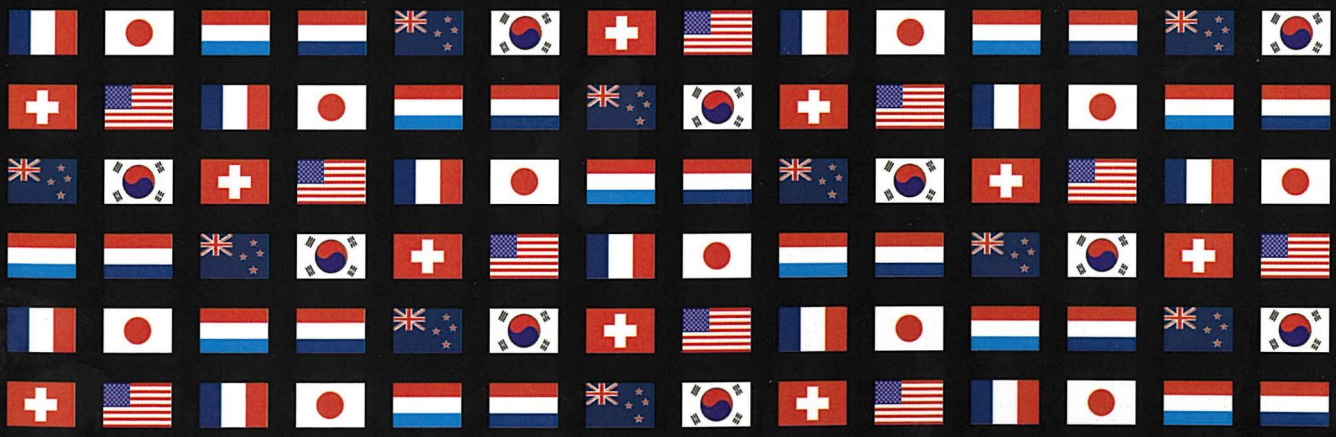
SHAREHOLDER ACTIVISM & ENGAGEMENT 2022

Contributing editors
Willem Calkoen and Stefan Wissing



LEXOLOGY
Getting the Deal Through

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Lexology Getting the Deal Through is delighted to publish the seventh edition of *Shareholder Activism & Engagement*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting the Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Willem Calkoen and Stefan Wissing of NautaDutilh, for their continued assistance with this volume.

LEXOLOGY
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London
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United States

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Wachtell, Lipton, Rosen & Katz

GENERAL

Primary sources

1 What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

In the United States, corporations are subject to a dual legislative regime, being governed by both state corporation laws and federal securities and other laws. In addition, publicly traded companies must comply with the listing rules of the exchange on which they are listed. Beyond laws and regulations, there are best practices and guidelines advocated by proxy advisory firms, institutional investors and others in the investment community that touch on shareholder activism and engagement issues.

State law

Each corporation is incorporated in one of the 50 states. State corporation law establishes the fiduciary duties, powers and authority of directors of both privately held and publicly traded companies, as well as rights and powers of the companies' shareholders. More than half of all public companies in the United States are formed in Delaware. A small state that has 'specialised' in the area of business law, Delaware has developed a highly sophisticated judiciary, a very deep body of case law relating to corporate matters and a legislature that is both experienced in matters of corporation law and highly responsive when changes are needed. Most of the other states follow to a greater or lesser degree the Model Business Corporation Act (which differs from Delaware law in some specific respects although the two regimes are quite similar in the way they deal with most issues), but Delaware is generally viewed as having a major influence on the corporate law of other states. For that reason, the Delaware General Corporate Law will serve as a reference point in this chapter. The enforcement of state corporation laws, including the decisions made by boards of directors, generally falls on the companies' shareholders in the form of direct or derivative litigation, on behalf of the company, against its officers and directors for non-compliance with state law. State court judges, especially in Delaware, play a central role in interpreting and enforcing corporation laws and standards.

Federal law

Federal laws that are most directly related to shareholder activism and engagement are laws governing securities trading, including the Securities Act of 1933 (the Securities Act), the Securities Exchange Act of 1934 (the Exchange Act), the Public Company Accounting Reform and Investor Protection Act of 2002 (the Sarbanes-Oxley Act) and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act), and the regulations that have been promulgated by the federal agencies under each of these Acts. The enforcement of these laws and regulations are the purview of the Securities and Exchange Commission (SEC). For example, shareholder activists are required to comply with beneficial ownership reporting requirements under section 13 of the Exchange Act, which generally require a person or group that has acquired direct or indirect beneficial ownership of more than 5 per cent of an outstanding class of equity securities to file a report with the SEC within 10 calendar days of crossing the 5 per cent threshold and promptly after material changes in the group's position or intentions. Companies must navigate the disclosure requirements of the Exchange Act in reporting on corporate governance matters in their periodic disclosures and their annual meeting proxy statement disclosures.

Federal laws relating to the protection of competition can also impact activism. In particular, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, and the rules and regulations promulgated thereunder (the HSR Act), generally requires persons proposing to acquire voting securities (and certain other interests) of a company valued over specified thresholds to file a notification and report form with the Federal Trade Commission and Antitrust Division of the Justice Department and observe a 30-day waiting period prior to consummating the acquisition. Because the lowest threshold is currently US$101 million, this filing may be the first time a company learns that an activist is accumulating a position in its stock (although activists are often able to avoid filing under the HSR Act while building their position by buying through separate funds).

Informal standard setters

Alongside the above regulatory regimes, public companies also have to be cognisant of proxy advisory firms, primarily Institutional Shareholder Services (ISS) and Glass Lewis, which advise institutional investors on how they should vote. In contested situations, these recommendations are often outcome determinative. Proxy advisory firms publish guidelines for governance best practices and issue voting recommendations and reports that, while not having the force of law, are highly influential with voters and so have to be taken into account.

There are no rules mandating engagement with shareholders, but companies do tend to engage with their significant institutional shareholders on a regular basis both during the annual proxy season, when companies may be seeking shareholder support, and the off-season to maintain good relations and understand issues that shareholders may care about. In any engagement with shareholders or other outside parties, companies must comply with Regulation FD, which prohibits a company from selectively disclosing material non-public information.

