NIRI Directors Roundtable
February 26, 2016

MACKENZIE PARTNERS, INC.

Prepared by:
Daniel H. Burch, Chief Executive Officer
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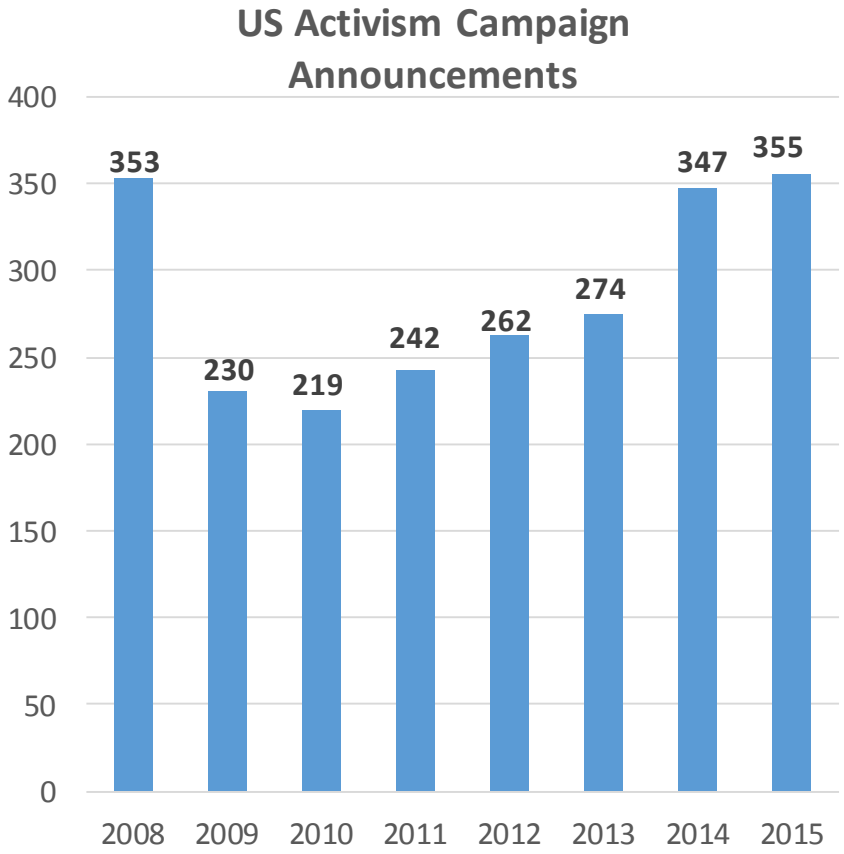
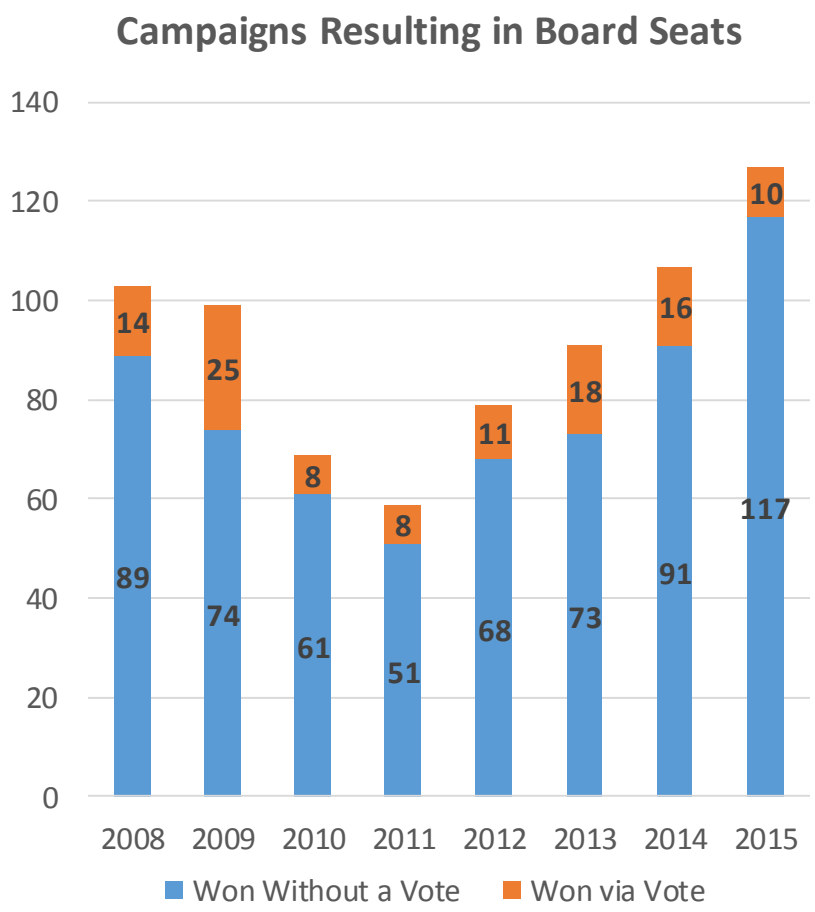
Number of Activist Campaigns Continues to Grow as More Activists are Gaining Board Seats





Data source: FactSet-Sharkrepellent

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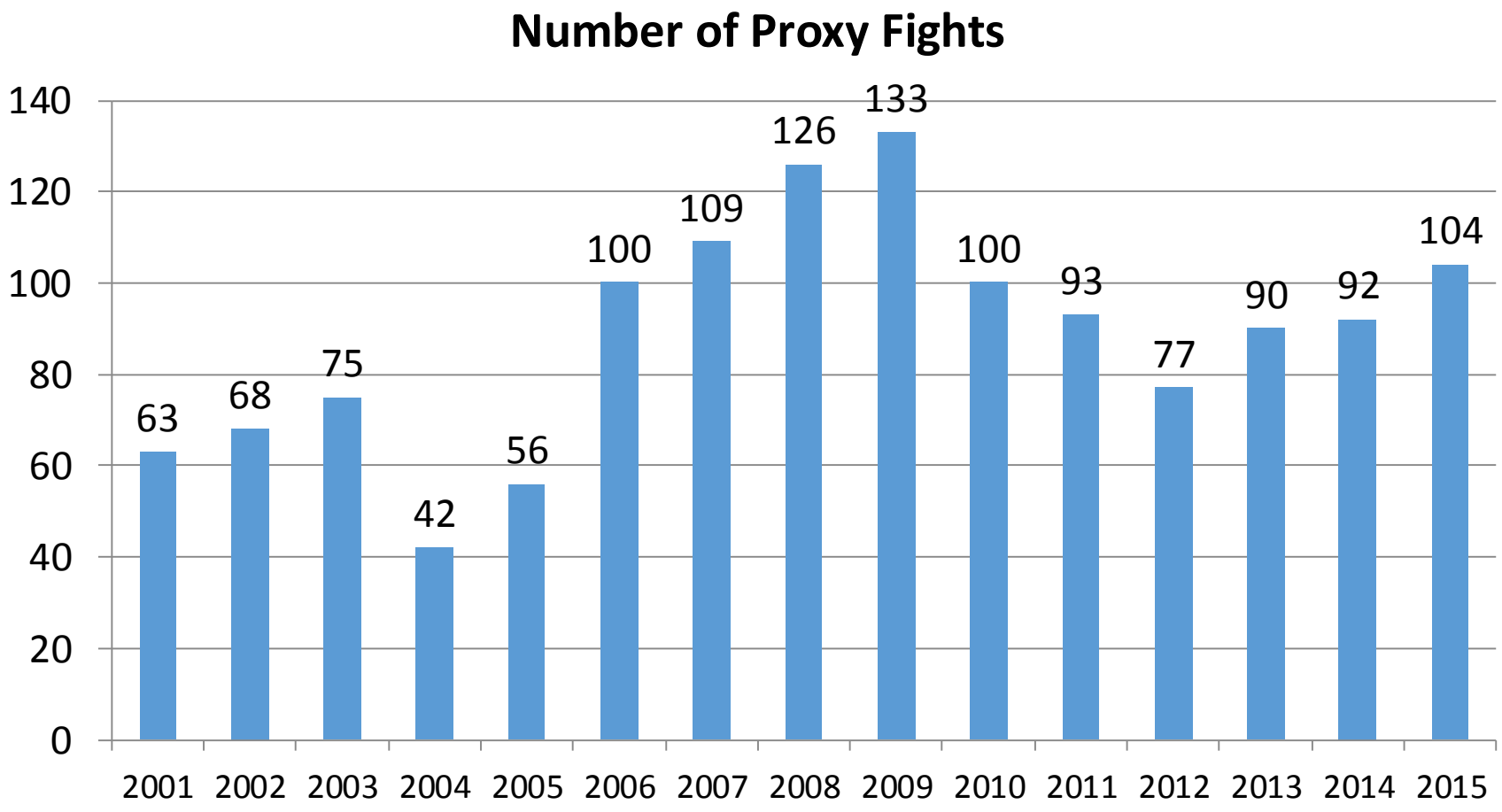
The Number of Proxy Fights Have Increased Over the Past Three Years



Data source: FactSet-Sharkrepellent

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Potential Activist Actions

- Nominate Director Candidates Privately or Publicly
- Submit White Paper to Board and Management and Offers to Work Constructively
- Publish White Paper and file with the SEC
- Establish a campaign website
- Launch Any of the Following Public Campaigns:
  - Shareholder outreach
  - Proxy fight for board seats
  - Written consent or special meeting to remove incumbent board, if allowed
  - Withhold campaign

Potential Company Actions

- Assess Potential Vulnerabilities in Light of Current Circumstances
  - Including: financial stock performance, governance profile and takeover defenses, feedback from shareholder
- Assess Shareholder Base and Potential Voting Scenarios
- Review Sell-Side Research and Media Commentary
- Review Structural Defenses and Potential Enhancements
- Identify Potential Lines of Attack
- Develop and Hone Responses in Advance of a Likely Potential Attack
- Identify Board Members that Will Help Lead the Dialogue
- Evaluate Need for Further Engagement with Dissidents
- Communicate Business and Capital Allocation Plans and Progress of Ongoing Initiatives
- Review Current Board Composition and Assess Need for Enhancements
- If Nominations Are Submitted:
  - Consider interviewing candidates submitted
  - Interview or reject candidates
  - Assess whether to add candidates to the board, negotiate/settle or fight

Engaging with the Activist

Top Don'ts

- Be defensive or make gratuitous personal attacks
- Create perception that management dominates or board is not fully engaged or independent
- Appear closed to alternatives or has prejudged the activist or candidates
- Assume that shareholders will see through spurious arguments
- Respond to every attack
- Be inflexible in the face of dissent

Top Do's

- Focus on the company's business
- Take the high road
- Stick to the company's core messages
- Maintain a measured approach
- Be proactive and address potential vulnerabilities
- Be flexible and consider adjustments based on shareholder feedback

Review Your Shareholder Engagement Program Before An Activist Appears

- Contact your top institutions off season offering to speak about their governance initiatives and the Company's
  - Contact outside the annual meeting season and schedule calls 4 to 6 months before the annual meeting
  - Provide an agenda of the topics to be discussed and a list of participants
  - Include index funds as well as actively managed funds
  - Include the funds' governance groups
  - One or more directors should participate on calls with the top index funds
  - Ask for details on their governance policies if they are not published
  - Provide details on the Company's governance practices and address concerns (i.e.: pay practices, shareholder rights, etc.)
- Don't expect to speak with all of your top holders
  - If they are interested they will respond
  - For many, no response generally means they have other higher priorities than with your Company
  - Mid to Small Cap companies may have a lower response rate due to their relative investment value in the investor's portfolio
- Don't engage in discussions with investors unless the Company is prepared to respond to investor concerns

Shareholder Engagement Best Practices

- Plan to have one or more directors participate in the dialogue with the top 3 to 5 holders out of the top 15 holders annually or bi-annually
- Select and train 2 to 3 directors for shareholder engagement
  - Directors should be prepared to discuss the company's business strategy and the board's involvement in setting the strategy and holding management accountable
  - Also choose directors that are comfortable speaking with investors and can speak about key governance matters, the specifics of the company's executive compensation and equity award programs
  - To manage scheduling conflicts more than 1 director is needed
- Develop a detailed agenda and discussion materials
  - Distribute well in advance of the planned outreach
  - Conduct a rehearsal session with all expected participants
  - Provide the agenda and final list of participants to the investor contact at least two days before the scheduled call
- Provide investor feedback to management and the board
- Consider summarizing in the proxy the Company's outreach efforts and any changes that were made as a result

Appendix

BlackRock Issues Letter to CEO's Warning Against Short Termism

February 1, 2016

Dear Chairman and CEO,

Over the past several years, I have written to the CEOs of leading companies urging resistance to the powerful forces of short-termism afflicting corporate behavior. Reducing these pressures and working instead to invest in long-term growth remains an issue of paramount importance for BlackRock's clients, most of whom are saving for retirement and other long-term goals, as well as for the entire global economy.

