder Activism

Analyze existing stockholder base

- Monitor stockholder activity to identify unusual trading and activist positions before public filing or unsolicited offer
- IR should identify, log, monitor, and brief internal working group (and stock watch team) on all incoming communications

Establish a dialogue with stockholders

- Open lines of communication that can be used when needed later
 - Important that key stockholders are not hearing from the company for the first time after proxy contest is launched
 - Build support for incumbent board/management
- Use effective messaging to define financial and strategic goals and a clear path to achieve them
- Can determine which existing stockholders may “defect” and why
- Understanding potential motivations for support of activists or acquirors is key to defense and improved governance

Review bylaws and corporate governance policies for best practices

- While most activists focus on performance issues, they will often exploit structural vulnerabilities in the bylaws and charter, such as removal rules, action by written consent, and stockholder-called meetings, to advance their goals

Preparing for Stockholder Activism

Identify and coordinate your response team

- Create team as soon as risk of being targeted is considered substantial
- Generally a small team including management, a banker, a lawyer, an outside public relations specialist, and a proxy solicitor
- Engage a financial advisor and law firm to look at the company through the eyes of an activist/unsolicited bidder to identify vulnerabilities

Refresh company's shareholder rights plan

- Consider "on the shelf" strategy

Brief board on business and stockholder engagement developments

- Directors need to be up to date on all dealings with activists/bidders

Prepare possible responses by company to identified vulnerabilities

- Traditional takeover defenses are no longer as effective
- Poison pill not effective against small percentage accumulation of stock

Responding to Stockholder Activism

Meeting with Activists

- Important and prudent to meet with the activist
- Often meet first with IR & possibly CFO; later with CEO & possibly Lead Independent Director

Pros:

- Understand the specific concerns of the activist
 - Provides forum for company to explain its strategy and rebut issues raised by activist
 - Can diffuse situation before it becomes public
- Demonstrates good faith and commitment to stockholder value

Cons:

- Activist typically will not sign a confidentiality agreement in order to retain flexibility on trading in its position, which limits any discussion to public information
 - Statements made in meetings can be used by activist in their campaign

Responding to Stockholder Activism

Negotiated Settlements

- Negotiated settlements are becoming more prevalent
- Settlement may occur in conjunction with other board or governance changes (e.g., existing directors or management stepping down)
- Common terms include:
 - Board representation (including committee rights)
 - Standstill
 - Non-disparagement

Negotiated peace usually lasting for one or two annual meetings

Pros:

- Can avoid an ugly and time-consuming fight while maintaining stability
- Can win over activist to publicly support the board and management
- May deter other activists from joining the fray
- Can contribute positive ideas

Cons:

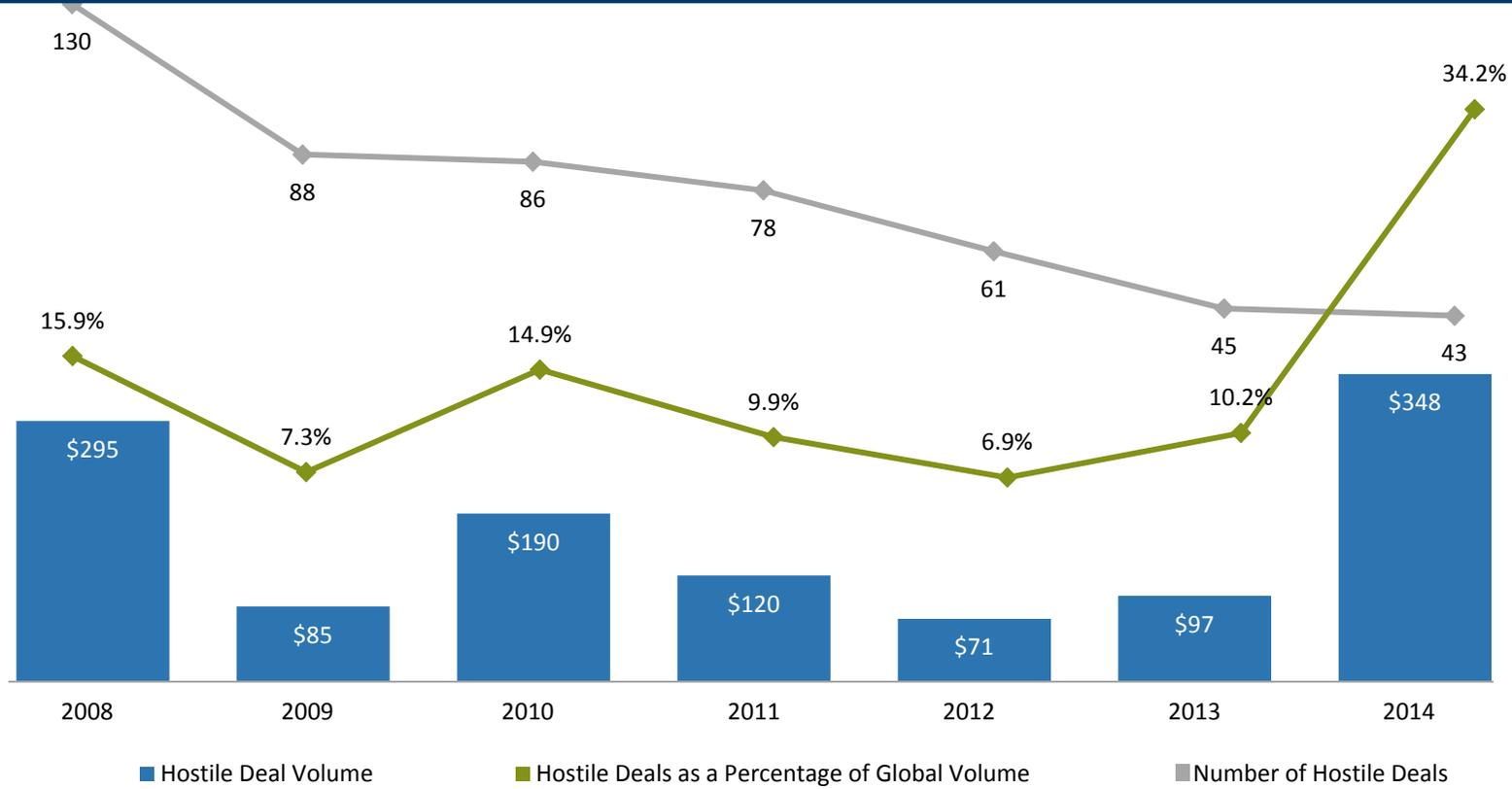
- Settlement is generally viewed publicly as an activist victory
- Even if an activist gets a few seats on the board, they can wield disproportionate power within the boardroom
- May result in board dissention and board debates may become public
- May not deter other activists from pursuing their own agendas

Hostile M&A

Hostile Deals

- Hostile and unsolicited offer deal volume was \$71 billion in 2012 and \$97 billion in 2013 (6.9% of global dollar volume in 2012 and 10.2% in 2013). Through 6/30/2014, those numbers are already \$348 billion and 34.2%.

2008 – 2014 Hostile and Unsolicited Deal Volume



Preparing for Takeover Offers

Prepare board and management to respond to takeover proposals

- CEO should be the sole spokesperson for the company
- The company has no duty to discuss or negotiate
- The company has no duty to disclose unless leaked from within
- All responses should be tailored to the situation by the response team

Be ready to call a special board meeting to consider offer

- Board should know there is no duty to accept or negotiate, only to act in good faith and on a reasonable basis
- A premium over market is not necessarily a fair or adequate price
- Management, bankers, and lawyers should all present to the board

Professional Profiles



Eduardo Gallardo

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Eduardo Gallardo is a partner in the New York office of Gibson, Dunn & Crutcher. He focuses his practice on mergers and acquisitions, and corporate governance matters. Mr. Gallardo has extensive experience representing public and private acquirers and targets in connection with mergers, acquisitions and takeovers, both negotiated and contested. He has also represented public and private companies in connection with proxy contests, leveraged buyouts, spinoffs, divestitures, restructurings, recapitalizations, joint ventures and other complex corporate transactions. Mr. Gallardo has substantial experience in the technology, financial services, telecommunications, real estate and healthcare industries.