Shareholder activism

2 How frequent are activist campaigns in your jurisdiction and what are the chances of success?

Shareholder activism and engagement have been increasingly viewed as fixtures in the governance of publicly traded companies. Every proxy

season sees many activist campaigns of all kinds, ranging from high-profile economic campaigns involving large public companies and 'name-brand' activists, to lower profile efforts by social activists seeking to advance a social, political or governance agenda using the corporate voting machinery. In discussing shareholder activism in the United States, it is helpful to separate shareholder activists into two separate categories:

- economic activism by hedge funds or other fund activists: this category consists of professional investors who make sizeable (but still minority) investments in a target company and then publicly or privately advocate for change, often characterised by a drive for near-term shareholder value; and
- 14a-8 activism: shareholders submit proposals under Exchange Act Rule 14a-8, which requires a company to include a shareholder proposal in its proxy materials if certain requirements are met (for example, if the shareholder owns US$2,000 of the company's securities for three years, US$15,000 for two years, or $25,000 for one year). 14a-8 proponents vary widely and include retail shareholders, social justice groups, religious organisations, labour pension funds, individual gadflies and other coalitions.

In recent years, both types of activism have been on the rise. Assets under management by activist hedge funds remain at elevated levels, encouraging continued attacks, including on many large successful companies. Meanwhile, environmental, social and governance (ESG) concerns have given rise to an increasing number of campaigns by 14a-8 activists, both individuals and institutional shareholders.

According to Lazard's 2021 Review of Shareholder Activism, which analyses campaigns at companies with market capitalisations greater than US$500 million, in 2021 there were 158 companies targeted by 173 activist campaigns, leading to 89 board seats claimed by activists. These figures are down approximately 30 per cent from 2018's record of 227 companies targeted by 249 activist campaigns. Over 90 per cent of the board seats claimed in 2021 resulted from settlements between the company and the activist rather than an actual vote in a contested election. Activist funds have amassed very substantial 'war chests' of available capital and both they and activist shareholders (including ESG activists) are expected to continue to be a major force going forward.

Many public companies receive one or more shareholder proposals under Rule 14a-8 every one or two years relating to governance or other ESG issues. In the 2021 proxy season, over 800 shareholder proposals were filed. Most of these are precatory proposals, not seeking to directly implement a change but requesting the board to take a specified action. The success of these depends very much on the particular topic (for example, a request to eliminate a staggered board would almost invariably receive a very high level of support, whereas a request for a company to study gender pay disparities will depend on whether investors perceive there is a problem and how the company has responded). Because the proxy advisory firms have policies to recommend against directors standing for re-election if they do not implement the will of the shareholders as expressed in a shareholder resolution, companies are increasingly responsive to shareholder proposals that receive broad shareholder support.

3 How is shareholder activism generally viewed in your jurisdiction by the legislature, regulators, institutional and retail shareholders and the general public? Are some industries more or less prone to shareholder activism? Why?

The merits of shareholder activism remain a hotly debated subject in the United States. In general, corporate America and its supporters view much shareholder activist activity as short-term oriented, often abusive, and detrimental to the ability of companies to plan and execute long-term strategies. The institutional shareholder community, supported by many in the sell-side analyst community, the press and academia, consider shareholder activism as a valuable mechanism for holding boards of directors to account. Institutional shareholders have been on either side of activist fund attacks. While some recognise the damage an activist attack may have on the long-term value of a company, others are working with activist funds, either behind the scenes or by co-sponsoring a campaign. There is a general recognition that some shareholder activism can be constructive (typically characterised by open-minded behind-the-scenes engagement), while other forms of activism, where there is less quiet engagement and more aggressive public mudslinging, is often destructive. Activists benefit in the public eye by claiming and being accorded credit for changes that take place in companies after they announce their involvement. In some cases, this is deserved; in others, the improvements are not attributable to (and sometimes were even despite) the activist's involvement, but companies are happy to let the activist take credit as long as they move on and attack someone else. Activist funds do best (indeed, some studies suggest that they only produce above-market returns) when they succeed in getting their target company sold. In those cases it often appears that their involvement 'unlocked value', but this is often a dubious proposition as it compares a known result (the accelerated recognition of a control premium) against the unknown future. In short, the perception of shareholder activism is still in flux. It is only in the past few years, with the widescale elimination of staggered boards and other takeover defences, that decision-making power has shifted out of the boardroom to the institutional shareholder community, and that community (including passive investors, such as index funds, and influential proxy advisers, such as ISS and Glass Lewis) is still trying to understand how to use its new-found power.

Legislators and regulators have largely stayed out of the fray of shareholder activism. The SEC has sought to play an even-handed role, ensuring that both sides provide full and fair disclosure and are not misleading in their proxy solicitations. To advance this goal, in early February 2022, the SEC proposed comprehensive changes to the beneficial ownership reporting requirements under section 13 of the Exchange Act, which are designed to modernise and tighten beneficial ownership reporting rules for public companies. The frequency and impact of hedge fund activism has also prompted some legislators to propose federal legislation (such as the Brokaw Bill and Senator Elizabeth Warren's attempt to achieve stakeholder corporate governance by way of mandatory federal incorporation), but to date these changes have not received significant support.

Meanwhile, 14a-8 activists have been looked upon more favourably by institutional shareholders as a way to achieve certain ESG goals, such as board diversity and environmental sustainability. For example, the recent proxy access campaign (pushing companies to adopt provisions in their governing documents that would allow certain long-term shareholders the right to include their director nominations on the company's proxy card) has garnered the support of institutional shareholders as a way to improve corporate governance where regulators have failed to act.

Activism in the United States is broadly spread across industries, although naturally some individual activists gravitate towards certain industries once they feel they have established a good understanding of the industry. In 2021, the retail, technology and industrials industries had the highest aggregate value of activist fund positions. Certainly, no industry is immune from shareholder activism. Companies in highly regulated industries, such as banks and insurance companies, were once seen as less likely targets for an activist campaign, but the targeting of AIG (by Carl Icahn) and the Bank of New York Mellon (by Nelson Peltz) and the engagement between ValueAct and Citigroup make it clear that even companies in highly regulated industries can be subject to fund activism.

As for 14a-8 activism, certain industries are more susceptible than others, given the ESG focus of some campaigns. For example, the

New York City Comptroller and the New York City Pension Funds' initial Boardroom Accountability Project, a campaign for proxy access, specifically targeted carbon-intensive energy companies, among others, as a way to improve governance at companies that were seen to be 'most vulnerable to long-term business risks related to climate change'. The recent two-front proxy contest waged by Exxon simultaneously against an economic activist and an ESG activist shows that even the largest companies in carbon-intensive industries can be vulnerable to activism. In early 2021, Exxon announced that activist Jeff Ubben, founder of ESG and sustainability-focused activism fund Inclusive Capital Partners, had been granted a seat on the company's board of directors. Ubben, who previously founded ValueAct Capital Partners and the ValueAct Spring Fund, also focused on ESG and sustainability-linked investments. Later that year, tiny startup hedge fund, Engine No. 1, which owned only 0.02 per cent of Exxon's shares, won a proxy fight to install three directors on Exxon's board with its carbon footprint reduction platform.