While we've heard strong support from corporate leaders for taking such a long-term view, many companies continue to engage in practices that may undermine their ability to invest for the future. Dividends paid out by S&P 500 companies in 2015 amounted to the highest proportion of their earnings since 2009. As of the end of the third quarter of 2015, buybacks were up 27% over 12 months. We certainly support returning excess cash to shareholders, but not at the expense of value-creating investment. We continue to urge companies to adopt balanced capital plans, appropriate for their respective industries that support strategies for long-term growth.

We also believe that companies have an obligation to be open and transparent about their growth plans so that shareholders can evaluate them and companies' progress in executing on those plans.

We are asking that every CEO lay out for shareholders each year a strategic framework for long-term value creation. Additionally, because boards have a critical role to play in strategic planning, we believe CEOs should explicitly affirm that their boards have reviewed those plans. BlackRock's corporate governance team, in their engagement with companies, will be looking for this framework and board review.

Blackrock Letter (continued)

Annual shareholder letters and other communications to shareholders are too often backwards-looking and don't do enough to articulate management's vision and plans for the future. This perspective on the future, however, is what investors and all stakeholders truly need, including, for example, how the company is navigating the competitive landscape, how it is innovating, how it is adapting to technological disruption or geopolitical events, where it is investing and how it is developing its talent. As part of this effort, companies should work to develop financial metrics, suitable for each company and industry, that support a framework for long-term growth. Components of long-term compensation should be linked to these metrics.

We recognize that companies operate in fluid environments and face a challenging mix of external dynamics. Given the right context, long-term shareholders will understand, and even expect, that you will need to pivot in response to the changing environments you are navigating. But one reason for investors' short-term horizons is that companies have not sufficiently educated them about the ecosystems they are operating in, what their competitive threats are and how technology and other innovations are impacting their businesses.

Without clearly articulated plans, companies risk losing the faith of long-term investors. Companies also expose themselves to the pressures of investors focused on maximizing near-term profit at the expense of long-term value. Indeed, some short-term investors (and analysts) offer more compelling visions for companies than the companies themselves, allowing these perspectives to fill the void and build support for potentially destabilizing actions.

Those activists who focus on long-term value creation sometimes do offer better strategies than management. In those cases, BlackRock's corporate governance team will support activist plans. During the 2015 proxy season, in the 18 largest U.S. proxy contests (as measured by market cap), BlackRock voted with activists 39% of the time.

Nonetheless, we believe that companies are usually better served when ideas for value creation are part of an overall framework developed and driven by the company, rather than forced upon them in a proxy fight. With a better understanding of your long-term strategy, the process by which it is determined, and the external factors affecting your business, shareholders can put your annual financial results in the proper context.

Blackrock Letter (continued)

Over time, as companies do a better job laying out their long-term growth frameworks, the need diminishes for quarterly EPS guidance, and we would urge companies to move away from providing it. Today's culture of quarterly earnings hysteria is totally contrary to the long-term approach we need. To be clear, we do believe companies should still report quarterly results – "long-termism" should not be a substitute for transparency – but CEOs should be more focused in these reports on demonstrating progress against their strategic plans than a one-penny deviation from their EPS targets or analyst consensus estimates.

With clearly communicated and understood long-term plans in place, quarterly earnings reports would be transformed from an instrument of incessant short-termism into a building block of long-term behavior. They would serve as a useful "electrocardiogram" for companies, providing information on how companies are performing against the "baseline EKG" of their long-term plan for value creation.

We also are proposing that companies explicitly affirm to shareholders that their boards have reviewed their strategic plans. This review should be a rigorous process that provides the board the necessary context and allows for a robust debate. Boards have an obligation to review, understand, discuss and challenge a company's strategy.

Generating sustainable returns over time requires a sharper focus not only on governance, but also on environmental and social factors facing companies today. These issues offer both risks and opportunities, but for too long, companies have not considered them core to their business – even when the world's political leaders are increasingly focused on them, as demonstrated by the Paris Climate Accord. Over the long-term, environmental, social and governance (ESG) issues – ranging from climate change to diversity to board effectiveness – have real and quantifiable financial impacts.

At companies where ESG issues are handled well, they are often a signal of operational excellence. BlackRock has been undertaking a multi-year effort to integrate ESG considerations into our investment processes, and we expect companies to have strategies to manage these issues. Recent action from the U.S. Department of Labor makes clear that pension fund fiduciaries can include ESG factors in their decision making as well.

Blackrock Letter (continued)

We recognize that the culture of short-term results is not something that can be solved by CEOs and their boards alone. Investors, the media and public officials all have a role to play. In Washington (and other capitals), long-term is often defined as simply the next election cycle, an attitude that is eroding the economic foundations of our country.

Public officials must adopt policies that will support long-term value creation.

Companies, for their part, must recognize that while advocating for more infrastructure or comprehensive tax reform may not bear fruit in the next quarter or two, the absence of effective long-term policies in these areas undermines the economic ecosystem in which companies function – and with it, their chances for long-term growth.

We note two areas, in particular, where policymakers taking a longer-term perspective could help support the growth of companies and the entire economy:

- First, tax policy too often lacks proper incentives for long-term behavior. With capital gains, for example, one year shouldn't qualify as a long-term holding period. As I wrote last year, we need a capital gains regime that rewards long-term investment – with long-term treatment only after three years, and a decreasing tax rate for each year of ownership beyond that (potentially dropping to zero after 10 years).
- Second, chronic underinvestment in infrastructure in the U.S. – from roads to sewers to the power grid – will not only cost businesses and consumers $1.8 trillion over the next five years, but clearly represents a threat to the ability of companies to grow. At a time of massive global inequality, investment in infrastructure – and all its benefits, including job creation – is also critical for growth in most emerging markets around the world. Companies and investors must advocate for action to fill the gaping chasm between our massive infrastructure needs and squeezed government funding, including strategies for developing private-sector financing mechanisms.

Blackrock Letter (continued)

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Blackrock Letter (continued)

Over the past few years, we've seen more and more discussion around how to foster a long-term mindset. While these discussions are encouraging, we will only achieve our goal by changing practices and policies, and CEOs of America's leading companies have a vital role to play in that debate.

Corporate leaders have historically been a source of optimism about the future of our economy. At a time when there is so much anxiety and uncertainty in the capital markets, in our political discourse and across our society more broadly, it is critical that investors in particular hear a forward-looking vision about your own company's prospects and the public policy you need to achieve consistent, sustainable growth. The solutions to these challenges are in our hands, and I ask that you join me in helping to answer them.

Sincerely,

Laurence D. Fink

Improving Focus On the Long Term

- Boards and management should devote more effort developing and explaining the company's long-term strategies; outlining the milestones (financial and non-financial) to achieve the strategy; and reporting on progress at regular intervals.
- Investors should engage with companies through proactive, on going dialogue with the board and management regarding strategy, capital allocation and performance.
- Investors should carefully evaluate an activist campaign to assess the short, medium and long-term implications.

S.E.C. Chief Sees Virtue in Activist Investors

NYTimes – Michael de la Merced March 19, 2105

NEW ORLEANS — For several years, much of the debate at the big deal maker conference here has been whether shareholder activism is a blight on the corporate landscape.

According to the chairwoman of the Securities and Exchange Commission, not necessarily.

In a speech at the Tulane Corporate Law Institute, the S.E.C. chief, Mary Jo White, said that the agency did not necessarily look unkindly on investors who buy stakes in companies and then push for changes in corporate strategy.

“Reflexively painting all activism negatively is, in my view, using too broad a brush and indeed is counterproductive,” she said. Activist tactics, she added, “can be compatible with the kind of engagement that I hope companies and shareholders can foster.”

That’s in contrast to the arguments of several prominent deal makers, notably Martin Lipton, the well-known mergers lawyer, who told the conference last year that he believed that many of these agitators had short-term investment goals that could harm a company.

Ms. White acknowledged the debate: “I did say this was a lively topic with many different views.”

Many mergers advisers have publicly bemoaned the lack of action by the S.E.C. to address what they believe is a glaring hole in securities laws: tightening the 10-day window in which an investor can quietly and quickly build a stake of at least 5 percent in a company before disclosing it publicly.

Several activist investors have used derivatives to quickly build their positions without setting off the securities law requirements, to the consternation of many. No less than Leo E. Strine Jr., the chief justice of Delaware’s Supreme Court — wearing a jaunty trilby hat at the conference this year — argued on a panel in favor of a more sensitive tripwire that involved disclosure within 24 hours.

The S.E.C. has recognized disclosure as an issue, noting that last week it brought civil charges against several individuals for failing to update regulatory disclosures in a timely manner.

But the commission has no plans at the moment to change that window, Michele Anderson, the agency’s chief of mergers and acquisitions, said.

Regardless, the S.E.C. is aware of the principles that it intended to protect — and which parts of the activism discussion in which it would not weigh.

“It is an interesting and important debate, but our role at the S.E.C. is not to determine whether activist campaigns are beneficial or detrimental in any given circumstance,” Ms. White said. “Rather, the agency’s central focus is making sure that shareholders are provided with the information they need and that all play by the rules.”

RECENT DEVELOPMENTS IN THE LAW: DUTIES OF DIRECTORS OF DELAWARE CORPORATIONS

Prepared for the Directors Roundtable and NIRI (SF)

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February 26, 2016

Court of Chancery Indicates Strong Disapproval of Disclosure-Only Settlements to Resolve M&A Litigation

If you are a director and you have been sued in recent years, odds are it was in M&A litigation. While the rate of filing new securities class actions has not changed much in recent years, with 2015 being a slight exception, lawsuits challenging mergers and acquisitions have become almost ubiquitous. A decade ago less than 40 percent of all major mergers or acquisitions drew a lawsuit. In recent years the total has been well over 90 percent for deals with a nominal value in excess of $100 million. These cases follow a pattern: The target's Board is accused of breaching its fiduciary duties by not getting a good enough deal. The acquiror is accused of aiding and abetting the target's Board in breaching its fiduciary duties, on the theory that the acquiror got too good a deal. And both sides are accused of failing to disclose in the S-4 proxy statement and prospectus something they should have disclosed.

Until very recently, virtually all of these cases settled, and settled early, for what are called disclosure-only settlements. These are settlements in which the target's stockholders get no money but only a supplemental S-4 with a few more disclosures thrown in. Of course, money does change hands, but that money all goes to the plaintiffs' lawyers, who often are the real drivers behind this sort of litigation. And in

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return, the defendants get peace – at least the sort of peace that a broad release can provide. The release becomes sort of an insurance policy against another lawsuit.

But in 2015, this practice began to change. In a series of decisions, the most recent of which was only a month ago, the Delaware Court of Chancery has started to clamp down on these disclosure-only settlements, criticizing them roundly.

