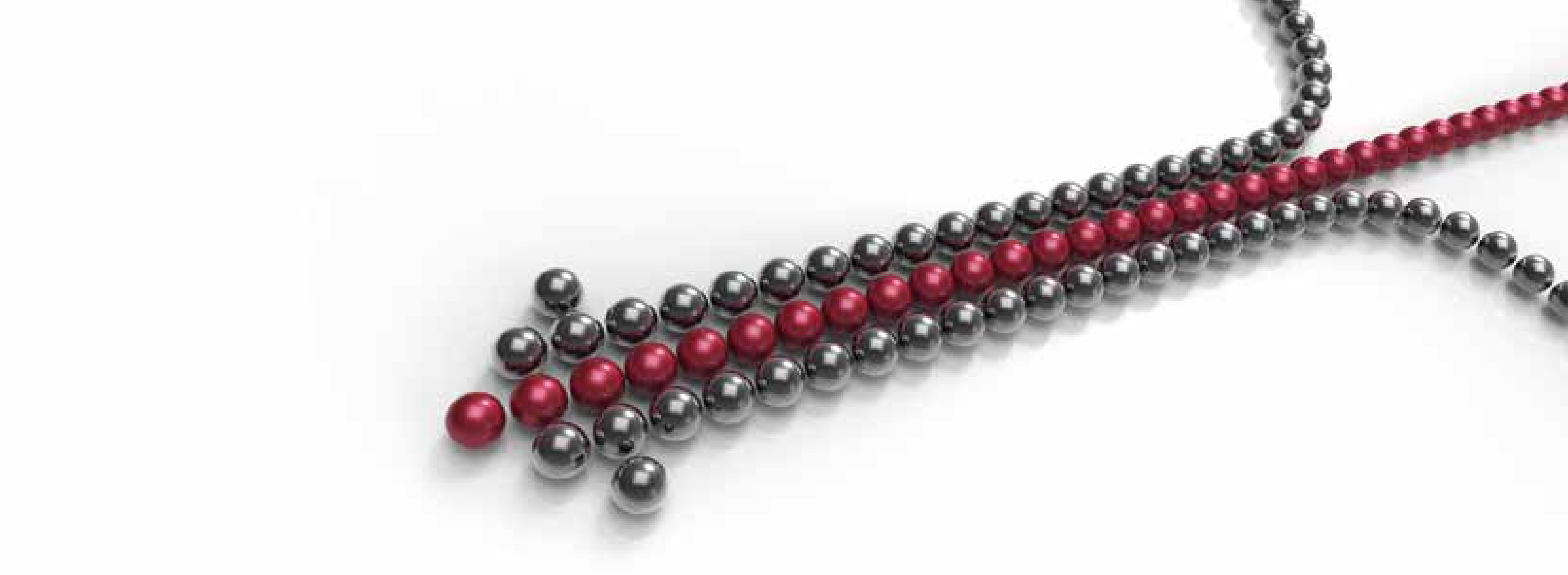

ICLG

The International Comparative Legal Guide to:

Mergers & Acquisitions 2017

11th Edition

A practical cross-border insight into mergers and acquisitions

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EDITORIAL

Welcome to the eleventh edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Four general chapters. These chapters are designed to provide readers with an overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 41 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Scott Hopkins & Lorenzo Corte of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for their invaluable assistance.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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Chapter 4

Accountability and Stability - Getting the Balance Right for the Benefit of Corporations and their Shareholders

Wachtell, Lipton, Rosen & Katz

Adam O. Emmerich

Trevor S. Norwitz

Now that most major American corporations have dismantled their takeover defences under pressure from governance advocates and shareholder activists, they are more vulnerable to hostile takeover bids and activist attacks. Despite the new "balance" – or perhaps because of its success in achieving gains in shareholder power – the shareholder activist community is continuing to press for provisions that allow for recall elections at any time on short notice. Some institutional investors have grown concerned about the short-termism that flows from this new shareholder-centric governance model and are promoting a new paradigm in which more effective engagement and communication with major shareholders would be rewarded with support for well-established long-term plans. It remains to be seen whether institutional long-term investors will honour that tacit understanding when there is a near-term premium on offer. In the near term, we propose that responsible institutional investors should reject further diminution of the mandate delegated to boards of directors to act collectively in the best interests of the corporation and its shareholders. This means not giving further support to recall elections and management by referendum, but instead embracing governance structures that favour annual accountability over constant disruption and distraction. This, we believe, will be to the benefit of shareholders and companies, and encourage more responsible board service and the recruitment and retention of more dedicated and engaged directors.

