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Corporate Update

Engagement and Activism in the 2015 Proxy Season

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As the 2015 proxy season approaches, the dominant theme appears to be the interaction between directors and investors. Though, traditionally, there was little to no direct engagement, recent experience indicates that communication between these two groups is now on the rise, in some cases resulting in collaboration. This is potentially a beneficial development, particularly insofar as it may help companies and long-term investors work together to resist pressure from activist shareholders seeking short-term profits. In the current environment where activists and hedge funds appear to wield unprecedented financial and political leverage, and the influence of proxy advisors is as significant as it is controversial, the predominant trend seems to be "toward diplomacy rather than war."¹ Organizations such as the Shareholder-Director Exchange, which

began last year to offer guidance to shareholders and boards on direct engagement, are promoting policies that may reduce the incidence, duration, and severity of contentious public disagreements.

For many activist investors, however, controversy and not compromise is the goal, and these investors are likely to continue to engage in the more combative tactics of proxy fights, consent solicitations, withhold-vote campaigns, and proxy access proposals. More powerful than ever, these investors are using every tool at their disposal to discomfit their targets, and it seems no company is too big or too profitable to be immune from attack. The counter-current of high-profile activist aggression—particularly aimed at boards of directors—thus runs alongside the dominant theme of cooperation and engagement.

Direct Engagement on the Rise

Direct engagement between directors and shareholders traditionally has been rare, generally limited to annual meetings and proxy disclosures, and otherwise—particularly with respect to in-person interaction—occurring only in unusual circumstances. In recent years, however, as activism and shareholder rights have come to dominate the corporate governance landscape, communication with institutional investors has been understood as one of the more effective ways to address any simmering discontent and forestall issues before they become public controversies. Investor relations and communication primarily are handled by management and corporate officers, but recently there has been some momentum toward involving directors themselves. In December 2013, Mary Jo White, U.S. Securities and Exchange Commission chair, stated:

Engagement with shareholders should mean more than just mailing out the annual proxy statement and conducting the annual meeting And the board of directors is—or ought to be—a central player in shareholder engagement.²

White's remarks quickly gained traction in the corporate governance arena. In July 2014, the Shareholder-Director Exchange—an organization that describes itself as "a working group of leading independent directors and representatives from some of the largest and most influential long-term institutional investors"³—announced that it had sent a letter to the lead directors and corporate secretaries of every Russell 1000 company.⁴ The letter proposed that public company boards consider "adopting and clearly articulating a policy for shareholder-director direct engagement."⁵ The signatory investor members of the Shareholder-Director Exchange represent over \$10 trillion in assets under management and include prominent investment groups such as BlackRock, CalSTRS, and State Street Global Advisors. The letter cited the example of JP Morgan Chase & Co., which, in 2013, convened a group including board members and shareholders representing 40 percent of the shareholder base to discuss corporate governance issues. The Shareholder-Director Exchange has prepared a framework for direct engagement, the "SDX Protocol," which was endorsed by JP Morgan Chase in its 2014 proxy.⁶

The SDX Protocol offers a 10-point set of guidelines for direct engagement between "longer-term" shareholders and directors. The Shareholder-Director Exchange emphasizes that the protocol is intended not to encourage the board to interfere with or usurp the investor relations

function of management, but rather to consider direct engagement where doing so can be an effective aspect of the overall communications efforts of the company.⁷ The protocol advocates that boards adopt a clear policy for engagement (recommending a case-by-case analysis of each decision to engage with a shareholder and suggesting that a board consider whether to post its policy on its website).⁸ Other points include identifying potential engagement topics, selecting participating directors, and planning and preparing for the engagement. The protocol sensibly recommends that companies review and update their policies annually and modify them to fit their own specific circumstances.⁹ Whether or not companies adopt the SDX Protocol, case-by-case decisions on director/investor engagement is something that public companies should consider.