In the most recent decision, handed down on January 22, 2016, the Delaware Court of Chancery rejected the proposed settlement of a stockholder class action lawsuit challenging Zillow, Inc.'s acquisition of Trulia, Inc. in a stock-for-stock merger valued at something between $2.5 billion and $3.5 billion.[2] Chancellor Andre Bouchard found that the proposed settlement was neither fair nor reasonable because the company would be providing its stockholders with useless and immaterial supplemental disclosures that did not justify a broad release of claims.[3] Chancellor Bouchard also warned that, moving forward, the Court of Chancery will no longer approve disclosure-only settlements unless (1) the supplemental disclosures satisfy a "plainly material" standard and (2) the proposed release is sufficiently narrow.[4]

The *Trulia* decision follows a series of recent decisions in which the Court of Chancery has signaled its growing unwillingness to approve disclosure-based settlements of merger litigation.

Vice Chancellor Sam Glasscock III examined the agency problems associated with disclosure-only settlements in his September 17, 2015 opinion in *In re Riverbed Technology, Inc. Stockholder Litigation*.[5] He noted the incentives: Plaintiffs' counsel get a quick and certain fee. And defendants avoid future litigation by paying a deal tax to gain a broad release – a release that could displace the interests of stockhold-

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[2] *In re Trulia, Inc. Stockholder Litigation*, C.A. No. 10020-CB, 2016 WL 325008, at *1 (Del. Ch. Jan. 22, 2016). The agreed-upon additional disclosures would have added to the existing 224-page proxy "(1) certain synergy numbers in J.P. Morgan's value creation analysis; (2) selected comparable transaction multiples; (3) selected public trading multiples; and (4) implied terminal EBITDA multiples for a relative discounted cash flow analysis." *Id.* at *11.

[3] The court rejected the settlement even though the parties narrowed the release to exclude unknown claims and antitrust claims. As narrowed, the release still released all claims "arising under federal, state, foreign, statutory, regulatory, common law or other law or rule" held by any member of the proposed class relating in any conceivable way to the transaction. *Id.* at *3-*4.

[4] *Id.* at *10. The Chancellor also encouraged parties to adjudicate disclosure claims outside the context of a settlement – either by a preliminary injunction motion or by a contested fee application. Neither would result in a release.

[5] C.A. No. 10484-VCG, 2015 WL 5458041, at *3-4 (Del. Ch. Sept. 17, 2015).

er class members in diligently pursuing and investigating real claims.[6] Although Vice Chancellor Glasscock narrowly approved the proposed settlement in *Riverbed*, he insisted that the court would approach future proposed settlements with increased scrutiny, particularly with respect to the breadth of claim releases.[7]

Less than a month later, Vice Chancellor Laster rejected a proposed settlement arising from Hewlett-Packard's $2.7 billion acquisition of Aruba Networks, stating that plaintiffs' counsel had inadequately represented the stockholder class members.[8] At the settlement hearing, Vice Chancellor Laster questioned the merits of the case at the time it was initially filed, took note of the weak discovery record of plaintiffs' counsel and expressed concerns over the fact that the proposed release extended far beyond the disclosure claims to cover future, unknown claims. The Court's close scrutiny of the proposed settlement in *Aruba* set the stage for Chancellor Bouchard to issue his stern warning in *Trulia* several months later.

Trulia takeaways:

- **New "plainly material" standard** – *Trulia* established a new standard for evaluating the adequacy of supplemental disclosures offered as part of a proposed settlement. To pass muster, a company's supplemental disclosures must "address a plainly material misrepresentation or omission."[9] In other words, the supplemental disclosure will only support a settlement if the company's previous disclosure was materially incorrect or omitted material information. Relatedly, courts may request supplemental briefing or appoint an *amicus curiae* to help evaluate the alleged benefits of a supplemental disclosure.
- **Narrow releases required** – Only narrow releases that "encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process"[10] will support a settlement. Courts will likely not accept releases that include "unknown claims" or general language referring to "any claims arising under federal, state, statutory, regulatory, common law, or other law or rule," like the release in *Trulia*.[11]
- **Difficulty of negotiation** – The new "plainly material" standard for supplemental disclosures and the narrow release requirement will make it more

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[6] *Id.*

[7] *Id.* at *6.

[8] *In re Aruba Networks, Inc. Stockholder Litigation*, C.A. 10765-VCL, Hr'g Tr. (Del. Ch. Oct. 9, 2015).

[9] *Trulia, Inc.*, 2016 WL 325008, at *10.

[10] *Id.*

[11] *Id.* at *4.

challenging for parties to negotiate settlements in the future. Put simply, plaintiffs will have every incentive to insist upon a monetary settlement.

Practical implications:

- **Decreased filings in Delaware** – The court's increased scrutiny of disclosure-only settlements will likely lead to fewer filings in Delaware of lawsuits traditionally targeted at securing these types of settlements. To the extent that plaintiffs' attorneys do choose to file claims in response to public company M&A deals, the lawsuits will likely be of a higher quality compared to those filed pre-*Trulia*, and will seek money.
- **Forum shopping** – Plaintiffs' counsel may attempt to file merger objection cases in other jurisdictions to avoid increased scrutiny by Delaware courts. The effectiveness of this strategy will depend on whether those jurisdictions choose to follow *Trulia* and whether the corporation has adopted a forum selection bylaw specifying Delaware as its designated forum.
- **No more "deal insurance" for companies and their Boards** – Defendants in stockholder class actions will no longer be able to secure deal certainty by making supplemental disclosures and paying attorneys' fees in exchange for global claim releases. Releases must be much narrower, limited to disclosure issues and deal process issues.
- **Decline in cost of D&O insurance?** – Might rates for directors' and officers' liability insurance fall as a result of a decrease in the volume of frivolous merger opposition lawsuits? Maybe, but it is too early to say.

Expansion of the Business Judgment Rule and New Exceptions to "Entire Fairness" Review

Until very recently, if a corporation entered into a major transaction with a controlling person, the deal would be scrutinized by courts in Delaware under Delaware's "entire fairness" test. In simple terms, that meant the deal had to be fair, both in terms of process and in terms of substance (including price). Also, the burden of proving "entire fairness" was placed on the corporation's directors, not the plaintiffs. That's a tough standard.

There was one escape from this standard. If the directors used an independent and empowered Special Committee to vet and approve the deal, or if an informed majority of the disinterested minority stockholders voted to approve the deal, then the bur-

den of proof shifted from the controlling stockholder over to the plaintiff. But the burden-shift aside, entire fairness review continued to apply.[12]

Such was the law for 20-plus years until 2014, when the Delaware Supreme Court in *Kahn v. M&F Worldwide* ("*MFW*") held that business judgment should be the standard of review for mergers between a controlling stockholder and its subsidiary if, and only if: (i) from the beginning, the controlling stockholder conditions the transaction on the approval of both the Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee has the power to freely select its own advisors and definitively say "no"; (iv) the Special Committee satisfies its duty of care in negotiating a fair price; (v) the minority vote is informed; and (vi) the minority is not subject to coercion.[13] Applying this new standard, the Court ultimately affirmed the Court of Chancery's decision to grant the defendant's motion for summary judgment in a breach of fiduciary duty case arising from a going-private merger.[14]

This occurred in 2014. But several cases decided in 2015 have shed further light on the implications of *MFW*:

- **No business judgment review for superficial compliance with the *MFW* standard**

In its August 27, 2015 *Dole Food* decision, the Court of Chancery held that even where the structure of a going-private transaction technically complied with *MFW* in form, the defendant directors were not entitled to business judgment review because they each took actions to undermine the Special Committee throughout the transaction process.[15] The Court in *Dole Food* found that the defendants' fraudulent actions, which included knowingly providing the Special Committee with "projections that contained falsely low numbers," interfered with the effectiveness of the Special Committee as a bargaining agent for minority stockholders.[16] *Dole Food* highlights the fact that courts will closely scrutinize transactions – even if the transactions appear to follow *MFW* in form – to ensure that each of the six *MFW* requirements is satisfied in substance.

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[12] *Kahn v. Lynch Communication Systems, Inc.*, 638 A.2d 1110, 1116 (Del. 1994).

[13] *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 645 (Del. 2014).

[14] *Id.* at 654.

[15] *In re Dole Food Co., Inc. Stockholder Litig.*, C.A. No. 8703-VCL (Del. Ch. Aug. 27, 2015), at 1.

[16] *Id.* at 68.

- ***MFW* applies to private mergers and motions to dismiss at the pleadings stage**

On November 18, 2015, the Delaware Supreme Court affirmed the Court of Chancery's order in *Swombley v. Schlecht*[17] granting a motion to dismiss stockholder class action claims that challenged the fairness of a private-company controlling-stockholder merger.[18] The Court of Chancery had held, and the Supreme Court agreed, that because the merger agreement required approval from both an independent negotiating Special Committee and a majority of unaffiliated minority stockholders, the defendants were entitled to the protection of the business judgment rule under *MFW*. The Supreme Court's decision is significant in several respects:

First, the decision upholds the notion that *MFW* applies to both public and private company freeze-out mergers.

Second, the decision confirms that courts may apply *MFW* at the motion to dismiss stage and grant such motions without allowing discovery, when appropriate. This, in turn, suggests that Boards can structure transactions in a way that seeks to avoid the expenses associated with discovery.

- **Business judgment rule applies to mergers not involving a controlling stockholder if transaction is approved by a fully informed, uncoerced majority of disinterested stockholders**

The Delaware Supreme Court confirmed on October 2, 2015 that that the business judgment rule is the appropriate standard in post-closing damages suits involving mergers that are not subject to the entire fairness standard and that have been approved by a fully informed, uncoerced majority of the disinterested stockholders, even where such approval is statutorily required.[19]

Aiding and Abetting Liability for Deal Advisors in Breaches of Fiduciary Duty and Director Liability for Failure to Properly Inquire about Advisor Conflicts

Several times in recent years directors have escaped liability for breach of fiduciary duty because of exculpatory provisions in the corporation's bylaws,[20] only to see their

[17] C.A. No. 9355-VCL, 2014 WL 4470947 (Del. Ch. Aug. 27, 2014).

[18] *Swombley v. Schlecht*, No. 180, 2015, 2015 WL 7302260 (Del. Nov. 19, 2015).

[19] *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304, 308-14 (Del. 2015).

[20] Such exculpatory provisions typically are created under Del. Gen. Corp. Law § 102(b)(7). Such provision may "eliminate[e] or limit[] the personal liability of a director to the corpora-

deal advisors nevertheless be held liable for aiding and abetting the directors' breach of fiduciary duty. While the directors themselves may have escaped liability, it was doubtlessly a nuisance – or worse – for them to remain ensnared as witnesses in the litigation against their deal advisors, and to have the court find that they breached their duty of care.

The most noteworthy of these cases – *Rural/Metro* – was tried in 2014, resulting in a judgment against the bankers for $75.8 million before interest. The judgment against the advisors was affirmed, if narrowed, by the Delaware Supreme Court on November 30, 2015.

The facts of *Rural/Metro* are complicated, but in substance the Court of Chancery found that the Board (i) created a Special Committee that lacked independence, (ii) gave that Committee a very limited charter that did not include negotiating the sale of the company, (iii) failed for months to supervise the Committee, (iv) while the Committee went ahead and hired a financial advisor that (v) never really disclosed that it had a keen interest in, and stood to profit by, using its position as advisor to Rural/Metro to win a contest to provide staple financing to the buyer of Rural/Metro, and (vi) then provided a financial analysis to Rural/Metro based on material false information (vii) which the Rural/Metro Board spent almost no time reviewing before approving the sale of the company. The Court of Chancery found, and the Supreme Court agreed, that the Board had had breached its duty of care under *Revlon*[21] by failing to act within a range of reasonableness in managing the company's sale process. Both courts also agreed that the Board's financial advisors were liable for aiding and abetting the directors' breaches of fiduciary duties.[22] The exculpatory clause saved the Board from monetary liability for its breaches of duty. But the clause did not save the financial advisor from monetary liability for aiding and abetting those breaches – most notably by hiding the advisor's conflict of interest behind some very bland and boilerplate disclosures.[23] Hence the $75.8 million judgment against the advisor.

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tion or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit." 8 Del. Code § 102(b)(7).

[21] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

[22] *RBC Capital Markets, LLC v. Jervis*, No. 140, 2015, 2015 WL 7721882, at *2 (Del. Nov. 30, 2015).