The Current Landscape

Over the past two decades, power at American corporations has effectively been transferred from the boardroom, where it has traditionally been entrusted to shareholder-elected directors (who owe fiduciary duties to the corporation and have been charged with managing the business and affairs of the corporation), into the hands of shareholders. Directors are now more continuously accountable to shareholders than ever before. This change is perhaps most evident from the decline in the number of corporations with staggered boards. A staggered board combined with a rights plan or "poison pill" is the most effective defence a company can have to empower the board to reject or negotiate an inadequate takeover bid. At companies with staggered boards, directors are typically elected to three-year terms, with one third of the board standing for election each year, creating a degree of continuity and stability for a corporation by ensuring that control of the board of directors cannot change, without the concurrence of the board itself, at a single shareholder meeting. In 1998, over 60% of S&P 500 companies had a staggered board in place. By 2015, the percentage of S&P 500 companies with a staggered board in place had declined to 10%.[1]

While there are reasons to be concerned that the elimination of staggered boards may prove myopic and damaging to individual corporations and the broader economy, it is a reality that corporations and their boards have come to accept. It is now indisputable that American corporations are more susceptible to hostile takeover bids and attacks from activist investors than ever before. As a result of the decline in staggered boards, the entire board of directors at the vast majority of public companies in the United States now stand for election annually, giving shareholders an opportunity to swiftly influence the direction of American corporations on an annual basis.

At the same time that American corporations were amending their governing documents to remove staggered boards, changes were also occurring in the shareholder base of American corporations. The increased reliance by Americans on individual retirement accounts ("IRAs") and defined contribution plans, such as 401(k) plans, to fund their retirement has resulted in increasingly large percentages of wealth being held in mutual funds and exchange traded funds ("ETFs") directed by fund managers.[2] As a result, the stock of American corporations is increasingly concentrated in the hands of a few large institutional investors. In 1980, institutional investors owned 34% of U.S. common stock.[3] By 2016, the percentage of U.S. common stock owned by institutional investors was 70%.[4] A significant portion of institutional ownership consists of indexed mutual funds, which are funds that track the components of a market index, such as the S&P 500, in order to provide broad market exposure.[5] Index funds have low portfolio turnover and hold stock for the long-term, buying and selling only to align their ownership with the index they are tracking, which is consistent with the long-term goals of their underlying investors, many – probably most – of whom are saving for retirement or college education and are more interested in stable long-term growth than short-term gains. There have been huge increases in the amount invested in these passive funds in recent years. The portion of the S&P 500 owned by passive mutual funds and ETFs more than doubled from 2005 to 2016, increasing from 4.6% to 11.6%.[6] Passive mutual funds and ETFs collectively own more shares than active funds at 112 companies in the S&P 500. Indeed, a single institutional investor – Vanguard – manages passive funds that control 5% or more of shares in 468 companies in the S&P 500, up from only three companies in 2005.[7]

Recently, a number of market participants, including especially some of the largest and most influential index fund managers, have publicly acknowledged that the continued emphasis on short-term gains and the corresponding governance changes that have contributed to the increased focus on short-term results are not in the best interests of most investors. As Laurence Fink, the Chairman and Chief Executive of BlackRock, noted in a letter to the CEOs of S&P 500 companies in 2015, "the effects of the short-termist phenomenon are troubling both to those seeking to save for long-term goals such as retirement, and for our broader economy. In the face of these pressures, more and more corporate leaders have responded with actions that can deliver immediate returns to shareholders, such as buybacks or dividend increases, while underinvesting in innovation, skilled workforces or essential capital expenditures necessary to sustain long-term growth". In a subsequent letter in 2016, he again emphasised that reducing the pressures of short-termism and "working instead to invest in long-term growth remains an issue of paramount importance". Similar sentiments have been expressed by William McNabb, CEO of Vanguard, who noted in a 2015 speech that "Vanguard funds hold companies in perpetuity. We want to see our investments grow over the long-term".[8]

The recognition of the problems posed by short-termism by such major institutional investors, along with their willingness to contribute to a solution, represents an important inflection point in corporate governance in the United States. As Leo E. Strine, Chief Justice of the Delaware Supreme Court, has noted, it is "[p]recisely because index funds do not sell stocks in their target index, [that] those funds have a unique interest in corporations pursuing fundamentally sound strategies that will generate the most durable wealth for stockholders. Index fund investors do not benefit by bubbles that burst".[9]