Mr. Gallardo also advises corporations, their boards of directors and special board committees in connection with corporate governance and compliance matters, shareholder activism, takeover preparedness and other corporate matters. He also represents various major investment banks as financial advisors in M&A transactions, and hedge funds in their M&A and investment activities.

In 2011, Mr. Gallardo was named to *Law 360's* list of "Rising Stars" under the age of 40.

Mr. Gallardo is a member of the Board of Advisors of the Institute for Law & Economics of the University of Pennsylvania, a contributor of The Harvard Law School Forum on Corporate Governance and Financial Regulation, a member of the Advisory Board of Columbia Law School's Blog on Corporations and the Capital Markets, and a member of the Society of Corporate Secretaries and Governance Professionals. He is also a member of the New York State Bar Association and the Negotiated Acquisitions Committee of the American Bar Association's Business Law Section. Mr. Gallardo is a general editor of the *M&A Practice Guide*, published by Lexis/Nexis.

Mr. Gallardo received his Juris Doctor from Columbia Law School in 1999, where he was a Harlan Fiske Stone Scholar. He received a Bachelor of Arts from Cornell University in 1996. Mr. Gallardo is admitted to practice in the State of New York.

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Elizabeth Ising is a partner in Gibson Dunn’s Washington, D.C. office, practicing in the Securities Regulation and Corporate Governance practice group. She also is a member of Gibson Dunn’s Hostile M&A and Shareholder Activism team and Financial Institutions practice group. She advises clients, including public companies and their boards of directors, on corporate governance, securities law and regulatory matters and executive compensation best practices and disclosures. Representative matters include advising on Securities and Exchange Commission reporting requirements, proxy disclosures, director independence matters, proxy advisory services, board and committee charters and governance guidelines and disclosure controls and procedures. Ms. Ising also regularly counsels public companies on shareholder activism issues, including on shareholder proposals and preparing for and responding to hedge fund and corporate governance activism.

Ms. Ising was named as one of ten “Rising Stars of Corporate Governance” for 2009 by Yale School of Management’s Millstein Center for Corporate Governance and Performance. She also is a frequent author and speaker on securities law and corporate governance issues impacting public companies. Recent publications include the article “Top 11 Legal and Regulatory Tips for Boards of Directors” published by *Corporate Board Member* in early 2011 and articles in *Insights – The Corporate & Securities Law Advisor*. Ms. Ising also co-authors a chapter on shareholder proposals in the treatise *A Practical Guide to SEC Proxy and Compensation Rules* and authored an article in the American Bar Association’s *Business Law Today*, updates for the 2003 – 2006 editions of *Preparing for Your Annual Meeting*, Bowne & Co., and a chapter for *Corporate Governance: Law and Practice*, 2005 supplement, LexisNexis. Ms. Ising is a member of the Society of Corporate Secretaries and Governance Professionals and the National Advisory Board of the Women in Law Empowerment Forum. She is also the former Chair of the Corporate Finance Committee; Corporation, Finance and Securities Law Section of the District of Columbia Bar.

Ms. Ising graduated with high honors from the University of North Carolina at Chapel Hill School of Law in 2000. She was a member of Order of the Coif and was inducted into the James E. and Carolyn B. Davis Society. Ms. Ising was also a published member of the *North Carolina Journal of International Law and Commercial Regulation*. Ms. Ising is admitted to practice in the State of North Carolina and in the District of Columbia and is a member of Gibson Dunn’s Global Diversity Committee.