4 What are the typical characteristics of shareholder activists in your jurisdiction?

In the United States, it is important to distinguish between the two main types of activists: economically driven activist hedge funds (which threaten and wage full-blown proxy fights) and social and political activists (who rely mostly on submitting shareholder proposals using SEC Rule 14a-8). The former group (activist hedge funds) are typically headed by charismatic, ambitious and aggressive individuals. Their funds are typically structured to provide the fund managers with a 20 per cent 'carried interest' on any upside in their portfolio, providing a significant incentive to lock in short-term gains on their positions. The latter group (14a-8 proponents) vary widely and include all varieties of retail shareholders, social justice groups, religious organisations, pension funds, trade unions, individual gadflies and other coalitions with shared interests.

In addition, in recent years, traditional institutional investors have become involved in the activist arena as well. Historically, such institutional holders were passive money managers, generally voting with the board's recommendation and selling their shares if they lost faith in the company. In recent years, however, traditional investors have worked alongside activist investors, sometimes actively soliciting their involvement in situations, and sometimes openly co-sponsoring activist campaigns. Certain institutions have even mounted their own campaigns against their portfolio companies through the submission of 14a-8 proposals, such as the New York City Pension Fund and its Boardroom Accountability Project.

5 What are the main operational governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

Shareholder activists have focused on a wide variety of capital structure changes, such as increasing leverage, stock splits, dividends and repurchases, and strategic changes, such as a company sale or break up or other operational or governance changes, including changes to management and boards of directors. In 2020, strategic changes and M&A transactions were featured prominently in the various campaigns. Although calls for company sales remain prevalent, activists have begun to make more sophisticated demands, such as the break-up of conglomerates (eg, United Technologies Corporation) and reorganisation of complex corporate structures (eg, Procter & Gamble). In addition, activists are increasingly challenging announced M&A transactions from either the buyer side (such as Bristol-Myers's acquisition of Celgene) or the seller side (such as Dell's buyout of its VMware tracking stock).

Often, shareholder activist campaigns will couple a call for capital structure changes and strategic changes with criticism of and suggested changes to corporate governance (eg, eliminating structural defences, board refreshment, management changes, criticism of executive compensation and other governance changes). A significant percentage of the activist campaigns every year include demands for board seats at the target company. In the United States, activists won a total of 65 board seats in 2021.

ESG issues are also areas of focus, especially for institutional investors. BlackRock, in its CEO's 2018 annual letter, noted that 'every company must not only deliver financial performance, but also show how it makes a positive contribution to society'. In 2022, BlackRock further observed that, 'in today's globally interconnected world, a company must create value for and be valued by its full range of stakeholders in order to deliver long-term value for its shareholders'. In the 2019 proxy season, social and environmental proposals made up approximately 48 per cent of all proposals submitted. There has been heightened activism around climate change, particularly in the context of the late-2015 Paris Climate Accord and the previous US administration's deregulatory stance, including calls for more expansive environmental and sustainability disclosure, with growing focus on sustainability measurement and accountability. There has also been a continued focus on lobbying and political spending disclosure. Board diversity has also been in the spotlight, receiving expressions of support from notable institutional investors, such as State Street and Vanguard. After recent tragedies in the United States, selected institutional investors are pushing companies for stronger positions on gun control. Conventional activist funds have also embraced this development by launching separate funds with social and environmental goals or including ESG factors in their overall investment process.

SHAREHOLDER ACTIVIST STRATEGIES

Strategies

6 What common strategies do activist shareholders use to pursue their objectives?

The strategies employed by activist investors vary depending on the intended goal. Key tactics in:

- deal activism include pushing for a merger, sale or divestiture transaction by the target company or, after the announcement of such a transaction, exercising shareholder rights to appraisal in hopes of getting a higher price, encouraging a topping bid by a third party, trying to influence the combined company or the integration process or, increasingly, trying to scuttle the deal or force a price bump;
- operational activism include advocating for cost-cutting measures, strategy change, portfolio review or management turnover, in each case, often in combination with a proposal to replace the CEO or members of the board of directors, or both;
- financial engineering or balance sheet activism include demanding that a target company undergo a capital structure change in the form of buying back shares, declaring a special dividend or overhauling the company's tax planning;
- environmental, social and governance activism include advocating for environmental, social and governance change, including eroding a company's takeover defences to facilitate economic activism goals; and
- 'short' activism include accumulating a short position and combining it with negative public campaigns, white paper publications, among others.

These more conventional tactics are often coupled with more innovative approaches, such as economic arrangements among funds, partnering with a hostile third-party bidder, calling special meetings

for referendums and combining traditional proxy fights with vote no campaigns. Some activists have looked to the courts in their campaigns by making wide-ranging pre-suit books-and-records demands and using litigation to extend director nomination deadlines or to challenge the target company's decision in proxy fights. Activists have also been known to employ new methods to engage retail shareholders, including using social media and redoubling engagement efforts with institutional shareholders and proxy advisers.

Processes and guidelines

7 | What are the general processes and guidelines for shareholders' proposals?

A shareholder may propose that certain business be brought before a meeting of shareholders by providing notice and complying with applicable provisions of state law and the company's by-laws and charter. The company's advance notice by-laws will generally set forth the time requirements for delivering a proposal (for example, that the proposal be received by the company's corporate secretary not more than 90 days and not less than 60 days before the meeting), other procedural requirements (such as a description of the ownership and voting interests of the proposing party) and limitations on the types of proposals that can be submitted (for example, that a proposal may not be submitted that is substantially the same as a proposal already to be voted on at the meeting). It is often costly to submit a proposal in this manner because the soliciting shareholder must develop its own proxy materials and conduct its own proxy solicitation. However, serious fund activists seeking to effect a change in the company's strategy or to nominate directors do proceed in this manner under the by-laws of the company rather than relying on Rule 14a-8.

Under the Securities Exchange Act of 1934 (the Exchange Act), Rule 14a-8, a shareholder may submit a proposal to be included in the company's proxy statement alongside management's proposals (avoiding the expense of developing independent proxy materials and conducting an independent proxy solicitation). Rule 14a-8, as revised, sets forth eligibility and procedural requirements, including that:

- the proposing shareholder has held US$2,000 of the company's securities for three years, US $15,000 for two years, or US $25,000 for one year (although transition rules will permit a shareholder that has held US $2,000 of a company's securities for one year as of the effective date of the amendment of Rule 14a-8, and continuously maintains ownership of at least US$2,000 of the company's securities, to qualify to submit a proposal for meetings to be held before 1 January 2023);
- the proposal be no longer than 500 words; and
- the proposal be received at least 120 calendar days prior to the anniversary of the date of release of the company's proxy statement for the previous year's annual meeting.