In a sign that these investors acknowledge the important place they hold as the custodians of the retirement and other savings of most Americans, these investors have communicated a series of principles, which has been referred to as a new paradigm for corporate governance, outlining the corporate governance practices that companies should undertake.[10] These investors have encouraged companies to (1) develop, and clearly articulate a long-term plan, (2) ensure board participation in the development and approval of corporate strategy and communicate the board's role in the development of strategy to investors, including the major issues debated by the board and how they were resolved, (3) recognise the importance of corporate social responsibility and environmental, social and governance issues and how they are managed, (4) develop and communicate procedures for engagement by management and directors with institutional investors and facilitate engagement between directors and institutional investors when requested, (5) support [national] policies that are designed to achieve long-term value creation, (6) not engage in stock repurchases at the expense of long-term investment, and (7) focus on explaining the company's long-term strategy, rather than on quarterly earnings guidance.

It is encouraging that that these investors are publicly expressing their opinions and carving out a new place for themselves in the corporate governance landscape. Although it remains to be seen what will happen when a hostile bidder or activist emerges and a near-term premium or other short-term profit opportunity is on offer, we have no doubt that the influence of these long-term investors will be more beneficial to individual corporations and the economy as a whole than the influence of proxy advisory firms and hedge fund activists focused on short-term gains. But the new paradigm for corporate governance will not, on its own, be sufficient to undo the emphasis on short-termism.

There are countervailing currents. Some governance advocates and shareholder activists, not satisfied with the decline of staggered boards at American corporations, continue to advocate for further governance changes. They are pressing companies to amend their governing documents to permit shareholders to act by written consent (at any point in time without the need for a stockholder meeting) and to allow smaller and smaller minorities of shareholders to call special meetings, effectively giving shareholders the power to remove any or all directors at any time. Many large public companies have adopted versions of either or both such provisions. Instead of routine and scheduled meetings where shareholders have the opportunity to thoughtfully consider the progress that the company has made over an appropriate period, the widespread adoption of these provisions would give hostile bidders and activist investors looking to take advantage of short-term market fluctuations the ability to try to force through changes at any point in time, often with limited ability for shareholders to engage with managements and boards and thoughtfully consider the progress and long-term goals of the corporations.

Under the Delaware General Corporation Law ("DGCL"), corporations are required to hold annual stockholder meetings and special meetings of stockholders "may be called by the board of directors or by such person or persons as may be authorized by the certificate of incorporation or the bylaws".[11] Historically, companies did not include provisions in their governing documents that would alter the default standard under Delaware law and permit shareholders to call special meetings. However, in response to pressure and proposals from governance advocates, that has changed. Approximately 63% of S&P 500 companies currently provide shareholders with a right to call special meetings, up from only 43% 10 years ago and significantly less a decade before that.[12] Companies now routinely receive proposals from shareholders to amend their bylaws to permit shareholders to call special meetings (and at lower and lower thresholds, even if they already do have such rights). In 2016, 20 public companies in the United States received shareholder proposals to either allow shareholders to call special meetings or to decrease the minimum threshold of shareholders required to call a meeting. These proposals are often brought by gadfly activists with miniscule shareholdings rather than real investors. Such proposals are generally supported by the influential proxy advisory firms ISS and Glass Lewis. ISS notes in its voting guidelines that its general recommendation is to "vote for management or shareholders proposals that provide shareholders with the ability to call special meetings" and that its preferred threshold for the percentage of shareholders necessary to call a special meeting is 10%.[13] In general, these proposals to amend the bylaws could be binding on companies, but many are precatory or non-binding. Even in those cases, however, many public corporations adopt such provisions following approval by a majority vote. Understandably, public companies do not want to be painted as unfriendly to shareholders or draw the ire of the proxy advisory firms, who typically recommend voting against such companies' directors if they do not properly implement any shareholder precatory resolution by the next annual meeting.