Direct engagement is not without its critics, who see a number of potential downsides of interaction. Legitimate objections include unfair access for large shareholders, potential management concerns about the undue influence of major shareholders on directors, and the inadvertent disclosure of information in violation of Regulation FD.¹⁰ Nonetheless, as the Shareholder-Director Exchange points out, "it is shortsighted for corporate boards to avoid engaging with their long-term investors when activists frequently meet with those same institutions to pursue corporate change."¹¹

The Politics of Activism

There is no question that shareholder activists have become more active, and more successful in their activism, in recent years.¹² With their unprecedented funds—reportedly close to \$200 billion¹³—economically-motivated activists engage in more interventions, target larger companies, and enjoy significant support from traditional investors and political actors.¹⁴ According to a recent Credit Suisse report, there were 514 activist campaigns in 2014, the highest since the financial crisis, and a 20 percent increase over 2013.¹⁵ Activist shareholder interventions increased 88 percent between 2010 and 2013, while the average market capitalization of target companies increased to \$8.2 billion in 2012 from \$3.9 billion in 2011.¹⁶

The recently announced proxy fight for seats on the board of DuPont Co., initiated by long-time activist Nelson Peltz of Trian Fund Management, demonstrates that no company is too large to be targeted, and that outperforming the market does not insulate even a very large company from attack. The five largest companies ever engaged in activist proxy contests all were targeted within the last nine years—and in each case (other than DuPont, so far), the activists did achieve some elements of their strategic goals.¹⁷ In 2014, activists won a board seat in a record high of 73 percent of proxy fights, an increase from 63 percent in 2013.¹⁸ In addition, many activists have obtained board representation simply by threatening a proxy contest, as a number of companies have chosen to settle rather than bear the economic and reputational risks of a proxy fight.

The introduction to the SDX Protocol lists a number of "red flags" that are likely to attract negative attention from activist organizations such as the Shareholder Rights Project at Harvard Law School.¹⁹ In recent years, the Shareholder Rights Project has operated to pressure public companies to declassify their boards of directors, and in nearly 100 cases—for better or worse—it has had the intended effect.²⁰ The red flags cited by the SDX Protocol include both financial performance-related items such as shareholder return and corporate governance-oriented items

such as takeover defense plans. Based on the list, which is long and described as "growing," the question for many companies is not whether they will experience the unwanted scrutiny of corporate gadflies and the unwelcome intrusions of activist investors, but when.

As its profile rises, shareholder activism has become increasingly a socially charged issue, with some activists portraying themselves as Robin Hood-like characters in the corporate world²¹ and some populist politicians allying themselves with activist causes.²² This is heightened by an appeal to democratic values and an increasing focus on "shareholder rights," rather broadly defined.²³ For example, Institutional Shareholder Services (ISS) has announced that it will consider, for its revised Governance QuickScore 3.0 ratings, whether a board of directors has recently taken action that "materially reduces shareholder rights," including eliminating the ability to call a meeting by written consent, lowering quorum requirements, classifying the board of directors, or increasing authorized capital.²⁴

Yet companies, boards, and other investors should keep in mind that shareholder activism is often merely a tactic in a self-interested investment strategy. Shareholder activists such as hedge funds typically are pursuing short-term financial gain at the expense of long-term shareholders and stakeholders. These funds welcome the support of academics and theorists who argue that disruption is good for the market;²⁵ however, a recent study by the Institute for Governance of Private and Public Organizations, after investigating these claims, found:

[T]he most generous conclusion one may reach from these empirical studies has to be that "activist" hedge funds create some short-term wealth for some shareholders as a result of investors who believe hedge fund propaganda (and some academic studies), jumping in the stock of targeted companies. In a minority of cases, activist hedge funds may bring some lasting value for shareholders but largely at the expense of workers and bond holders; thus, the impact of activist hedge funds seems to take the form of wealth transfer rather than wealth creation.²⁶

Activist hedge funds, in other words, keep their profits for themselves.

Fortunately, investors can be and frequently are persuaded by a company's management and directors to resist the initiatives of activist funds, even when the activists' positions are backed by proxy advisory firms such as ISS and Glass Lewis. Investment managers such as BlackRock have made public statements in support of corporate America's long-term strategic goals.²⁷ BlackRock's CEO recently wrote that "it is part of our collective role as actors in the global capital markets to challenge [the trend toward short-termism]."²⁸ Despite the pressure to accede to activist demands, nonetheless it is the responsibility of the board of directors and the chief executive to, in the words of one Yale professor, "resist self-motivated activism that adds nothing."²⁹