If the shareholder has complied with the procedural requirements of Rule 14a-8, then the company may only exclude the proposal if it falls within one of the 13 substantive bases for exclusion under Rule 14a-8 (eg, that the proposal would be improper under state law, relates to the redress of a personal claim or grievance, deals with a matter relating to the company's ordinary business operations, relates to director elections, has already been substantially implemented, is duplicative of another proposal that will be included in the company's proxy materials or relates to a specific amount of cash or stock dividends). A company will often seek 'no-action relief' from the Securities and Exchange Commission (SEC) staff to exclude a shareholder proposal from the company's proxy materials on one of the bases of exclusion listed above. If no-action relief is not granted, a company could, but rarely does, seek a declaratory judgment from a court that the shareholder proposal may be excluded from the company's proxy statement.

Shareholder 14a-8 proposals are often precatory or non-binding, and do not require implementation even if the proposal receives majority support. Shareholder proposals may, however, be binding if the proposal is with respect to an action reserved for the shareholders (for example, a proposal to amend the by-laws may be binding depending on state law and the company's by-laws).

In recent years, even precatory proposals have become an effective way for shareholders to compel change because Institutional Shareholder Services (ISS) and Glass Lewis will generally recommend that shareholders vote against directors who do not promptly implement the expressed will of the shareholders.

8 | May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

The right of shareholders to nominate candidates for election as director is considered a fundamental element of corporate democracy. That right, and the process to be followed to exercise it, is typically contained in a company's by-laws. Companies are not, however, required by state or federal law to permit shareholders to use the company's proxy infrastructure, at the company's expense, to nominate directors for election to the board. For many years, there were efforts by shareholder activist groups to require companies to give shareholders access to the company's proxy statement to nominate their candidates. This culminated in the adoption by the SEC of Exchange Act Rule 14a-11, which would have granted proxy access (limited to 25 per cent of the board) to 3 per cent shareholders who had held their shares for at least three years. However, this rule was struck down by the federal courts in 2011.

Proxy access was thrust back onto the agenda in large part through Rule 14a-8 proposals by individual shareholders, as well as large institutional investors, such as the New York City Pension Funds. In reaction to the popularity of these proxy access proposals, most large public companies have since adopted proxy access by-laws with standards similar to proposed Rule 14a-11. Over 80 per cent of the companies in the S&P 500 have adopted a proxy access by-law, with most allowing nominations for 20 per cent of the board seats by a shareholder or group of shareholders (up to 20 shareholders) that have held 3 per cent or more of the company's shares for three years or more. Given the relative infancy of proxy access by-laws and the percentage and holding period to be met, we have not yet seen many instances of shareholders utilising this new option to nominate directors, but these nominations may become more popular in the future.

9 | May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

Whether a shareholder may call a special meeting depends on the corporate laws of its state of incorporation and its organisational documents. With respect to Delaware corporations, under section 211(d) of the Delaware General Corporate Law (DGCL), a company's certificate of incorporation or by-laws may authorise shareholders to call a special shareholder meeting. The certificate of incorporation or by-laws would then set forth the procedural requirements for calling a special meeting, including the minimum holding requirements for a shareholder to call a special meeting. About two-thirds of companies in the S&P 500 provide for this right in their organisational documents, while a third do not. For those companies that do allow shareholders to call special meetings, the required ownership threshold varies considerably, from as low as

10 per cent to as high as 50 per cent, although 25 per cent is sometimes cited as the most common threshold.

The institutional shareholder groups, and the proxy advisers ISS and Glass Lewis who make voting recommendations to them, generally favour providing shareholders with the right to call a special meeting. A few years ago, there was a significant increase in the number of proposals to lower the ownership percentage required to call special meetings (typically from around 25 per cent to as low as 10 per cent, which is the level preferred by ISS and Glass Lewis); however, most of these proposals were unsuccessful as most major institutions believe that 20 per cent or 25 per cent is the right level.

Whether shareholders may act by written consent without a meeting also depends on state corporate law and the particular company's organisational documents. With respect to Delaware corporations, under section 228 of the DGCL, shareholders may act by written consent in lieu of a shareholders' meeting, unless the company's charter provides otherwise. A majority of S&P 500 companies do not allow their shareholders to act by written consent without a meeting. While ISS and Glass Lewis state that they consider the right to act by written consent an important shareholder right, most large institutions appreciate that, as long as shareholders have the right to call a special meeting if necessary, action by written consent is unnecessary, as well as being potentially destabilising and undemocratic (in that it disenfranchises minority shareholders).

Litigation

10 | What are the main types of litigation shareholders in your jurisdiction may initiate against corporations and directors? May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? Are there methods of obtaining access to company information?

Litigation is an important element of the corporate governance system in the United States. Shareholders may initiate two main types of litigation against a corporation and its directors – derivative and direct, depending on the nature and sufferer of the alleged harm. A company's shareholder can also initiate proceedings against a company to inspect certain corporate books and records of the company.

Shareholders may bring derivative actions on behalf of a corporation where there has been an alleged breach of the directors' or officers' fiduciary duty of care, fiduciary duty of loyalty or other wrongdoing. The purpose of a derivative suit is to remedy harm done to the corporation usually by directors and officers. Derivative suits face a number of procedural hurdles, which depend in large part on the jurisdiction in which they are brought. Certain states require that, before a derivative lawsuit is filed, the shareholder make a 'demand' on the board of directors to bring the lawsuit on the corporation's behalf. The demand requirement implements the basic principle of corporate governance that the decisions of a corporation – including the decision to initiate litigation – should be made by the board of directors. If a shareholder makes such a demand, the board of directors may consider whether to form a special litigation committee of independent directors to evaluate the demand. If the board of directors refuses the demand, the shareholder may litigate whether the demand was 'wrongfully refused'. Certain jurisdictions recognise an exception to the demand requirement where demand would be 'futile'– namely, if a majority of the board of directors is conflicted or participated in the alleged wrongdoing. In such circumstances, it might be appropriate and permissible for shareholders to skip the demand process and proceed directly to filing a complaint (in which they would need to demonstrate that a demand would have been futile).

While shareholder derivative suits are brought for the benefit of the corporation, shareholder direct and class actions address unique, direct harms to the particular shareholder plaintiffs. In the M&A context, it has become common for shareholders to initiate class actions against target companies and their boards of directors, alleging that the target company's board violated its fiduciary duties by conducting a flawed sale process that did not maximise value for the companies' shareholders. In such instances, a critical factor in determining the outcome of the litigation will be which standard of review is applicable to the board's conduct; in other words, the deferential 'business judgement rule' or a heightened standard of review that some jurisdictions have adopted (such as Revlon, Unocal or 'entire fairness'). Many public companies have adopted 'exculpation' provisions in their governance documents, which provide that directors (although not officers) cannot be personally liable for damages arising out of breaches of the duty of care. However, a director generally cannot be indemnified or exculpated for breaches of the duty of loyalty, including the obligation to act in good faith.