In recent years, governance activists have also been pressuring companies to permit shareholders to take action through consent solicitations. This deviation from the default standard of shareholder action by meeting generally has to be contained in the certificate of incorporation to be valid. In other words, shareholders cannot adopt action by written consent without board approval and the board cannot eliminate it without shareholder approval. Almost 30% of companies in the S&P 500 now give shareholders the ability to act through non-unanimous written consent. This provision was extremely rare for public companies until recently.[14] In a consent solicitation, no shareholder meeting is called, but the shareholder decision, including a decision to remove and replace directors, is taken by the written consent of the number of shares required to take the action assuming all shares were voted (typically a majority of the outstanding shares). At companies where shareholders have unfettered ability to act by written consent, the most important and fundamental decisions facing a corporation, which would typically be made at a shareholder meeting, can be made instantly by a majority of shareholders, often without notice or information to other shareholders, and without time for thoughtful consideration and discourse. In situations where shareholders are already able to call special meetings in between annual meetings, the right to act by written consent is fundamentally inappropriate. The only "benefit" to shareholders is that the "ambush" scenario – the risk of a total upheaval without notice – is so destabilising that it makes a company with this "Achilles' heel" extremely vulnerable to takeover bids and activist campaigns. And yet shareholder activists and their supporters (including ISS) refer to this as a "fundamental shareholder right".

Widespread implementation of these governance practices will transform governance at American corporations. Our corporate governance system has traditionally been a republican form of democracy, in which shareholders elect a board of directors who owe fiduciary duties to the corporation to oversee the management of the corporation and, if they are dissatisfied, replace them at the next election cycle. The changes now being proposed, and often adopted, would replace this model with governance by recall and referendum, in which directors and managers of corporations must cater to the immediate, short-term desires of a simple majority of the stockholders at any given point in time. This shift only serves to further deter directors and management from pursuing long-term strategies necessary for growing a successful company, which often require years of investment and even losses before yielding the expected benefits. Certainly directors should be accountable to shareholders. However, instead of facing the possibility of ultimate shareholder supremacy in relation to corporate policy through replacement of some or all directors once each year at the annual meeting, directors and officers of American corporations are increasingly becoming vulnerable to campaigns to replace the board of directors which may be brought at any time. This constant vulnerability gives activist investors and hostile bidders the opportunity to take advantage of fluctuations in stock prices that are not correlated to the underlying value of the corporation. At any time a hostile bidder could come in with a premium over the then-current market price that fails to accurately value the long-term plans and initiatives of the company, or an activist investor could take the opportunity to push an agenda that might create short-term gains at the expense of long-term growth. These proposals may receive significant support from arbitrageurs and other short-run speculators. Institutional investors who are custodians of the long-term investments of ordinary working Americans should, consistent with the new paradigm and the goals of their investors, resist these types of governance changes.

This vulnerability to recall and referendum is exacerbated in Delaware (where most public companies in the United States are incorporated), due to statutory language which has been interpreted to prohibit companies from including in their organisational documents a provision that would permit directors to be removed only "for cause" between annual meetings.[15] In addition a recent decision of the Court of Chancery emphasised that the bylaws of a Delaware corporation (as opposed to the certificate of incorporation) may not require a super majority vote for director removal, even if such provision has been long-standing and was approved by shareholders.[16] When a Delaware corporation's governing documents make it possible to act by written consent or at a special meeting, shareholders have the power to remove directors at any time. This means that directors who have faithfully carried out their duties and overseen the management of a company for the long term, can be removed and replaced on virtually a moment's notice as a result of short-term factors such as temporary market fluctuations, a quarter that didn't live up to analyst expectations, a campaign by an activist investor, or an opportunistic hostile bid that undervalues the company. In Delaware, if action by written consent or a stockholder-called special meeting is permitted, this cannot be modified by shareholders in the governing documents even if shareholders wanted their directors to serve for a full year and be up for re-election only at the annual meeting.[17]

In his 2015 speech, Mr. McNabb of Vanguard noted that "[b]oards must have a backbone. To be frank, board members cannot be more worried about their own seats than they are about the future of the company they oversee. Boards must take a principled stand to do the right thing for the long term and not acquiesce to short-term demands simply to make them go away".[18] But without the right governance system in place, any such stand by directors would be futile. However committed and principled directors may be, if an activist shareholder can gather a coalition and replace the board of directors overnight through written consent, no amount of backbone will enable a director to do the right thing for the long-term. The constant exposure to action by written consent and recall meetings also detracts from the ability of directors and managers to develop and implement long-term plans in the first place. Time and resources must be devoted to preparing for an attack from an opportunistic hostile bidder or an activist investor, and even more time spent responding to such an attack in the event that it occurs. At all corporations without staggered boards, it is possible that significant time and resources will need to be spent dealing with such an attack on an annual basis. However, at corporations where the governing documents permit shareholders to call special meetings or act by written consent, the possibility of a referendum or recall at any moment increases the amount of time and resources that must be diverted away from the long-term plans of the corporation to address such matters. There is no principled reason that shareholders who are committed to the long-term growth of the corporation should need, or want, the ability to replace the board of directors more frequently than once a year.