The Proxy Battleground

The proxy statement continues to be the primary battleground for activist investors waging campaigns against their corporate targets. One source reports that in the 2014 proxy season, seeking boardroom representation was the most popular tactic, accounting for just over 40 percent of all activist interventions in the first half of last year.³⁰ Meanwhile, proxy access

proposals are surging in number this year, as activists attempt to enact so-called "private ordering" of proxy access in lieu of action by the SEC in this area. The New York City Comptroller has launched the "2015 Boardroom Accountability Project," a national campaign for the widespread implementation of proxy access.³¹ The five pension funds of New York City are submitting precatory proxy access proposals simultaneously at 75 companies, chosen in order to spotlight the issues of climate change, board diversity, and CEO pay. The Boardroom Accountability Project's requested proxy access bylaw would permit shareholders who own 3 percent of a company for three or more years the right to have their director candidates—up to one-quarter of the board seats—listed in the company proxy. Since 2012, proxy access proposals with 3 percent/three year criteria have received shareholder approval at a rate of just over 50 percent.³²

As with every shareholder proposal, proxy access proposals must meet certain formal and procedural requirements to be eligible for inclusion in the company proxy statement. Proxy access proposals have evolved in recent years, and their sponsors are often sophisticated investors, and as a result, most submissions are properly prepared. Without a procedural defect, these proposals can be difficult to exclude. The SEC has been unwilling to provide no-action relief on the exclusion of proxy access proposals on the basis of "substantial implementation," meaning that the company has already adopted a form of proxy access with more stringent requirements. This season, in the wake of a seemingly successful Whole Foods Market request—and in response to the large number of proxy access proposals submitted under the New York City initiative—numerous companies have submitted requests for exclusion under Rule 14a-8(i)(9), the rule that permits exclusion when there is a direct conflict with a management proposal on the same topic. However, reversing a December no-action letter stating that Whole Foods could exclude a proxy access proposal due to "direct conflict," the SEC announced earlier this month that it would not, after all, provide no-action relief at this time with respect to any shareholder proposal on that basis.³³ The suspension of no-action relief is in effect pending a review of the "scope and application" of the rule.³⁴

While no-action relief is not necessary for a company to exclude a shareholder proposal from its proxy materials, and while no-action letters are merely informal determinations with no binding effect, the SEC's reversal of its no-action decision in this situation nonetheless is significant. The tortuous path of proxy access reform over the last decade is a reflection of its complexity and controversy.³⁵ The SEC's initial position on the Whole Foods proposal was consistent with prior determinations regarding Rule 14a-8(i)(9) on a wide range of governance topics, and its recent, unexpected action highlights the unusually high profile, and high stakes, of proxy access in the current environment.

In our view, even if proxy access proposals are adopted, they are unlikely to have a meaningful impact, as hedge funds and other economically-motivated activists are much more likely to eschew proxy access due to its inherent limitations and instead bring the fight directly to the shareholders through a proxy contest. Proxy access is most likely to be utilized by special interests groups who cannot bear the cost of a proxy contest but want to have board representation to pursue their own agenda.

The 2015 Proxy Season

In 2015, public companies can expect an increase in both activist attention and the level of engagement expected by shareholders generally. Investors are eager for engagement. CMi2i, a capital markets research company based in the United Kingdom, recently surveyed global institutions managing over \$6.7 trillion: 55 percent of respondents stated that they expect their level of engagement with portfolio companies to increase in 2015, while the remainder said that they expect it to remain the same.³⁶ Only 13 percent of the respondents said that they do not have an active engagement policy with portfolio companies.³⁷

Companies facing activist attacks, or considering a policy of direct engagement generally, should evaluate each situation on its own terms. Proactive and thoughtful communication with shareholders, whether involving the board directly or through traditional corporate channels, can be a powerful tool in promoting shareholders' understanding and support of the company's long-term strategy. Once an attack has commenced, effective, and possibly direct, communication with major shareholders may be crucial in gaining support for the board's position versus that of the activist attackers. That said, the specifics of each situation will determine the best path of communication and engagement, and certainly any decision by boards to engage directly with shareholders should be made in close consultation with management and counsel.