Aside from derivative suits and direct actions, a Delaware company's shareholders also have the right, under DGCL section 220, to inspect certain books and records of the company; provided that they have 'proper purpose' for seeking those materials. Under section 220, to be eligible for the inspection right, a shareholder must establish both a proper purpose for the inspection – namely one that is reasonably related to the person's interest as a shareholder, and that the scope of the books and records sought is no broader than what is 'necessary and essential to accomplish the stated, proper purpose'. To exercise this right, a shareholder should first make a demand on the company. If the company or an officer of the company refuses the demand or does not respond within five business days, the shareholder may apply to the court for an order to compel the inspection.

SHAREHOLDERS' DUTIES

Fiduciary duties

11 | Do shareholder activists owe fiduciary duties to the company?

A majority or controlling shareholder may owe fiduciary duties to other shareholders if it exercises control. Such fiduciary duties are generally relevant in the context of a self-dealing transaction (where the controlling shareholder is effectively on both sides). This set of facts is not normally present in a shareholder activist campaign.

If an activist succeeds in having directors elected to a company's board, those directors owe the same fiduciary duties to the company and its shareholders as any other director. The courts have recognised (most explicitly in the Delaware case *In re PLX Shareholders Litigation*) that shareholder activists often have different interests and focus more on the short term than the company's shareholders in general, but directors designated by (or even employed by) activists owe their fiduciary duties to the company and shareholders as a whole.

Compensation

12 | May directors accept compensation from shareholders who appoint them?

It is not illegal for directors to receive compensation from shareholders who appoint them. This often happens, for example, when employees of an activist hedge fund are themselves nominated and elected as directors. However, it would be important to analyse whether acceptance of compensation from a nominating shareholder might be contrary to the directors' fiduciary duties. Under federal securities laws, the compensation would also likely have to be disclosed. In addition, the corporation itself may have limitations in its by-laws or charter with respect to directors accepting direct compensation from shareholders who nominate them. It is common practice for companies to require a director candidate to sign an agreement that includes a representation by the nominee that he or she is and will not become party to any undisclosed

agreement with any person other than the company with respect to compensation in connection with his or her service as a director of the company.

It is important to distinguish between compensation paid to a nominee prior to nomination and ongoing compensation paid to a director after the director is on the board. It is not uncommon for an activist to offer some modest compensation to candidates in exchange for agreeing to stand for election in a proxy contest. The argument is that those payments may be necessary to recruit high-quality independent candidates to participate in a proxy contest, and that as long as these arrangements are disclosed, they should not create significant conflicts. Some activists have attempted to go further and offer compensation to their candidates after election that could influence the manner in which they act as directors (eg, by giving them an incentive to sell the company quickly). Attempts to adopt by-laws to outlaw these types of 'golden leash' arrangements were rejected by Institutional Shareholder Services and some institutional shareholders. However, the general recognition in the corporate governance community that compensation arrangements of this type raise serious questions regarding alignment of economic incentives and can create serious conflicts of interest have led to them being extremely rare.

Mandatory bids

13 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction? When are shareholders deemed to be acting in concert?

There is no mandatory bid requirement under US federal tender offer rules or Delaware corporate law.

At least three states have statutory 'control share cash-out' provisions (of which, in some cases, companies may opt out), providing that if a bidder gains voting power of a certain percentage of shares (20 per cent in Pennsylvania, 25 per cent in Maine and 50 per cent in South Dakota), other shareholders can demand that the controlling shareholder purchase their shares at a 'fair price' (effectively providing the equivalent of dissenters' rights applicable to the acquirer rather than the issuer).

Shareholders acting in concert (the US terminology is acting 'as a group') do, however, have disclosure obligations under section 13 of the Securities Exchange Act of 1934 (the Exchange Act). Shareholders may be deemed to have formed a group when they agree to act together in connection with acquiring, holding, voting or disposing of a company's securities.

Disclosure rules

14 Must shareholders disclose significant shareholdings? If so, when? Must such disclosure include the shareholder's intentions?

Accumulations of large blocks of equity securities trigger reporting obligations under section 13 of the Exchange Act, which requires any person or group that acquires beneficial ownership of more than 5 per cent of a class of a public company's registered voting equity securities to file a beneficial ownership report with the Securities and Exchange Commission (SEC) disclosing its ownership and certain other information. For this purpose, 'beneficial ownership' generally means direct or indirect voting or dispositive power over a security, including through any contract, arrangement, understanding, relationship or otherwise. Disclosure obligations may also be triggered by membership in a 'group' that beneficially owns more than 5 per cent of a class of equity securities of a public company. Acquisition or ownership of a class of non-voting securities does not trigger any filing obligations for these purposes.

Under the current rules, an individual investor or group that beneficially owns more than 5 per cent of a class of equity securities of a public company must generally report its holdings on Schedule 13D within 10 days of its holding exceeding 5 per cent, unless it is eligible to report its holdings on a short-form Schedule 13G. In early February 2022, the SEC proposed amendments to these reporting requirements that would shorten the filing deadline to five days. Importantly, a Schedule 13D requires detailed disclosures regarding the filer's control persons, source of funds and the purpose of the acquisition of the securities, including any plans for further acquisitions or intention to influence or cause changes in the management or business of the issuer. Material changes in the previously reported facts require 'prompt' amendment of a Schedule 13D under the existing reporting requirements, whereas proposed amendments to these requirements would impose a firm amendment deadline of one business day after the occurrence of a material change.

Certain investors can satisfy their section 13 beneficial ownership reporting obligations by filing the simpler and less detailed Schedule 13G. These generally include specified institutional investors (eg, banks, broker-dealers, investment companies and registered investment advisers) and other passive investors acting in the ordinary course and without a control purpose or effect. There are also other exceptions that may allow an investor to report beneficial ownership on a Schedule 13G instead of a Schedule 13D.

As beneficial ownership is based on the power to vote or dispose of a security, under the current reporting requirements, whether ownership of a significant derivative position in the equity securities of a public company will trigger a Schedule 13D or Schedule 13G filing requirement depends on the type of the particular derivative. Cash-settled derivatives generally do not give rise to beneficial ownership because they do not create a contractual right to acquire voting or dispositive power, but other types of derivatives may constitute beneficial ownership of the underlying securities. Under the proposed amendments, however, the SEC has defined 'deemed' beneficial ownership to include reference securities underlying cash-settled derivative securities that are held for the purpose or effect of changing or influencing the control of the relevant public company.