[23] The advisor in *Rural/Metro* is not the only banker to have gotten into trouble recently by hiding its conflicts. The Court of Chancery recently refused to dismiss aiding and abetting

Lessons from *Rural/Metro*:

- **The responsible group – be it the entire Board or a properly empowered Special Committee – should take an active role in the sales process from start to finish** – Rural/Metro created a Special Committee but did not actually empower it to pursue a deal; the Board also appointed to the Special Committee two (of three) directors who had a personal interest in liquidating their investment in Rural/Metro quickly, and thus were not disinterested. Having done this, Board failed to meet for roughly three months, during which the Special Committee pursued an unauthorized and highly flawed sales process almost to completion.[24] In addition, when it finally awoke, the Board did not receive valuations from its financial advisor until hours before it approved the deal.[25] A Board should be cognizant of the company's value on an ongoing basis with respect to both a potential sale and any alternative corporate action.
- **Special Committees with limited charters require monitoring** — Sometimes a Special Committee is delegated all the Board's powers, because the Board, or a majority of its members, have conflicts. But in other instances, where the Special Committees have more limited charters, Boards should monitor their Special Committees to ensure that all of its members remain independent and act within the scope of their delegated duties. The Court of Chancery found that two members of the Special Committee in *Rural/Metro* were conflicted, each having personal incentives to push for a sale of the company.[26] The Special Committee also commenced a sales process without permission from the Board—for months, the Committee acted beyond the scope of its authority, which was limited to hiring an advisor, exploring strategic alternatives and making a recommendation.

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claims against another financial advisor in *In re Zales Corporation Stockholders Litigation*, C.A. No. 9388-VCP, 2015 WL 5853693 (Del. Ch. Oct. 1, 2015). Zales sold itself for $21 a share. Zales' advisor did not tell Zales that a month before seeking to advise Zales, a team from the advisor led by the same senior banker had pitched the buyer, proposing that the buyer acquire Zales for $21 a share. *Id.* at *3, *22. As the court put it, "On the truncated record before me on Defendants' motions to dismiss, I can only speculate as to why the topic of [the advisor's] prior presentation to [the buyer] apparently did not come up in connection with the decision of the [seller's] Board to make a counter offer of $21 per share as opposed to something higher, in response to [the buyer's] all cash offer of $20.50 per share." *Id.* at *22.

[24] *In re Rural Metro Stockholders Litigation*, 88 A.3d 54, 72 (Del. Ch. Mar. 7, 2014), *aff'd sub nom. RBC Capital Markets, LLC., LLC v. Jervis*, – A.3d –, 2015 WL 7721882 (Del. Nov. 30, 2015).

[25] 88 A.3d at 79.

[26] *Id.* at 65.

- **Boards should vet financial advisors carefully as part of engagement process *and beyond*** – Boards and Special Committees should adequately screen potential financial advisors on an ongoing basis to make sure they are aware of any actual and potential conflicts that the advisor, including members of the individual deal team and the advisor firm as an entity, has or may have with any parties to the transaction or other potential bidders. As the Board identifies conflicts, it should evaluate whether or not such conflicts are manageable given the context. A Board must be especially diligent in monitoring conflicted advisors throughout the sales process.
- **Boards may consider using financial advisor engagement letters as a device to screen for potential conflicts –** Boards may consider using their engagement letters with financial advisors as a tool for identifying conflicts. For instance, a Board might include in the terms of the letter (i) representations from an advisor that it has disclosed certain relationships, (ii) a covenant to make additional disclosures if required throughout the process and (iii) a right to terminate the advisor for cause in the event of a breach of any representation or covenant or a change in the advisor's independence.[27]
- **Boards should keep detailed records of their diligence** – Boards should keep detailed records of their ongoing diligence efforts, which include identifying and managing conflicts, holding regular meetings, and overseeing the sales process. To that end, Board minutes should accurately reflect the Board's actions and diligence efforts, and be timely drafted. Creation of minutes should not await the filing of litigation.

[27] *See generally* Klinger-Wilensky, Eric S. and Emeritz, Nathan P., Financial Advisor Engagement Letters: Post-Rural/Metro Thoughts and Observations (April 24, 2015) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2604250) (discussing four contractual provisions that may be used in financial advisor engagement letters to effectively investigate an advisor's potential conflicts).

WHEN INVESTORS ASK TO SPEAK TO DIRECTORS

Preparation is vital to ensure successful board-shareholder engagement.

By Nicole Noutsios

It is no secret: proxy access and shareholder activism are grabbing the media spotlight, and more institutional investors are asking to speak to directors.

What does that mean for companies, their boards, and IR professionals? As the 2015 proxy season and other recent corporate governance developments have highlighted, companies need a thoughtful and proactive approach on how they structure engagement between their shareholders and their board of directors. And, since there is a broad spectrum of shareholder engagement that can occur, companies need to create a flexible and proactive framework for successful board-shareholder engagement.

The desire of shareholders to influence the board and the strategic decisions of companies is not a new development, although many companies traditionally have limited direct communications between investors and directors. In the past year, a number of fund managers have publicly called for greater board-shareholder engagement. Vanguard sent a letter to its portfolio companies asking them to create "shareholder liaison committees" and to "encourage boards to have a thoughtful process to communicate with shareholders." BlackRock, TIAA-CREF, State Street, and other institutions have urged companies to adopt a 10-point "Shareholder Director Exchange Protocol" to promote more effective engagement. Meanwhile, it appears that directors have become more willing to engage with investors. According to PricewaterhouseCoopers' 2014 Annual Corporate Directors Survey, 66

percent of respondents said they communicate with institutional investors.

Peggy Foran, the chief governance officer, vice president, and corporate secretary at Prudential Financial, who also serves on the board of Occidental Petroleum, observes that Say-on-Pay votes, activism, and proxy access are fueling an increase in engagement. "Companies are looking at the activism landscape and saying, if it happened to them, it can happen to us. So, over time, more companies will embrace direct board-shareholder interaction. Boards are starting to ask how to open up the dialogue so that they can promote better transparency on what is happening within the company and understand the shareholder ecosystem and perspective."

When and How Should Boards Communicate?

Given the increased frequency of board-shareholder engagement, companies should be proactive and evaluate their communications plans for potential shareholder dialogue, and create a customized protocol appropriate for each individual situation. Even with the increase in investor communications, the PricewaterhouseCoopers' survey found that "almost half of directors have not discussed company protocols and practices regarding the process by which shareholders can request direct dialogue with the board, the particular director(s) who would participate in such a dialogue, and the permissible topics for discussion."

The types and reasons for investor requests can vary. According to NIRI's 2013 Board-Shareholder Engagement survey, the most likely venues for direct interactions between board members and shareholders are annual meetings (49 percent) and through the proxy voting arms of institutional shareholders (11 percent). During proxy season, the most common topics on which directors interact with shareholders are corporate governance policies, including executive compensation and director nominations. Activist situations, which can also occur throughout the year, are becoming more commonplace and public.

If a company does decide to allow direct board-shareholder engagement, it must be mindful about when and how that engagement occurs. Additionally, the company's overall objectives need to be addressed. Given the broad spectrum of shareholder engagement that can occur, the initial priority should be a thoughtful examination of whether it is appropriate for a company's board members to interface with its shareholders, and who the most appropriate company contact is. Not all board members are ready for "prime time," so some companies limit which directors may speak directly to investors. Within the companies that do permit direct communication, 35 percent of NIRI survey respondents said they allow only certain directors to do so.

The first step in a successful board-shareholder engagement is for the investor relations officer to establish a communications protocol. The IRO should initially review every request prior to any interaction, and if the request needs to be escalated, it should involve other pre-determined members of the executive team – including the legal team and/or a senior executive. Often, it may be more appropriate for management, legal, or investor relations to try to address the reason for the request first before involving a board member.

While board-shareholder communication may be appropriate in select cases, direct access to any board member is not necessarily the best approach for every company. Directors with stronger capital markets expertise or greater industry expertise may serve as better company representatives than other board members. For investor inquiries related to Say-on-Pay, the chair of compensation committee may be the best representative, assuming the chair is conversant about the company's pay practices. Having a strong partnership and thoughtful discussion with executives, legal team, and external advisors can help determine the best course of action.

There are a variety of formats companies choose from to quickly and proactively address shareholder requests or concerns. While many companies designate only one representative from the board to speak for the company's interests, others may choose to create a special committee to address shareholder concerns. There are also situations where an IRO, legal counsel, or member of the management team will participate in the meeting or call with the board member and investor to provide additional perspective or oversight. The overarching goal in this situation is to provide company representatives who are knowledgeable, prepared, and can engage quickly if needed.

For example, when Atmel announced the retirement of its CEO, several investors wanted to provide feedback to the board about the CEO selection process. Peter Schuman, senior director, investor relations at Atmel, worked with his management team to determine the most effective spokesperson from the board to engage with select shareholders. The team determined that the chairman was the most appropriate member of the board to speak with key investors.

Preparation for Engagement

Before a board member engages with a shareholder, the company should have a clear and cohesive communication plan in place, as well as an educated and prepared director. While constructive dialogue between the board and investors can be insightful for both sides, large and long-term negative ramifications may result if not executed properly. This holds especially true in the case of activism; campaigns can have a range of outcomes and parts of a director's conversation can be taken

out of context and end up in print, negatively affecting shareholders' perceptions of the company.

Strong and advanced preparation also is paramount in ensuring a positive outcome during board-shareholder communications. In some cases, board members may not be up-to-date about the company if board meetings are only held on a quarterly basis. Therefore, it is likely that select board members may not have as strong a grasp about the company's story and disclosure history as the company's day-to-day IR or communications representatives. All board members who plan to speak to investors should have Regulation FD training to help prevent inadvertent disclosures of material, non-public information. The PricewaterhouseCoopers' survey found that "despite increased director-shareholder communications ... directors also continue to be worried about violating Regulation FD" – 89 percent said they are at least "somewhat concerned."

It is imperative that advance preparations are made so the parameters of what will and will not be discussed are clearly understood and agreed upon by the company's representatives. If the company decides to allocate board time to speak with a shareholder, the board member should be armed with not only talking points and disclosure history, but also the shareholder's key concerns and perspective about the company.

Clear and consistent communications, coupled with an approved cohesive and coordinated plan, are necessary when multiple representatives are communicating with investors. For example, if the topic is related to proxy season, the designated board member(s) should be briefed about whether or not the company spoke with this investor about a specific topic in the past, and whether

A YEAR-ROUND STRATEGY FOR PROXY SEASON

MANY COMPANIES HAVE DEVELOPED ACTIVE YEAR-ROUND GOVERNANCE OUTREACH programs to help guarantee a successful proxy season. Advanced planning with your management team and directors on the company's expected proxy ballot items can greatly impact a company's relationship with investors, as well as ensure a successful proxy season.

Here are some guidelines to consider, well in advance of your shareholder meeting.

Advance planning can have a large impact. Six to nine months before your shareholder meeting, begin your company's proxy planning and shareholder outreach. Engage your general counsel, management team, and board to proactively discuss key issues, such as Say-on-Pay, that may impact the company in proxy season.

Prepare well in advance of your shareholder meeting to ensure a positive outcome. Before engaging your shareholders, make sure your team has a communication plan and established goals. Spokespersons should be armed with not only talking points and disclosure history, but also the shareholders' key concerns and perspective about the company. For example, the company's representatives should be briefed about whether or not the company communicated with this investor on a specific governance topic in the past and whether or not the board implemented any of the investor's suggestions.

Start investor outreach well in advance of your shareholder meeting. Reach out early to your top shareholders to obtain feedback about your compensation program, as well as other potential governance issues. If the dialogue is started well before the busy spring proxy season, governance experts, such as a proxy solicitation firm, can offer your company broad perspective about key issues that may impact your company. Early engagement allows for an interactive conversation that will help drive the board's discussion regarding the company's future proxy proposals.