Another recent phenomenon that occurred in 2014 and is likely to continue into 2015 is directly tied to the decrease in the number of public companies with staggered boards. In 2014, there were seven contests at companies with over \$500 million in market capitalization that sought majority representation on the board of directors.³⁸ Given that ISS and shareholders appear to be more willing to support a change in the majority of the board, we could see an increase in activists seeking to take control of public companies without paying any premium for the shares. This should drive companies to engage more with their institutional shareholders to avoid this prospect.

The two themes of activism and engagement do, to a certain extent, overlap. One of the founders of the Shareholder-Director Exchange, a prominent corporate lawyer who also tried his hand at investment banking, has partnered with a former chief financial officer of JP Morgan Chase to start something new: "an activist hedge fund with a collaborative approach to management."³⁹ As reported in the Wall Street Journal, the fund has begun with investments from more than a dozen current and former chief executive officers in addition to the founders.⁴⁰ The fund expects to raise money from traditional investment groups such as pension funds and does not intend to launch proxy fights or release so-called "poison pen" letters. The inception of this fund is yet another signal that the lines between activism and mainstream investing are beginning to blur in today's corporate environment. There is all the more reason for companies to be thoughtful in their engagement with investors and to take a long-term view of the future.

Endnotes:

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Article III. 3. The Shareholder-Director Exchange, "Introduction and Protocol," February 2014, available at <http://www.sdxprotocol.com/> (SDX Protocol).

Article IV. 4. PR Newswire, "Leading Public Company Directors and Representatives of Major Institutional Investors—United Under Shareholder-Director Exchange Banner—Announce New Steps Taken to Advance Growing Governance Movement," July 22, 2014, available at www.prnewswire.com/news-releases/leading-public-company-directors-and-representatives-of-major-institutional-investors---united-under-shareholder-director-exchange-banner---announce-new-steps-taken-to-advance-growing-governance-movement-268085121.html.

Article V. 5. The Shareholder-Director Exchange, Letter dated July 2, 2014, available at www.sdxprotocol.com/wp-content/uploads/2014/07/SDX_Investor-Letter.pdf.

Article VI. 6. See *id.*

Article VII. 7. See SDX Protocol, *supra* note 3, at 4, 12.

Article VIII. 8. See *id.* at 12.

Article IX. 9. See *id.* at 15.

Article X. 10. See, e.g., Andrew Ross Sorkin, "Investors to Directors: Can We Talk?" NYTimes.com Dealbook, July 21, 2014, available at dealbook.nytimes.com/2014/07/21/investors-to-directors-can-we-talk/?_r=0.

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Article XVI. 16. See SDX Protocol, *supra* note 3, at 2 (citations omitted).

Article XVII. 17. See Maureen Farrell, "The Largest Companies Ever Hit by Activist Proxy Fights," WSJ.com MoneyBeat, Jan. 9, 2015, available at <http://blogs.wsj.com/moneybeat/2015/01/09/the-largest-companies-ever-hit-by-activist-proxy-fights/>.

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Article XXX. 30. See Linklaters.com, *supra* note 12.

Article XXXI. 31. See City of New York, Office of the Comptroller, Boardroom Accountability Project, available at comptroller.nyc.gov/boardroom-accountability/.

Article XXXII. 32. For a more detailed discussion of proxy access proposals, see David A. Katz, "Proxy Access Proposals for the 2015 Proxy Season," Nov. 7, 2014, available at blogs.law.harvard.edu/corpgov/2014/11/07/proxy-access-proposals-for-the-2015-proxy-season/.

Article XXXIII. 33. See David R. Fredrickson, Securities and Exchange Commission, Letter to Whole Foods Market, Jan. 16, 2015, available at www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/jamesmcritchiecheveddenrecon011615-14a8.pdf.

Article XXXIV. 34. See Securities and Exchange Commission, Public Statement, "Statement from Chair White Directing Staff To Review Commission Rule for Excluding Conflicting Proxy Proposals," Jan. 16, 2015, available at www.sec.gov/news/statement/statement-on-conflicting-proxy-proposals.html#.VL5RHvldWvg.

Article XXXV. 35. The SEC proposed a proxy access rule in 2003 and in 2007 but did not approve a final rule until 2010. The rule was issued under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, became effective in November 2010, and then was vacated by the U.S. District Court for the District of Columbia in July 2011.

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