In addition, section 16(a) of the Exchange Act requires a person or group to disclose when their beneficial ownership of a company's equity securities exceeds 10 per cent. At that point, and as long as they remain 10 per cent holders, those persons are generally deemed to be insiders subject to section 16(b)'s short-swing profit disgorgement rules. Various exceptions apply, for example, section 16 is not applicable to the securities of foreign private issuers, and institutional investors can generally disregard shares held on behalf of clients or in fiduciary accounts when determining section 16 beneficial ownership.

The Hart-Scott–Rodino Antitrust Improvements Act of 1976 (the HSR Act) may also impose a filing obligation with the Federal Trade Commission (FTC) and the Antitrust Division of the Justice Department (DOJ) on certain investors. For 2022, an investor's proposed acquisition of a company's voting securities (and certain other interests) is generally reportable if the transaction value exceeds US$101 million (this dollar amount is adjusted annually). If the investor proposes to cross this threshold (or one of the other specified higher thresholds), the investor must first file a notification and report form with the FTC and the DOJ and observe a 30-day waiting period prior to consummating the acquisition. These filings are not made public by the FTC or the DOJ, but either party may independently choose to make the fact of the filing public. There are certain structures that can be used (for example, involving put-call options or the use of multiple funds as acquisition vehicles), and certain exemptions that may be available, that may permissibly allow an investor to accumulate voting securities (and certain other interests) well in excess of the HSR Act threshold without the need to first

secure clearance under the HSR Act. Counsel should be consulted early regarding the use of such methods as the rules are highly technical.

15 | Do the disclosure requirements apply to derivative instruments, acting in concert or short positions?

For the purposes of section 13, a person is also deemed to be the beneficial owner of securities over which the person can acquire voting or dispositive power within 60 days (provided that, where any such rights to acquire securities are acquired with a control purpose or effect, beneficial ownership is triggered, regardless of whether the rights are exercisable within the 60-day time frame). Thus, an option, warrant, right or conversion privilege that results in voting or dispositive power and that can be exercised within 60 days creates current beneficial ownership.

An investor may generally talk with other investors and management about its investment in a company without tripping any disclosure requirements under the securities laws. However, if the investors coordinate activities or agree to act together with other investors in connection with acquiring, holding, voting or disposing of the company's securities, the investors may be deemed to have formed a 'group' for purposes of sections 13 and 16 of the Exchange Act. An investor group will have its holdings aggregated for purposes of determining whether the relevant reporting thresholds have been crossed.

The Exchange Act does not currently require the disclosure of short positions, even large ones. In 2010, the Dodd–Frank Wall Street Reform and Consumer Protection Act amended section 13(f) of the Exchange Act to direct the SEC to prescribe rules for the public disclosure of certain details with regard to short sales that, at a minimum, would occur every month. However, the SEC has yet to implement these provisions and adopt a disclosure regime for short positions.

Insider trading

16 | Do insider trading rules apply to activist activity?

The SEC's insider trading rules prohibit a person from buying or selling a security, in breach of a fiduciary duty or other duty of confidence, while in possession of material non-public information about that security. The rules also prohibit the 'tipping' by insiders of such material non-public information and the trading by the recipient of such information. Insiders typically include a company's directors, officers, employees, counsels, significant shareholders and any other person that has a duty not to trade on material non-public information. Additionally, most, if not all, companies have adopted insider trading policies that apply to directors, officers, employees, controlling shareholders and their respective affiliates to minimise the likelihood of insider trading.

An activist may come into possession of material non-public information in its capacity as a significant shareholder or an affiliate of a director where it has nominated a director onto the company board. In such a situation, the activist would be subject to the SEC's insider trading rules, as well as any insider trading policies implemented by the company. To preserve their trading flexibility, many activists prefer not to have their own insiders on the board.

An activist's own plans and intentions with respect to a target company, although potentially market moving, are not considered inside information because they are not subject to any fiduciary duty to the company. Accordingly, an activist can 'tip' others about its plans, and even encourage them to buy shares in the target (although if they agree to act together in connection with acquiring, holding, voting or disposing of the target company's securities, they will be considered acting in concert and will be required to file a Schedule 13D). The recently proposed SEC amendments would make it clear that a party that receives a 'tip' from an activist about to file a Schedule 13D, would be deemed to be included in that activist's 13D filing group.

COMPANY RESPONSE STRATEGIES

Fiduciary duties

17 | What are the fiduciary duties of directors in the context of an activist proposal? Is there a different standard for considering an activist proposal compared to other board decisions?

The fiduciary duties of directors are governed by state corporation law. Directors have basic fiduciary duties of loyalty (not putting their own interests above those of the company) and due care. Directors' decisions are typically reviewed under the default standard of the 'business judgment rule', which is a presumption, absent evidence to the contrary, that disinterested and independent directors acted on an informed basis and in the honest belief that the action taken was in the best interest of the company. As such, board decisions are not easily overturned. When a company receives an activist proposal, the same principles apply, and the board must review and consider the proposal to determine whether it is in the best interest of the company and its shareholders.

In Delaware, in certain instances, a board's action in response to an activist proposal may be subject to an enhanced level of judicial scrutiny. If the board adopts defensive measures after a takeover or similar proposal is launched or threatened, the decision may be reviewed under the heightened *Unocal* standard, under which the directors must show both that there are reasonable grounds for believing there to be a danger to corporate policy and effectiveness and that the defensive measure was reasonably proportional in relation to the threat. Generally, the board has wide latitude to take defensive measures within a range of reasonableness, so long as those measures are not coercive or preclusive. Actions that impede the shareholder franchise (for example, if an activist is seeking to replace a majority of the directors and the board increases the board size to deny the activist a majority) are liable to be overturned by the courts (under the *Blasius* line of cases).

Preparation

18 | What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

Our advice is always situation-specific. That being said, principles for responding to activists include the following.

- Everything should go through the CEO (or, if applicable, chair of the board): all executives and directors should refer activist and takeover approaches, overtures and conversations to the CEO. It is essential that the company speak with one voice. The CEO should keep the board of directors informed and solicit director input for decisions and reactions. Activists may try to contact directors directly, in which case, directors should keep in mind that all conversations are 'on the record' and any comments may be used by the activist in their proxy and press materials.
- Maintaining board unity is essential: a unified, supportive board is essential to producing the best outcome, whether the goal is resisting an activist agenda or negotiating the best possible settlement. It is critical to avoid having an activist drive a wedge between management and the board. Honest and open debate should be encouraged but kept within the boardroom. Activists can be extremely effective in dividing boards by targeting selected board members with a combination of threats and promises, and boards need to be very wary of such tactics.
- Except in 'clear conflict' situations, special committees with additional financial and legal advisers are not advisable: special committees usually hinder board unity, overemphasise the role of advisers, deprive directors of the most valuable source of information and do not enhance directors' legal protection in non-conflict

situations. Clear conflict means the involvement of interested directors or senior management on the other side of the transaction.