Have a strong knowledge of your investors and how they vote. Many companies use a proxy solicitation firm to analyze proxy voting data to determine whether their investors closely follow their institution's voting guidelines or if they have the ability to have an independent perspective on your proxy proposals. In some cases, the proxy compliance department will have greater impact than your institutional contact. Before you allocate management or board time, it is important that the company has a clear understanding of who the decision makers are at each buy-side firm.

Incorporate feedback into your planning. When reaching out to the company's key influencers, determine what each buy-side firm's policies are and potential "hot buttons" to consider. If you receive insightful investor feedback about the company's anticipated proxy proposals, you should consider incorporating this input into your proxy planning.

Continue outreach later in your proxy process. Reach out a second time to investors as the company sets the record date for the annual meeting. Identify your top influencers and target your discussions to be focused on the preliminary proxy filing. Depending on your proxy proposals, certain issues may require you to enlist a specific board committee member to assist with engagement.

Select the most appropriate representatives. If you need to set up a governance road show, you should send a knowledgeable board member and ensure that he or she is adequately prepared. For Say-on-Pay matters, other internal participants also may include the IRO, the chief governance officer, and the HR officer who oversees compensation and understands your executive pay practices. Your team members should also be aware of key speaking points and past shareholder concerns.

or not the company implemented any of the investor's suggestions. When dealing with proxy fight activism, many companies schedule multiple preparation sessions and heavily engage outside lawyers, communications consultants, and proxy solicitors. Preparation will help avoid the possibility of an unprepared director inadvertently violating Regulation FD or sending messages that conflict with what management has been sharing with Wall Street. Extensive preparation is critical to achieving the most optimal outcome and company alignment on key issues.

The Role of IROs in Facilitating Engagement

As board-shareholder engagement becomes more prevalent, boards have developed an increasing need to be continuously informed of Wall Street's perspective and the drivers of the company's valuation. The board should never be surprised by adverse shareholder sentiment or a negative perception of the company. IROs are in a unique position to provide their boards with strategic perspective on the most pressing investor issues facing the company and industry, as well as the interplay among executive compensation, board compensation, and corporate governance trends. When informed about the most relevant company issues, concerns, and changes in the governance landscape, boards can better understand shareholder views and be more proactive and strategic if needed for shareholder engagement.

"I think IROs can add value to the board by focusing on the right issues that impact the company on Wall Street," says Stephanie Wakefield, vice president, IR, at Informatica, who has experienced a high-profile activist campaign. "For example, it is hard to provide appropriate context for a conversation with an activist if there isn't a solid understanding by your board members about the company's investor base and key investor issues before an activist emerges. To me, providing regular updates of the top holders, shifts in the base, questions that were being asked, and providing investor perspective on the company, is important. The last thing you want to do is have your board surprised by an activist situation or other investor relations related issue."

In addition to regular correspondence, many IROs provide quarterly overviews to the board, typically around the earnings cycle. A number of considerations when providing materials might include: Who are the top shareholders and how are their holdings changing over time? Is there anything that might be concerning about the company's shareholder mix? How do key influencers feel about the company's long-term growth drivers? Are there any areas where the key shareholders and sell-side analysts believe the company needs to improve? What are the key messages and how do they relate to the corporate strategy? Has the company's peer group been impacted by activism? If so, who is involved?

To provide a basic overview of the company's shareholder base and key concerns, many IROs send quarterly background materials, such as shareholder reports, analyst notes, and a summary of current Wall Street feedback and key concerns. If a perception study was recently completed, a high-level summary is often included to provide a third-party perspective. In preparation for proxy season, many IROs are providing customized reports about possible key issues and action plans as early as nine months prior to the shareholder meeting. In addition to written materials, many IROs are also presenting to the board on an ongoing basis and bringing Wall Street's perspective and sentiments on important issues that face the company and industry.

Jim Tolonen, former CFO of five public companies over 30 years, and a current board member and audit committee chair of MobileIron and Imperva, believes IROs can add a tremendous amount of value to boards if they provide strategic insight to not only the company's investor relations efforts, but also to corporate governance issues and other developments that may impact the board. "I think an insightful investor relations perspective can be extremely beneficial for boards to become more educated about how to deliver shareholder value. From a tactical perspective, I like to see background materials that outline the company's investor relations efforts at a high-level, such as shareholder outreach," he said. "However, what adds more value is the dialogue an IRO can bring on a strategic level, such as: What are the key messages and how do they relate to the company's strategy? What is the candid feedback from Wall Street that can assist the board on enhancing shareholder value? What are the key issues the board may face in proxy season and what should we be thinking about six to nine months in advance of our shareholder meeting?"

There is a strong need for companies to look forward and anticipate market trends and governance developments. As board-shareholder engagement becomes more prevalent, companies will benefit from having a communications policy about how to promptly address serious investor inquires. Companies and boards need to be thoughtful about understanding their shareholder base and the ever-changing sentiment of Wall Street and commit to strategic engagement. This presents an opportunity for investor relations officers to think proactively and to add significant value by educating the board about activism, corporate governance, and other key issues that may impact the company. IRU

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niri ANALYTICS

Researching Investor Relations

Communicating with Your Board
2013 Focus Group Report

April 18, 2013

National Investor Relations Institute
225 Reinekers, Suite 560
Alexandria, VA 22314

Contents

Study Objective

The National Investor Relations Institute (NIRI) conducted telephone focus groups with Senior Roundtable (SRT) members concerning an investor relations officer's (IRO) communications with a corporate Board of Directors (BoD or Board). Between February 4 and February 11, 2013, NIRI conducted ten separate focus groups,[1] which addressed the following issues:

- IRO/BoD communications practices
- Factors likely to influence greater communication with the BoD
- Type of information provided to the BoD
- Activities designed to facilitate greater communication between IRO and Board

SRT members voluntarily participated in the focus group. Focus group aggregated demographics were as follows:

- Average of 20 years' experience in investor relations
- 70% were corporate members
- 30% were IR counselors
- 42% work for a micro-cap company (market capitalization of less than $250 million)
- 28% work for small-cap, 15% for mid-cap, and 15% for large-cap companies (market capitalization of $250 million to less than $25 billion)
- 60% of group were female

Responses are taken verbatim from the research.

Survey Definitions:
Micro-cap: < $250 million

Small-cap: $250 million - < $2 billion

Mid-cap: $2 billion - < $10 billion

Large-cap: $10 billion - < $25 billion

Mega-cap: $25 billion +

[1] Focus group conversations were conducted on a 1-on-1 basis via telephone.

Key Findings

- IRO interaction with the Board of Directors is almost entirely at the discretion of senior management.
- Staying within the organizational chain of command is important above all else; including the CFO and CEO in all communications with the Board is strongly suggested.
- Credibility-building and earning management's trust should be the foundation for all future suggestions for IRO/Board interaction. Confidence in an IRO's writing and communication style is an important first step to Board communication.
- Adding value to the IR position is one of the many ways IROs can facilitate trust and build credibility.
- Products an IRO can provide to senior management and the Board vary widely. Being wary of inundating the Board with too many communications is important.
- In addition to quarterly reports, senior IROs may send their Board analyst reports, occasional press releases or research reports, company revenues, summary information about overall shareholder mood, benchmarking and perception studies, and relevant charts and graphs.
- IROs prefer in-person interaction with the Board. When that is not possible, conservative use of written communications that include senior management is suggested.
- Focus group members suggested capitalizing on any informal board interaction opportunities in order to establish connections in situations where formal interactions are not yet available.

Major Findings by Topic

Chain of Command

All focus group participants stated that it was important that IROs heed the desires of senior management and the organizational structure (whether formal or informal) of their company first and foremost. This was expressed directly and indirectly in verbatim statements:

- *"Really, [the determination to speak to the BoD] is based on what you're asked to do by senior management of your company. That's who runs the company, it's up to them."* – Head of Investor Relations and Corporate Communications, Mid-cap.
- *"[Do] not reach out to the Board without prior approval from management team. You have to understand what the relationship is before you do anything. … The CEO wants to know what's going on at all times."* – President & CEO.
- *"It depends on the style and preferences of CEO and to a lesser extent the CFO. If CFO doesn't want IRO talking to Board then it won't happen, that's a double gauntlet to get through."* – Vice President Investor Relations, Large-cap.
- *"Don't overstep your bounds with the Board. You may find yourself at odds with senior management and out of a job. I think you can get yourself in trouble."* – Vice President Investor Relations, Large-cap.
- *"The CFO was very supportive …"* – Founder.
- *"If you are reporting to CEO or CFO ask if it makes sense to be on hand to discuss investor topics with the BoD."* – Principal.
- *" … Don't just go off and do any communications with the whole Board without asking the CEO and CFO."* – Vice President, Corporate Communications and Investor Relations, Micro-cap.
- *"[At my last organization] the Board and the CEO were very open to the IRO presenting to the Board in person."* – Corporate Vice President Investor Relations, Small-cap.
- *"In my last organization there was tight CEO control of Board meetings, always a tightly controlled agenda … From her view it didn't make sense to have an IRO reporting directly to the board. The Board asked CEO and CFO questions."* – Vice President Investor Relations, Micro-cap.
- "*I think [Board access] has almost entirely to do with the CEO and CFO, and how they want the relationship to be and how they control the IRO's relationship with the Board. The more tightly controlled they hold that relationship the less access you as an IRO have with the Board. It's all how the CEO and CFO view access*." – Vice President Investor Relations, Micro-cap.
- "*What's appropriate to one company is not appropriate to another company*." – Vice President Investor Relations, Large-cap.
- *"I … built a relationship with both the CFO and the CEO. A direct line to the CFO and dotted line to CEO."* – Corporate Vice President Investor Relations, Small-cap.

Building Credibility and Trust

Increasing your credibility and establishing trust with your senior management was another recurring theme throughout these conversations. IROs emphasized the importance of being an expert in your field and providing reliable products to the CEO and CFO, before considering requesting Board access. Suggestions for ways to earn trust and gain credibility centered on the products an IRO provides to both their direct supervisors and to the Board, such as reports and email communications.

- *"[Senior management] got comfortable with my writing style and my presentation style first …"* – Corporate Vice President Investor Relations, Small-cap.
- "*If the IRO is going to be speaking with the BoD, it has to be someone who has significant confidence from both the CEO and the CFO."* – Vice President Investor Relations, Micro-cap.
- *"… it's all about credibility, knowledge of your company industry and the market. If there is an education factor [relating to the CEO and CFO], that needs to be approached only after credibility has been established."* – Head of Investor Relations and Corporate Communications, Mid-cap.
- *"… in a crisis situation there develops another level of the credibility factor."* – Vice President, Corporate Communications and Investor Relations, Micro-cap.
- *"Do not inundate your Board with emails, research reports, press releases. You become a spammer and you will lose a lot of credibility."* – Vice President Investor Relations, Micro-cap.
- *"They [senior management] are not going to trust you to interact with the Board right away, it will take time to gain that trust. Once you have built that trust they allow more leeway and are comfortable with your quality of work."* – Vice President Investor Relations and Corporate Secretary, Small-cap.

Once credibility has been built between an IRO and senior management, focus group members suggested that presenting in front of the Board successfully can further increase both senior management and the Board's confidence in the IRO.

- *" … [An IRO] gains a level of respect having access to the Board …"* – Principal.
- *"If you can sit in front of the Board and answer their questions, that gives more confidence to the Board and your senior management. "* – Vice President Investor Relations, Micro-cap.
- *"A former Board member said to me 'You gave us so much confidence that we knew what was going on'."* – Founder.

Adding Value

Adding value, both as the company's IRO, and in terms of the products delivered to the C-suite, was also top of mind for participants. This concept is linked to the previous theme of gaining trust and credibility. Focus group members expressed that one of the ways they indirectly build trust is through adding value. It is at the forefront of the group's expressions about their role as the IRO, and how they approach their Board interactions.