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Adam H. Offenhartz is a partner in the New York office of Gibson, Dunn & Crutcher. He is a member of Gibson Dunn's Litigation Practice Group and focuses on commercial litigation with an emphasis on corporate control contests. He has handled and tried jury and non-jury cases involving mergers and acquisition battles, shareholder derivative actions, restrictive covenants, bank fraud cases, real estate valuation and earn-out disputes, copyright infringement and other matters. Mr. Offenhartz also has an active arbitration practice with an emphasis on insurance and reinsurance disputes and cross-border disputes. He has also handled a number of regulatory, disciplinary and ad hoc proceedings. Mr. Offenhartz regularly represents plaintiffs/claimants for whom he has recovered substantial sums or achieved significant injunctive relief.

Mr. Offenhartz was named 2011 MVP in securities litigation by Law 360 for his work in corporate control and shareholder derivative litigation, and is recognized as a leading litigator in *Benchmark Litigation: The Definitive Guide to America's Leading Litigation Firms and Attorneys*.

Mr. Offenhartz joined Gibson Dunn in 1989 after earning his Juris Doctor from the University of Chicago Law School. He is a graduate of Harvard College, where he received a degree in American History and Literature.

Professional Profiles



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A founding member of Joele Frank, Wilkinson Brimmer Katcher and named President in August 2013, Matt has more than 18 years of experience providing strategic corporate, financial and crisis communications counsel to Boards of Directors and executive leadership of public corporations and private equity firms involved in M&A, hostile takeovers, proxy contests, shareholder activism defense, spin-offs, reorganizations, financial restructurings, management changes, litigation, regulatory actions and a wide range of corporate crises.

He has advised many companies in their defense against proxy contests, short attacks and other tactics employed by activist investors. Recent selected engagements, among others, include: PetSmart (JANA, Longview); Family Dollar (Carl Icahn); lululemon (Chip Wilson); Outerwall (JANA); Violin Memory (Clinton); Agilent (Relational); Meritor (Sandell); Lear (Marcato, Oskie); Ferro (FrontFour Capital, Quinpario); Commonwealth REIT (Corvex / Related); Danone (Trian); Gardner Denver (ValueAct); Oshkosh (Carl Icahn); PMC-Sierra (Relational); Brocade (Elliott); Greenbrier (Carl Icahn); Progress Software (Starboard); Motorola Mobility (Carl Icahn); Novell (Elliott); Lawson Software (Carl Icahn); Family Dollar (Trian); and Iron Mountain (Elliott).

In 2012 Matt received *The M&A Advisor's* "40 Under 40" Recognition Award, and in 2007 he was named to *PR Week's* inaugural "40 Under 40" list. Previously, Matt was a vice president in the M&A and crisis communications practice at Abernathy MacGregor Frank. He holds an MBA from Columbia Business School and a BA in international relations and a BA in communications from the University of Pennsylvania.



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Scott S. Winter is a Managing Director of Innisfree M&A Incorporated. Mr. Winter advises companies and investors on all aspects of shareholder engagement focusing on hostile and friendly acquisitions, shareholder activism, contested shareholder meetings, corporate governance, and other proxy solicitation matters.

Prior to joining Innisfree, Mr. Winter was an attorney with Skadden, Arps, Slate, Meagher and Flom LLP specializing in mergers and acquisitions, including cross-border and hostile transactions. Before attending law school, he was a certified public accountant with Ernst & Young LLP for a number of hedge fund and broker-dealer clients.

Mr. Winter earned a B.B.A. in accounting from the University of Wisconsin, and a J.D. from the New York University School of Law. Mr. Winter is member of the American Bar Association, Society of Corporate Secretaries & Governance Professionals, and a past member of Mergers, Acquisitions and Corporate Control Contests Committee of the Association of the Bar of the City of New York.