- Act and speak as though everything you do and say will be made public: appreciate that the public dialogue is often asymmetrical; while activists can, often without consequence, make personal attacks and use aggressive language, the company cannot respond in this manner. Any sign of discouragement, self-criticism of performance or execution or sign of dissension in the boardroom will be used against the company.
- The board has time and flexibility in responding and plenty of legal latitude: with respect to activism, the board has no special duty to implement an activist's proposals. The board's general fiduciary duties apply to decisions made in contemplation of or in reaction to shareholder activism. When considering an activist's proposals and criticisms, it is the board's responsibility to make decisions in the best interests of the company and stockholders.
- Remain focused on the business: activists and takeover approaches can be distracting and time-consuming for a board and management, but continued strong performance of the business, though not an absolute defence, is one of the best defences.

Defences

19 What defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

Structural defences

Many of the structural defences that, under state law and a company's charter and by-laws, may be available to companies to resist a hostile takeover bid can also improve the company's ability to resist an activist attack. However, in recent years, most large corporations have given up many of their defences after years of shareholder activist pressure. For example, if a company has a staggered board, an activist can only win a minority of the board seats in any one election cycle. If a company does not have a staggered board, an activist can propose to take control of the board (and control slate contests are increasingly common). Whereas most S&P 500 companies had a staggered board 15 years ago, approximately 90 per cent today do not. Because a staggered board has to be provided for in the company's charter, companies that have given up their staggered board are unable to implement one now.

Other provisions of a company's corporate profile that implicate its vulnerability to an activist attack are whether shareholders can call a special meeting (and what percentage ownership they need to do so) or act by written consent, which determine whether the company is only vulnerable at its annual meeting or throughout the year.

Most companies have adopted by-laws providing for advance notice and other requirements for shareholder proposals and director nominations that provide some advance warning of an attack. If a company's charter permits shareholders to act by written consent, the board cannot eliminate that danger but can implement a by-law requiring a shareholder who wants to act by written consent to ask for a record date in a process that can also provide a few weeks of notice of a consent solicitation.

The board can still implement a shareholder rights plan (also known as a 'poison pill') to prevent an activist or group of activists acting in concert from acquiring stock in the company above a specified threshold, but that level is typically set at 15 or 20 per cent, and activists generally do not need to go that high to have an effective attacking platform. The Delaware courts have recognised the validity of rights plans which set a lower trigger for activists than for passive investors (in the *Sotheby's* case), but also in 2021 held invalid a rights plan where the trigger was too low (5 per cent) and not justified by an immediate threat (in the *Williams Companies* case). Some states also have anti-takeover statutes that may discourage hostile acquirers or activists going over a specified threshold of ownership (although these too are typically at levels that do not frustrate activists).

The effectiveness of the available structural defences will vary depending on the situation. There are no defences that make a company immune to shareholder activism. Sometimes the very existence of one or more of these defences can actually create a vulnerability in an activist situation because the proxy advisory firms and major institutions dislike structural defences such as staggered boards and will support an activist to protest what they consider imperfect governance.

Other defences

Aside from traditional structural defences, the best defensive measures that a company can take (aside from keeping its stock price high) is to maintain active outreach and engagement with the company's core, long-term shareholders. Understanding investor concerns and maintaining an ongoing dialogue can not only identify potential areas of vulnerability for the company, but also help boards in avoiding public shareholder activist campaigns and securing shareholder support if faced with one. Additionally, companies and boards should continually monitor corporate governance benchmarks and trends and compare the company's corporate governance practices to evolving best practices to stay abreast of hot topic issues and address any potential vulnerabilities.

Proxy votes

20 Do companies receive daily or periodic reports of proxy votes during the voting period?

During a contested situation, it is not unusual for companies to receive frequent updates on proxy vote tallies. Even in uncontested situations, for relatively routine annual shareholder meetings, companies will often choose to receive periodically updated reports on proxy voting (if for no other reason than to confirm that they will have a quorum).

Historically, Broadridge, which is the single largest agent collecting vote tallies, would provide the vote tallies both to the shareholder proponent and the company. However, in recent years, after certain brokers objected to the release of this information to shareholder proponents, Broadridge changed its policy to provide vote tallies to the shareholder proponent only if the company affirmatively consents. Proxy rules are currently silent on preliminary vote tallies despite calls by various interest groups for the Securities and Exchange Commission's rulemaking on the subject. Some companies have received Rule 14a-8 shareholder proposals regarding vote tallies – namely keeping the interim vote tallies confidential, even from the company, in certain situations.

Depending on the language of the specific proposal, it may be possible to exclude the proposal on 'ordinary business' grounds. Of the shareholder proposals that have gone to a vote, none received majority support; however, certain institutional investors, such as Vanguard, and more recently, State Street Global Advisors, have indicated support for confidential voting. Certain companies have responded by adopting a policy on interim vote tallies, allowing Broadridge to provide non-public interim tallies to qualifying shareholders in certain situations.

Settlements

21 Is it common for companies in your jurisdiction to enter into a private settlement with activists? If so, what types of arrangements are typically agreed?

It is not uncommon for companies to enter into settlements with activists in order to end proxy fights and activist campaigns. Depending on the form of the settlement, the terms are sometimes publicly disclosed or filed by the company. The type and terms of the arrangement vary

depending on the activist's demands. Typically, the agitating activist will receive a number of board seats as part of the settlement. Elliott Management led the way in 2021, winning 11 board seats primarily through settlements with target companies. In campaigns where the activist has demands or proposals other than seating new directors, the settlement will usually involve the implementation of one or more of the activist's demands, either in its entirety or tailored in some way to be more acceptable or feasible for the company, often in addition to certain activist-approved governance changes.

SHAREHOLDER COMMUNICATION AND ENGAGEMENT

Shareholder engagement

22 Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

Effective engagement with major shareholders is an essential element of activist preparedness and defence. As shareholder activism has become more commonplace, most companies have shareholder outreach procedures in place to ensure constant, periodic dialogue with major shareholders. It is not unusual for companies to plan tours and participate in industry conferences as a way to meet shareholders and engage with them on issues and concerns they may have. The format of the shareholder outreach varies and includes published letters to shareholders, in-person meetings, teleconference calls and speaking engagements or panels at industry conferences. However, widely published, written communications are seen as impersonal and do not facilitate an exchange between the company and its shareholders. Thus, companies often rely on other engagement methods in addition to published communications for their top investors.