- *"Now [IROs] have to add more value, you can't just forward reports to the Board and expect them to read all of it."* – Corporate Vice President Investor Relations, Small-cap.
- *" … Or if you come in [to the organization] with a staff - analyze the situation and tell your [senior management] 'Here are things I can add value to …'. Know your audience and your staff and capabilities."* – Vice President Investor Relations, Micro-cap.
- *"It's important for the IRO to be familiar with all issues as well as trends happening in the industry."* – Vice President, Corporate Communications and Investor Relations, Micro-cap.
- *"Take the position that the Board members don't know anything and it's your responsibility to inform and educate. They may not always be focused on what's going on in company from a shareholder perspective."* – Head of Investor Relations and Corporate Communications, Mid-cap.
- *"The more information someone has, the better they can execute their job. Don't hoard information so people have to seek you out to get it. The more information they have the better they can do their job. You don't want to be accused of hoarding information from your Board or others."* – Head of Investor Relations and Corporate Communications, Mid-cap.
- *" … Less is more. These people are very busy and have a lot to comprehend, the more succinct and summarized the more valuable it's going to be."* – President & CEO.

Value is added by providing insight into the Street, knowledge about top shareholders of the company, and "color," or tonality and first-hand accounts of what analysts and shareholders are saying.

Preferably, IROs desire to impart this expertise via in-person communications.

- "*Try to make the meeting as informative and efficient as possible. Try to be useful."* – Head of Investor Relations and Corporate Communications, Mid-cap.
- *"I provide feedback to the Board concerning our Analyst Day; it's when I have a lot of feedback and a good opportunity for me to speak in front of the Board."* – Principal.
- *"What the Street will think about a company's strategic plan. If the Board wants to engage shareholders they should hear from the IRO in-person as well as the CEO."* – Principal.
- *"The IRO can speak about issues from the Street from a strategic perspective; the Board is very appreciative of first-hand information. Info the CEO and CFO cannot provide. If the Board is really concerned with any color or tonality I can answer that. I supplement the materials I provide to them by in-face meeting."* – Vice President Investor Relations, Micro-cap.
- *"[The Board] appreciates hearing things; they say 'I want to hear from you because you are the one on the front lines.' I'm free to speak openly."* – Head of Investor Relations and Corporate Communications, Mid-cap.

- *"Get involved in the detail. What's missing in most Board conversations is: Who owns you? What do they think about the company? I view it as my responsibility to be the voice of the shareholder with the Board, and that communication will be passed on and shared with the Board."* – Vice President Corporate Communications and Investor Relations, Micro-cap.
- *"The recent trends in corporate governance have created an additional opportunity for the IRO to demonstrate their value to the Board. Say-on-pay creates an opportunity to give the Board feedback from investors on that topic. Helping the Board understand and providing context."* – Corporate Vice President Investor Relations, Small-cap.
- *"I am conservative about putting things in paper but you also have to show color. I'll tell this information verbally …"* – Vice President Investor Relations, Micro-cap.
- *"The most value add for the IR function was giving [the Board] that insight into the Street; what they are thinking and what might be the reaction to strategic planning. That doesn't come in a report."* – Principal.
- *"[I] added value analysis and facilitation that just sending reports can't do."* – Vice President Investor Relations, Large-cap.
- *"Access to [Board] interactions and you can give that informal color rather than trying to add it to a report. Look for opportunities to provide color verbally."* – Vice President Investor Relations, Micro-cap.

However when direct access to the Board is not possible, imparting this added value in written form is also recommended where appropriate.

- *"In-person is not always possible, so you may have to put [color] in a report as conclusions."* – President & CEO.
- *"... and I suggested I could start writing a report to the Board."* – Vice President Investor Relations and Corporate Secretary, Small-cap.
- *"Provide a consistent report from IR about how shareholders feel about certain issues."* – Principal.
- *"When you ask your senior management if you can put something in front of the Board, make sure when they see it they will also want to put it in front of the Board. Step up your writing skills if you want to put things in front of the Board."* – Corporate Vice President Investor Relations, Small-cap.
- *"[During an activist shareholder situation] I sent daily cheat sheets to the Board: what was driving the stock, what shareholders were saying, any hostiles lying in the wings."* – Founder.
- *"Executive Summary is most important part, if you can add a little flavor and it's signed by you as the IRO, at least the Board knows who you are*." – Vice President, Corporate Communications and Investor Relations, Micro-cap.

Products for the Board

When asked what type of information IROs provide to Boards of Directors, and how that information is presented, some recurring ideas surfaced. A standard product distributed to the BoD among all participants is the quarterly report. However, other products varied and include press releases, analyst reports, company revenues, summaries via email, and slide decks.

Group members were asked to describe what their Board products contained.

- *"…analyst coverage, and the overall mood of the shareholder."* – Vice President Investor Relations, Large-cap.
- *"I put materials as simple as what are the latest analyst reports. I was told [by senior management] that there wasn't any room in the report, so I put it in as an FYI section, and got it in that way. Highlights, a one-page summary. Note stating something like 'If you're interested in these reports…' They will start to recognize who you are and what you can provide."* – Principal.
- *"It's a quarterly report right after each earnings release. And then communication with them on an as needed basis."* – Head of Investor Relations and Corporate Communications, Mid-cap.
- *"Between five and ten pages, it's an IR update and the key findings are in an Executive Summary, very high level stock price performance, bullets, key investor and sell-side analyst feedback. Hot topic type of stuff in the Executive Summary. Then there are two pages of stock price performance charts and graphs relative to our peers and our broader markets. A summary of analysts' buy and sell ratings and those of our peers. Detailed trading multiples and how we compare to our peers on a relative basis. Annotated stock price charts and stock volume statistics and metrics. Our top 30 shareholders and how that has changed."* – Vice President, Corporate Communications and Investor Relations, Micro-cap.
- *"Every quarter I try to add something new and different. Key areas of focus for investors"* – Vice President Investor Relations, Micro-cap.
- *"As opposed to <u>just</u> doing the quarterly maybe there is a monthly stock trading update: a couple of pages you can send to your Board. As opposed to waiting once per quarter. Try a one to three page update."* – Principal & CEO.
- *"On rare occasions I have emailed them a press release or something about to be released like maybe a research report."* – Corporate Vice President Investor Relations, Small-cap.
- *"Sometimes the presentations we made to the Board were a snapshot of the largest shareholders, a trend of institutional ownership over time, opinions of sell side analyst, issues that were important in the industry. Maybe every two years would do a benchmarking assessment of our company vs. peers."* – Founder.
- *"Some Board members are more interested in marketing perception; some were interested in trading dynamics, short interest for us vs. our peers, some in the financials."* – Head of Investor Relations and Corporate Communications, Mid-cap.
- *"Have a regular package that you produce for the Board. It's important to remember that if the Board is only meeting four times a year they will need a basic refresher; this is not their only job. If you can distill it down into five or six slides that's good. Do not overwhelm."* – Vice President Investor Relations and Corporate Secretary, Small-cap.

- *"Big picture strategic issues they need to know to help manage the company. That was captured in a quarterly six page report of top shareholders and put in CEO section the Board looked at on their own."* – Founder.
- *"[The IRO can't] send ten reports and expect the Board to go through them all. Take the time to go through all of them yourself and distribute key takeaways, and then also provide reports but distill it down to digestible material. Quality of content over speed of communication. I'd rather get them something and emphasized the information then just quickly send them something they have to take the time to review."* – Corporate Vice President Investor Relations, Small-cap.
- *"Start by producing a report – about five pages – that has some color and top shareholder information. Pick out sell side quotes that are indicative or illustrative of what the Street is thinking about your company. If you can include it, peer valuation and peer strategy can be very valuable, very value added for the Board to have."* – Vice President Investor Relations, Micro-cap.
- *"A summary released each quarter, plus five times a year I sent an email telling them why stock traded the way it did. Also one email for the peer trading."* – Vice President, Corporate Communications and Investor Relations, Micro-cap.
- *"Start with a really good report to your management team. Offer a few slides and or relevant bullet points. Offer to both your CEO and CFO depending on the relationship. I also sent an email to both the CEO and CFO about analyst reports. 'Attached is the report and here are the highlights … '"* – Vice President Investor Relations, Large-cap.

Informal Interaction

In situations where formal meetings are not available, senior IROs suggest making the most of any informal interactions with the Board of Directors. Finding opportunities to interact through volunteering for special assignments, projects, or helping create the Board meeting agenda were all suggestions made by the group to facilitate face time with the BoD.

- *"Don't just go after the formal interactions. It's going to be more valuable in the end to go for the informal interactions. Sometimes the Board would be just down the hall, just go down there and say 'Hi'."* – Vice President Investor Relations, Micro-cap.
- *"Say to [senior management] 'I'd love the opportunity to go to a Board dinner and have some informal interaction'. Many times the formal agenda has no room, and if the IRO is handling things well, sometimes they don't see the need to have you on the formal agenda. Ask for access to the informal interaction and you can give that informal color."* – President & CEO.
- *"Suggest [to senior management] having the opportunity to interact with the Board informally, that may open up the chance to see them at the Board dinner."* – Vice President Investor Relations, Large-cap.
- *"I got involved in the photo shoots for the Annual Report and our corporate website. That informal interaction led to introductions. Perhaps volunteer for something like that."* – Vice President Investor Relations, Micro-cap.
- *"I helped construct the peer groups for consultation."* – Founder.
- *"Understanding [General Counsel's] role and volunteering to help them construct the agenda for Board meetings, so you can determine where IR would fit into the agenda."* – Vice President Investor Relations and Corporate Secretary, Small-cap.
- *"I've had informal meetings with Board at Board dinners. One time I was the Board dinner guest speaker."* – Vice President Investor Relations, Large-cap.
- *"I took an idea from a NIRI Annual Conference session: volunteer for new Board member orientation. Only the CEO, CFO and IRO have the breadth of understanding about the company to go over the investor presentation with new Board members. I also then had a hand in determining which C-Suite Executives to introduce them to, including myself. I got to work directly with that new Board member … and once you make that relationship then you have that relationship. That person would call me personally or email me personally."* – Vice President Investor Relations, Micro-cap.
- *"A Board member will sometimes call me directly about something; perhaps they have a follow-up question about the quarterly report. Sometimes its support for a presentation they are doing."* – Head of Investor Relations and Corporate Communications, Mid-cap.

Conclusion

The goal of the focus group was to provide NIRI members with in-depth feedback from senior IROs on best practices for facilitating or increasing communication with Boards of Directors. It should be noted, however, that there are limitations to qualitative research such as focus groups. Because the results from focus groups are obtained from small numbers of individuals, the results do not necessarily generalize to the entire population. However, the comments of this focus group of senior IROs provide key takeaways for NIRI members interested in raising their visibility within corporate Boardrooms.

Other resources in the area of IRO communication with corporate Boards include: *Report in Person* (IR Update, November 2010), *IR Career Advice: Behind the Boardroom Door with Eleanor Bloxham* (IR Update, April 2010), and *How Suite It Is* (IR Update, June/July 2011). Additionally, there is the NIRI Sample Document Library, which contains templates, examples, reports and presentations for communicating with the Board.

For more information please contact Ariel Finno, Director-Research, National Investor Relations Institute at 703-562-7678, research@niri.org.

About the National Investor Relations Institute

Founded in 1969, the National Investor Relations Institute (NIRI) is the professional association of corporate officers and investor relations consultants responsible for communication among corporate management, shareholders, securities analysts and other financial community constituents. The largest professional investor relations association in the world, NIRI's more than 3,300 members represent over 1,600 publicly held companies and $9 trillion in stock market capitalization.

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From the Blog Bloomberg Intelligence, Investor Relations, Sustainable Finance

Proxy access, diversity, climate top 2016 AGM issues

BLOOMBERG INTELLIGENCE FEBRUARY 18, 2016

This analysis is by Bloomberg Intelligence analyst Gregory Elders. It appeared first on the Bloomberg Terminal.

Proxy access, carbon and pay will be focus of shareholder voting

The annual general meeting season, mainly March through May, gives investors a chance to weigh in on company performance by voting on board directors and executive pay. Resolutions on proxy access, board diversity and climate-change risk disclosure are a focus. More than 150 sustainability-related resolutions have been filed at over 100 companies, according to Ceres data.