In addition to diverting corporate resources away from long-term plans, governance by recall and referendum also drastically increases the burden on shareholders. Institutional investors, and all diversified investors, hold stock in hundreds of corporations and are not intimately familiar with the day-to-day operations of any individual company. Indeed, that is exactly why shareholders elect a board of directors to oversee the management and operations of the company on their behalf. When directors are elected on an annual basis, that task is onerous but manageable. Where governance is through referendum and recall, however, shareholders must spend much more time, money and energy monitoring the company. Institutional investors have expanded their in-house governance departments so that they will have the ability to engage with the companies that they invest, which is necessary for the new paradigm to be effective. Engaging with the hundreds of companies in their portfolios and understanding their long-term plans is not an easy undertaking, and shareholders can do a better job of evaluating and measuring the performance of directors and the progress of the company at annual meetings, which they have had time to prepare for.

The new paradigm is an important step forward in corporate governance in America relative to the short-termism that has held much of investing America in thrall for years. Although it remains to be seen exactly how institutional investors will use their significant power, their focus on sustainable long-term growth is a welcome and positive development. To enable the new paradigm to succeed, we believe that institutional investors should support changes to corporate governance that would restore a system of governance at American corporations that resembles a democratic republic and reject efforts, cloaked in the language of "corporate democracy", that would exacerbate short-termism. Shareholders with the right to elect directors annually can effectively monitor the corporations that they invest in, without leaving America's corporations constantly vulnerable and susceptible to distractions that detract from their ability to focus on the long-term growth of the company.

Endnotes

1. Source: SharkRepellent.
2. At year-end 2015, American households had 9.6% of their financial assets invested in 401(k) and other defined contribution retirement plans (up from 7.6% in 1995) and an additional 10.4% of their financial assets in IRAs. INVESTMENT COMPANY INSTITUTE, 2016 Investment Company Factbook: A Review of Trends and Activities in the U.S. Investment Company Industry, *available at*: https://www.ici.org/pdf/2016_factbook.pdf.
3. Marshall E. Blume and Donald B. Keim, *Institutional Investors and Stock Market Liquidity: Trends and Relationships* (August 21, 2012) (available at: http://finance.wharton.upenn.edu/~keim/research/ChangingInstitutionPreferences_21Aug2012.pdf).
4. See PROXY PULSE, A BROADRIDGE AND PWC INITIATIVE, 2016 Proxy Season Review (2016), available at: http://proxypulse.broadridge.com/reports/.
5. At year-end 2015, almost 30% of assets in mutual funds were in indexed mutual funds. INVESTMENT COMPANY INSTITUTE, *supra* note 8.
6. *See* Dennis K. Berman & Jamie Heller, *Wall Street's 'Do-Nothing Investing Revolution*, WALL ST. J. (Oct. 17, 2016), *available at*: http://graphics.wsj.com/passivists/.
7. *Id*.
8. *Available at*: https://corpgov.law.harvard.edu/2015/06/24/getting-to-know-you-the-case-for-significant-shareholder-engagement/.
9. Leo E. Strine, Jr., Can We Do Better By Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law, 114 COLUM. L. REV. 449 (2014).
10. *See* Martin Lipton, The New Paradigm for Corporate Governance (February 1, 2016) *available at*: http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.25111.16.pdf.
11. DGCL § 211(d).
12. Source: SharkRepellent.
13. Institutional Shareholder Services, United States Summary Proxy Voting Guidelines, 2017 Benchmark Policy Recommendations (December 22, 2016), *available at*: https://www.issgovernance.com/file/products/2017-us-summary-voting-guidelines.pdf.
14. Source: SharkRepellent.
15. Section 141(k) of the DGCL provides, in relevant part, that "[a]ny director or the entire board of directors may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote at an election of directors". The statute includes an exception for companies with staggered boards, but fewer and fewer companies have a staggered board. For an argument that Delaware should revise Section 141(k) of the DGCL to allow Delaware corporations to pro-vide in their certificate of incorporation that directors may only be removed for cause see Trevor S. Norwitz, Accountability Does Not Require Constant Vulnerability: A Simple But Necessary Update to the Delaware General Corporation Law, 41 DEL. J. CORP. LAW 1 (2016).
16. *Frechter v. Zier*, CA No. 12038–VGC (Del. Ch. Jan 24, 2017).
17. Norwitz, *supra* note 15.
18. Norwitz, *supra* note 15.

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