23 Are directors commonly involved in shareholder engagement efforts?

The company's senior management typically leads shareholder engagement efforts; however, directors are increasingly involved as well. Today, boards of directors are expected to have a lead independent director or a non-executive chair of the board who can assist management in engaging with investors. By having directors involved, the company is in a better position to address shareholder concerns regarding corporate governance and other issues that affect the company's longer-term value. However, the involvement of a director, independent or otherwise, may not be helpful or appropriate in every situation. The company should consult with its board and advisers to determine when directors should be involved and prepare its directors adequately if it is decided that one or more directors should be part of the shareholder engagement effort.

Disclosure

24 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

Generally, companies are not required to publicly disclose their shareholder engagement efforts, although companies often choose to disclose those efforts in their annual meeting proxy to show responsiveness to shareholder concerns. Companies also often announce which industry conferences their directors and officers will be attending or any large-scale shareholder meetings the company will be hosting. Large companies often also publish transcripts of or otherwise make available recordings of speeches or comments made by directors and officers at industry conferences and such shareholder meetings on the companies' website. In their annual meeting proxy, companies are required to disclose how security holders may communicate with the board of directors.

In engaging with investors and others, companies should make sure to comply with Regulation FD, a rule intended to ensure that companies do not engage in selective or unequal disclosure. Regulation FD applies when a company or a person acting on the company's behalf (ie, all senior officers and any other officer, employee or agent of the company who regularly communicates with the financial community) discloses material non-public information to investors or security market professionals. If the disclosure is intentional, then the information must be disclosed simultaneously to the public. If the disclosure is inadvertent, then the information must be disclosed to the public as soon as possible. Disclosures under Regulation FD often consist of furnishing the information on Form 8-K with the Securities and Exchange Commission (SEC) or publication in other widely disseminated sources, including press releases.

Disclosures to persons who expressly agree (even orally) to maintain the disclosed information in confidence are expressly exempted from Regulation FD. For this reason, before discussing material non-public information with a shareholder, friend or foe, a company will often insist on signing a confidentiality agreement. A shareholder may not want the company to disclose material non-public information to it because the shareholder's ability to trade in the stock may then be compromised because of insider trading concerns.

Communication with shareholders

25 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders? Are there systems enabling the company to identify or facilitating direct communication with its shareholders?

The federal proxy rules are the primary rules relating to communications to solicit support from shareholders. Any statement that is designed to result in the giving or withholding of a proxy must be filed under the proxy rules, comply with certain legending and informational requirements, and must not be misleading. In addition, companies that choose to hold private discussions with certain shareholders must be mindful of Regulation FD. Companies solicit formal votes from shareholders at both annual and special meetings, each of which are subject to federal proxy rules and certain notice requirements under state law or the company's by-laws, or both. Shareholders may cast absentee ballots or designate a proxy to vote either at the proxy's discretion or with specific and binding guidance.

In the context of a proxy contest, each side will typically issue its own detailed proxy statement and also write one or more 'fight letters', argumentative white papers or PowerPoint decks. All of these materials must be filed with the SEC under a proxy materials (14A) cover page.

The SEC staff has provided guidance on applying the proxy and tender offer rules when statements are made that constitute proxy solicitations through certain social media channels. The guidance permits the use of a hyperlink to information required by certain rules when a character-limited or text-limited social media channel, such as Twitter, is used for regulated communication.

Access to the share register

26 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership, or submit to their shareholders information prepared by a requesting shareholder? How may this request be resisted?

Under the Securities Exchange Act of 1934, Rule 14a-7, if a company has made or intends to make a proxy solicitation in connection with a shareholder meeting, the company must, upon written request of a shareholder entitled to vote at the meeting, either give the requesting shareholder the shareholder list or mail the requesting shareholder's soliciting materials to the company's shareholders at the requesting shareholder's expense. Most target companies choose the latter option, mailing all materials themselves.

In addition, state corporate law and a company's charter and by-laws may provide for access to shareholder lists under additional circumstances. For example, Delaware corporate law allows shareholders to inspect the company's stock ledger and its other books and records so long as the shareholder submits a demand under oath and explains the 'proper purpose' of the request. The company may resist this demand by asserting, and proving in court if necessary, that the shareholder's inspection purpose is not one that is reasonably related to the person's interests as a shareholder of the company or that the scope of records requested is too broad for the shareholder's purposes. However, given Rule 14a-7, it is difficult for a company to argue that a shareholder list and ownership information is either not necessary for an activist shareholder's proxy solicitation or otherwise too broad for the solicitation purpose.

UPDATE AND TRENDS

Recent activist campaigns

27 Discuss any noteworthy recent, high-profile shareholder activist campaigns in your jurisdiction. What are the current hot topics in shareholder activism and engagement?

Activists set new records in 2018, targeting the largest number of companies (nearly 300), deploying more capital and winning a greater number of board seats (161) than ever before. This pace slowed in 2020 due to the covid-19 pandemic, and 2021 saw a further decline in the number of campaigns, down to just 173 new campaign launches globally. Still, campaigns by the most well-known activist hedge funds are surging — in 2021, Elliott Management launched 17 campaigns, its most active year since 2018 — and a record 147 investors launched new campaigns in 2019, including 43 investors with no prior activism history. This number slightly declined in 2021, with 122 investors launching new campaigns, including 34 investors with no prior activism history. Activist hedge funds have significantly more than US$100 billion of assets under management and remain an asset class that attracts investment from major traditional institutional investors. Although a number of institutional investors are beginning to question whether hedge fund activism should be supported or resisted, and will act independently of activists, the relationships between activists and more traditional investors in recent years have encouraged increasingly frequent and aggressive activist attacks. Several mutual funds and other institutional investors have, on occasion, also deployed the same kinds of tactics and campaigns as the dedicated activist funds.

One development that has become increasingly prevalent is activism campaigns oriented around environmental, social and governance (ESG), which may be brought at the same time as traditional economic activism campaigns, requiring the target company to battle on two fronts. At Exxon Mobil, an ESG activist fund (supported by some large institutional investors) launched a proxy fight for seats on Exxon's board of directors, calling for Exxon to set carbon emission reduction targets and shift to a 'sustainable, transparent, and profitable long-term plan focused on accelerating rather than deferring the energy transition'. At the same time, a large, occasionally activist, hedge fund called on Exxon to cut spending to improve performance and maintain its dividend, as well as improve its environmental reputation. Even though the activists collectively owned a tiny fraction of the oil and gas behemoth, the dual-front tactic presented a significant challenge, won the support of some of Exxon's biggest institutional investors and eventually culminated in Exxon's loss of three board seats to activist-appointed nominees.

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