Proxy access gives stick to BlackRock CEO's long-term campaign

BlackRock CEO Larry Fink's recent letter to corporations urging them to focus on

long-term growth vs. short-term returns has added heft: BlackRock could potentially nominate directors at a quarter of S&P 500 companies. The investor holds over 3% of shares at nearly every company that has adopted proxy access so far, giving it the ability to nominate 20-25% of directors at those companies, assuming a three-year tenure of holdings. The threat of BlackRock flexing its power may add impetus for companies to act.

	Security	Ticker	Source	Position	Pos Chg	% Out	Mkt Val
1)	APPLE INC	AAPL US	ULT-AGG	315,425,945	0	5.69	29.97BLN
2)	MICROSOFT CORP	MSFT US	ULT-AGG	450,562,532	0	5.70	22.26BLN
3)	EXXON MOBIL CORP	XOM US	ULT-AGG	247,157,052	+6.29MLN	5.94	20.06BLN
4)	JOHNSON & JOHNSON	JN		171,415,527	+2.54MLN	6.20	17.48BLN
5)	GENERAL ELECTRIC CO	GE		530,391,816	0	5.62	14.94BLN
6)	JPMORGAN CHASE & CO	JP		242,374,317	-2.23MLN	6.58	13.70BLN
7)	WELLS FARGO & CO	WF		285,169,634	+3.82MLN	5.58	13.26BLN
8)	VERIZON COMMUNICATIONS...	VZ		258,211,194	0	6.35	13.10BLN
9)	PROCTER & GAMBLE CO/THE	PG US	ULT-AGG	157,635,830	0	5.83	13.02BLN
10)	AT&T INC	T US	ULT-AGG	346,337,997	+54.99...	5.63	12.85BLN
11)	FACEBOOK INC-A	FB US	ULT-AGG	126,420,664	0	5.51	12.61BLN
12)	ALPHABET INC-CL A	GOOGL ...	ULT-AGG	17,412,936	0	5.98	12.26BLN
13)	ALPHABET INC-CL C	GOOG US	ULT-AGG	17,011,501	+366,44...	4.92	11.61BLN
14)	BERKSHIRE HATHAWAY INC...	BRK/B ...	ULT-AGG	90,744,049	0	7.27	11.50BLN
15)	PFIZER INC	PFE US	ULT-AGG	395,701,728	+475,826	6.41	11.30BLN
16)	AMAZON.COM INC	AMZN US	ULT-AGG	20,938,818	+983,83...	4.45	10.22BLN
17)	COCA-COLA CO/THE	KO US	ULT-AGG	232,785,637	+1.08MLN	5.35	9.93BLN

AIG, others may fend off activists with proxy access carrot

Proxy access may be the long-term investor's antidote to the perceived short-term focus of many activist investors. Seventeen companies facing open activist campaigns have adopted proxy access, including AIG. Longer-term investors may be less likely to vote with activist proposals with the bylaw amendments that allow a group of investors with at least 3% holding over three years to nominate directors. Carl Icahn said Feb. 1 that he'll propose new AIG directors in his campaign to break up the company.

Activist Investor Campaigns Since 2010

	# Campaigns	# Completed	Disclosed Campaign/ Holding (years) Median	Max
Icahn Associates	34	17	1.5	5.2
Elliott Management	26	14	0.9	2.1
Pershing Square	16	6	2.2	6.1
Carlson	11	9	0.4	4.2
ValueAct	23	12	1.5	4.1
Third Point	15	7	1.0	1.9
JANA Partners	18	15	0.7	2.8
Trian	11	3	2.5	4.5
Starboard Value	31	19	1.1	4.8

Note: Holding periods may extend longer if below reporting thresholds
Source: Bloomberg Intelligence

Proxy access too late for arch coal, other energy may feel heat

Energy companies may feel investor pressure to better articulate long-term strategies, particularly around climate change, with the spread of proxy access. At least 21 energy companies, including more than 40% of S&P 500 energy members, have adopted proxy access, largely due to the New York City pension fund's climate concerns. Coal companies would be the most vulnerable to climate regulations, including Arch Coal (filed for bankruptcy in January), Peabody and Cloud Peak Energy. All have adopted proxy access.

Energy Companies Adopting Proxy Access

Ticker		Short Name	1 Year Total Return	3 Year Annualized Total Return	5 Year↓ Annualized Total Return	Market Cap
ACIIQ	US	ARCH COAL INC	-95.42%	-78.65%	-71.85%	9.79M
BTU	US	PEABODY ENERGY	-96.99%	-78.52%	-67.10%	62.65M
CLD	US	CLOUD PEAK ENERG	-79.94%	-54.83%	-41.44%	89.92M
SWN	US	SOUTHWESTRN ENGY	-68.37%	-37.24%	-25.48%	3.22B
DVN	US	DEVON ENERGY CO	-65.01%	-27.35%	-22.90%	9.31B
MRO	US	MARATHON OIL	-73.29%	-38.74%	-21.72%	4.94B
APA	US	APACHE CORP	-44.66%	-23.73%	-20.23%	13.45B
MUR	US	MURPHY OIL CORP	-64.55%	-28.53%	-19.32%	3.07B
APC	US	ANADARKO PETROLE	-54.84%	-22.84%	-12.82%	18.92B
HES	US	HESS CORP	-44.06%	-14.82%	-12.29%	12.04B
NBL	US	NOBLE ENERGY INC	-39.46%	-19.91%	-7.27%	11.93B
COP	US	CONOCOPHILLIPS	-48.26%	-12.97%	-5.00%	41.46B
OXY	US	OCCIDENTAL PETE	-15.09%	-4.73%	-4.19%	49.81B
XEC	US	CIMAREX ENERGY C	-19.61%	9.23%	-3.61%	7.75B
CVX	US	CHEVRON CORP	-21.44%	-7.12%	0.42%	156.06B

Market declines may raise investor scrutiny about executive pay

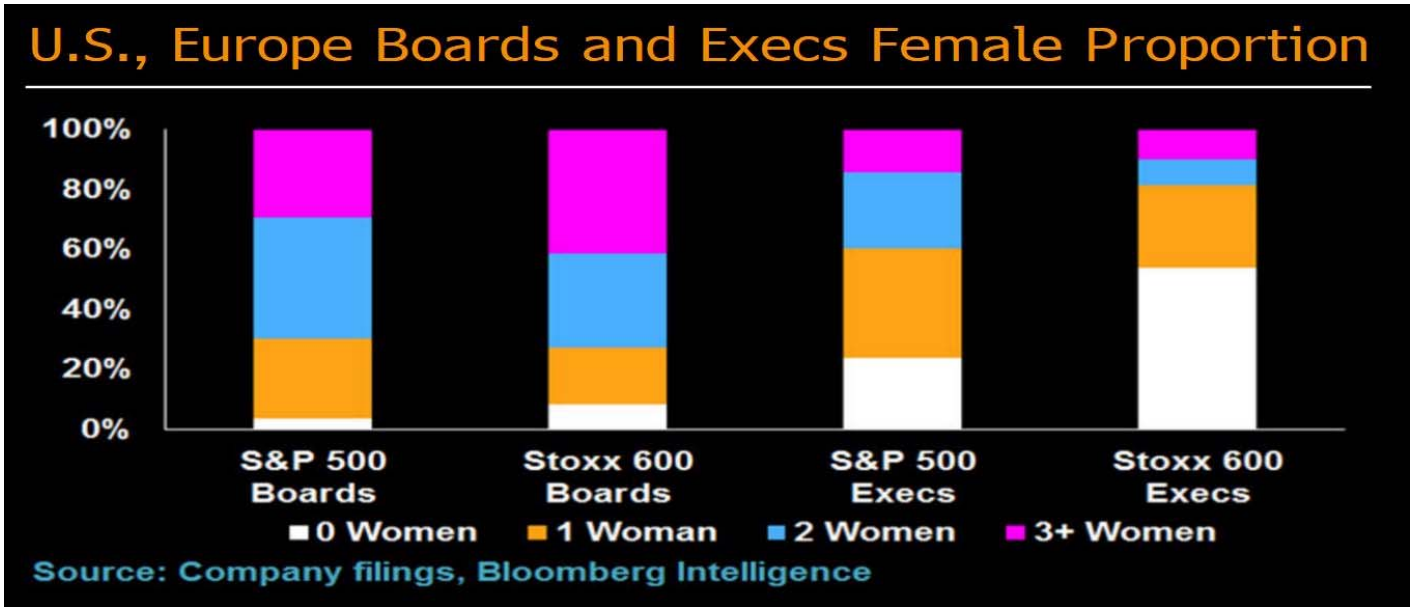
Share price declines may lead to heightened investor scrutiny of executive pay packages up for shareholder approval in coming months. Company boards have done a better job setting executive pay awards to win investor approval, with pay revolts generally declining the last five years. Only three companies in the U.S. S&P 500 and one in the U.K. FTSE 100 received majority shareholder rejection in 2015, with about 6% earning less than 75% approval.

S&P 100 Shareholder Say-on-Pay Approval %

Name	2014↓	2013	2012	2011
Oracle Corp	48.4	45.9	43.3	40.9
Bristol-Myers Squibb Co	56.8	86.9	97.1	95.9
QUALCOMM Inc	57.8	95.5	94.5	68.8
JPMorgan Chase & Co	61.7	78.6	94.4	92.7
Philip Morris International Inc	63.3	96.2	96.8	97.4
Caterpillar Inc	65.7	96.3	96.2	97.1
Honeywell International Inc	70.0	92.9	95.4	92.1
Microsoft Corp	72.7	72.6	95.9	94.1
Halliburton Co	72.9	93.5	92.4	97.6
Apple Inc	74.6	96.9	61.1	83.2
AT&T Inc	78.1	93.7	94.5	93.2
Coca-Cola Co/The	80.4	90.9	77.2	97.1
Exelon Corp	82.8	69.5	76.4	75.7
Walt Disney Co/The	84.2	80.6	58.0	56.9
Citigroup Inc	84.9	85.0	91.7	45.2
Starbucks Corp	85.3	87.1	72.6	93.8

Easier to get women into boardroom than into executive suite

Appointing women to corporate boards has proven relatively easy compared to changing the culture and creating opportunity to promote women to executive leadership. About three-quarters of S&P 500 and Stoxx 600 company boards had two or more female members, as of their latest fiscal year end. In contrast, only half the companies in the S&P had two or more women as executive officers, and one quarter have none. The Stoxx 600 fares worse, with only 20% having at least two female executives. More than half have none.



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Co-founder of MacKenzie Partners, Inc. - one of the leading Proxy and Corporate Governance consulting firms, and very active incumbents and dissidents in proxy contests. Formerly Executive Vice President and Co-founder of the Proxy/M&A Group at Dewe Rogerson, Inc., the predecessor to MacKenzie Partners. Previously with D.F. King & Co. for a combined total of 14 years. Also formerly Director of Corporate Development at Vornado, Inc., responsible for corporate acquisitions for 3 years.

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Admissions

State of California

Education

J.D., Harvard Law School, 1977
cum laude

A.B., University of Pennsylvania, 1974
summa cum laude, with highest honors

Securities litigation, M&A and corporate governance disputes:
Bruce Ericson is co-leader of Pillsbury's Securities Litigation & Enforcement Team and the managing partner of its San Francisco office. Over the last 17 years, his batting average in obtaining dismissals of securities class actions exceeds .785 and he is undefeated in defending such dismissals on appeal. Mr. Ericson represents public companies, their boards and their senior management in securities and corporate governance disputes of all kinds, in SEC investigations and SEC litigation, and in internal investigations, including situations involving disputes among senior management and significant questioning by outside auditors.

Banking investigations and litigation:
Mr. Ericson represented federal bank regulatory agencies in the investigation of Charles Keating, American Continental Corporation and Lincoln Savings and Loan Association, and in an action against the former officers, directors and shareholders of Southwest S&LA, including Governor J. Fife Symington, III of Arizona. The Southwest litigation resulted in an eight-figure settlement. Mr. Ericson also represented a federal bank regulatory agency in a mediation against a Big 4 accounting firm (obtaining a seven-figure settlement) and in other investigations of directors, officers, lawyers and accountants.

Mr. Ericson investigated directors, officers, shareholders, lawyers and others associated with Madison Guaranty S&LA of Arkansas. Mr. Ericson had principal responsibility for the Whitewater and Rose Law Firm investigations and drafted reports on these subjects. The reports were favorably reviewed by Garry Wills in *The New York Review of Books*, by Gene Lyons in *Harper's Magazine* and by Anthony Lewis in *The New York Times*. Lyons described the reports as "far and away the most comprehensive and reliable account of what happened (and didn't) in virtually all aspects of the Whitewater matter." Lewis described the reports as "a voice of reason on Whitewater," adding that the reports' "findings are each backed by a painstaking statement and analysis of the evidence. Reading the reports, one is struck by the triviality of the long-ago events at issue—and by the detachment and clarity with which they are examined."

As part of the Madison Guaranty investigation, Mr. Ericson interviewed (then) First Lady Hillary Rodham Clinton in the Treaty Room at the White House and also testified before the Senate Special Committee to Investigate Whitewater and Related Matters.

Mr. Ericson's other banking litigation experience includes representation of foreign and domestic lenders in contract and securities cases, lender liability cases, predatory lender cases, ATM litigation, and disputes over trust accounts and letters of credit. Mr. Ericson represented a major bank in fiduciary duty litigation arising out of an investment, a major oil company in a lender liability/limited partnership class action in which he obtained summary judgment, and a trust fund established by a foreign government in litigation against its investment manager.

Privacy:
Mr. Ericson represented a major telephone company in *In re National Security Agency Telecommunications Records Litigation*, MDL No. 06-1791, a series of 40 actions alleging that telephone companies cooperated with the NSA's Terrorist Surveillance Program. He spoke on defending privacy actions at the Association of Business Trial Lawyers' 34th annual seminar.

Antitrust, trade regulation and unfair competition:
Mr. Ericson has defended and prosecuted civil antitrust and unfair competition cases and counseled clients in industries as diverse as banking, computers, geothermal energy, groceries, magazine distribution, membership campgrounds, petroleum, professional sports, shopping centers and sugar beets. He represented a major grocery chain in an action alleging a conspiracy to drive out magazine distributors. He represented a major oil company in a challenge to its merger with another major oil company; defendants defeated a preliminary injunction motion, and had that affirmed on appeal. He represented a major grocery wholesaler in a class action alleging price-fixing and horizontal division of markets. He also represented a major commercial bank in unfair competition litigation challenging banks' disclosures of ATM fees, and three manufacturers of computer printers in unfair competition litigation challenging disclosures of inkjet printer speeds.

Appellate litigation:
Mr. Ericson has handled a variety of appeals and writ proceedings in both federal and state appellate courts. He is undefeated in obtaining affirmances of dismissals of securities class actions in the Ninth Circuit, having won such appeals in 2015, 2013, 2009, 2003 and 2000. In 2013 he won an appeal in the Federal Circuit and in 2003, he won several appeals of actions challenging the California gubernatorial recall election in the California Court of Appeal and California Supreme Court.

Firm management:
Mr. Ericson has served as a member of the firm's Associate Review Committee, Billings and Collections Committee, Compensation Committee and Nominating Committee and as the leader of the firm's litigation practice in San Francisco. He is co-leader of the firm's Securities Litigation & Enforcement Team nationwide and the managing partner of the firm's San Francisco office.

Representative Matters

- 2015: *He Nam You v. Japan*, No. C-15-3257-WHA (N.D. Cal. Nov. 24, 2015): Obtained dismissal of all claims against Japanese newspaper publisher in case brought by Korean “comfort women” alleging aiding and abetting of war crimes, RICO violations and defamation.
- 2015: *In re Syntroleum S’holder Litig.,* No. CJ-2013-5807 (Okla. Dist. Court, Tulsa County, July 31, 2015): Obtained dismissal of all claims against acquirer of assets of biofuels company.
- 2015: *James L. Turkle Trust v. Wells Fargo & Co.*, 602 Fed. Appx. 360 (9th Cir. 2015): Obtained affirmance of dismissal of class action alleging wrongful redemption of trust preferred securities.
- 2014: *Southeast Wireless Network, Inc. v. U.S. Telemetry Corp.*, No. C505430 (19th Judicial District Court, Parish of East Baton Rouge, Louisiana, Aug. 5, 2014): Obtained summary judgment in favor of client in Blue Sky action alleging fraud in exchange transaction with telemetry start-up.

- 2013: *In re HP Securities Litigation*, No. C-12-05980-CRB, 2013 WL 6185529 (N.D. Cal. Nov. 26, 2013): Obtained dismissal of all claims against HP's former CEO.
- 2013: *In re Century Aluminum Securities Litigation*, 729 F.3d 1104 (9th Cir. 2013): Obtained affirmance of dismissal of securities class action challenging accounting restatement.
- 2012: *James L. Turkle Trust v. Wells Fargo & Co.,* No. C-11-6494-CW, 2012 WL 2568208 (N.D. Cal. July 2, 2012): Obtained dismissal of class action alleging wrongful redemption of trust preferred securities.
- 2012: *Call v. Wells Fargo & Co*., No. C-11-5215-CW, 2012 WL 1232132 (N.D. Cal. Apr. 12, 2012): Obtained dismissal of another class action alleging wrongful redemption of trust preferred securities.
- 2011: *National Credit Union Administration Board v. Siravo, et al.*, No. CV-10-1597-GW (C.D. Cal. Aug. 1, 2011): Obtained dismissal with prejudice of all claims in $6.8 billion action by federal regulators against the directors of what was the nation's largest corporate credit union.
- 2011: *In re Century Aluminum Co. Securities Litigation*, No. C-09-1001, 2011 WL 830174 (N.D. Cal. Mar. 3, 2011): Obtained dismissal with prejudice of securities class action challenging accounting restatement.
- 2010: *Ingres Corp. v. CA, Inc.* 8 A.3d 1143 (Del. 2010): Won affirmance of trial court victory in software license case, made significant new law on forum selection clauses.
- 2010: *In re Century Aluminum Co. Securities Litigation*, 2010 WL 1729426 (N.D. Cal. Apr. 27, 2010): Obtained dismissal of securities class action challenging restatement.
- 2009: *CA, Inc. v. Ingres Corp.*, C.A. No. 4300-VCS, 2009 WL 4575009 (Del. Ch. Dec. 7, 2009): Won trial of software licensing case arising out of divestiture of software assets.
- 2009: *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156 (9th Cir. 2009): Obtained affirmance of dismissal of claims against bank holding company and its chairman.
- 2008: Represented UnionBanCal in four class actions challenging a tender offer for its outstanding public shares made by its parent, Mitsubishi UFG Financial Group.
- 2008: Handled SEC investigation of major bank regarding alleged insider trading.
- 2007: *Committee on Jobs Candidate Advocacy Fund v. Herrera*, C-07-3199-JSW, 2007 WL 2790351 (N.D. Cal. Sept. 20, 2007): Obtained preliminary injunction against enforcement of San Francisco ordinance limiting independent advocacy for or against candidates for elective office.
- 2007: *Siemers v. Wells Fargo & Co.*, No. C-05-4518-WHA, 2007 WL 760750 (N.D. Cal. March 9, 2007) and No. C-05-4518-WHA, 2007 WL 1456047 (N.D. Cal. May 17, 2007): Obtained dismissal of all claims against broker-dealer defendants in action alleging mutual fund revenue-sharing practices.
- 2006: *In re: National Security Agency Telecommunications Records Litigation*, MDL No. 1791: Represented AT&T in class actions alleging that telephone companies cooperated in the NSA's Terrorist Surveillance Program.
- 2006: *Rubke v. Capitol Bancorp Ltd.*, 460 F. Supp. 2d 1124 (N.D. Cal. 2006): Obtained dismissal of claims against bank holding company and its chairman.

- 2006: *In re Orange 21, Inc. Sec. Litigation*, No. 05-CV-0595-JM (S.D. Cal.): Obtained dismissal of all claims against maker of sunglasses and its board of directors.
- 2006: *In re BioLase Sec. Litigation*, No. 8:04-cv-947 (C.D. Cal.): Obtained dismissal of all claims against maker of dental laser devices, its CEO and CFO.
- 2005: SEC private investigation of Fortune 100 corporation: Resolved without any action against corporation.
- 2004: *In re Crown Vantage, Inc.*, No. C 02-03836 MMC, 2003 WL 25257821 (N.D. Cal. Sept. 25, 2003) and 2004 WL 1635543 (N.D. Cal. July 12, 2004), *aff'd* 198 Fed. Appx. 597 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1381 (2007). Obtained dismissal with prejudice of $550 million action alleging that investment bank conspired to spin-off divisions of paper company into an insolvent entity.
- 2004: *IDT Corp. v. Neckowitz* (N.D. Cal.): Obtained dismissal of negligent misrepresentation action.
- 2003: *Winick v. Pacific Gateway Exchange, Inc.*, 73 Fed. Appx. 250 (9th Cir. 2003): Obtained affirmance of dismissal of all claims in 10b-5 action.
- 2002: *In re Pacific Gateway Exchange Sec. Litig.*, No. C-00-1211 PJH, 2002 WL 851066 (N.D. Cal. Apr. 30, 2002): Obtained dismissal with prejudice of all claims in 10b-5 action.
- 2001: *In re Pacific Gateway Exchange Sec. Litig.*, 169 F. Supp. 2d 1160 (N.D. Cal. 2001): Obtained dismissal of all claims in 10b-5 action.
- 2001: Obtained summary judgment for oil company in class action challenging tender offer for limited partnerships.
- 2000: *Haney v. Pacific Telesis Group*, 2000 WL 33400194 (C.D. Cal. 2000): Obtained dismissal of all securities claims; case subsequently settled on very favorable terms.
- 2000: *Lawrence v. Zilog, Inc.*, 242 F.3d 382, 2000 WL 1545053 (9th Cir. 2000): Obtained affirmance of dismissal of 10b-5 action.
- 1999: *Samet v. AirTouch Communications Inc.* (N.D. Cal. 1999): Obtained dismissal of all claims in securities fraud action.
- 1998: *Lawrence v. Zilog, Inc.* (N.D. Cal. 1998): Obtained dismissal of all claims in 10b-5 action.
- 1997: *Equity-Linked Investors, L.P. v. Adams*, 705 A.2d 1040 (Del. Ch. 1997): Won trial of fiduciary duty suit challenging a corporate refinancing involving a change of control.

Honors & Awards

- *Legal 500 US*, Shareholder Litigation (2015)
- BTI Client Service All-Star (2014)
- *Super Lawyers* (2006-2015)
- Burton Award for Excellence in Legal Writing, Recipient (2013)

Affiliations

American Bar Association, Association of Business Trial Lawyers (member, Board of Governors), Bar Association of San Francisco, Civil Local Rules Attorney Advisory Committee (N.D. Cal.) (chair), Federal Bar Association, N.D. Cal. Lawyer Representative to the Ninth Circuit Judicial Conference, Supreme Court Historical Society, Ninth Judicial Circuit Historical Society

Courts

Supreme Court of the United States, United States Courts of Appeals for the District of Columbia and Ninth Circuits, United States District Courts for the Northern, Eastern and Southern Districts of California, Pro Hac Vice to the bars of the United States District Courts for the Districts of Colorado, Maine and Utah, Northern District of Georgia, Northern District of Illinois, Eastern and Northern Districts of Texas, the Court of Chancery of the State of Delaware, and trial courts in Louisiana and Oklahoma

Publications

Court of Appeals Warns Against Complacency in the PSLRA's Safe Harbor, 7/28/2015

Supreme Court to Securities Issuers: Beware What You Omit When Stating Your Opinions , 3/27/2015

Court of Appeals to Directors of Nonprofits: "Nonprofit" Does Not Mean "No Risk for You", 3/27/2015

Ninth Circuit Court of Appeals Raises Pleading Standard for Securities Fraud Actions, 12/18/2014

Delaware's Adoption of Garner — and Practical Ways to Respond, 8/28/2014

Delaware Supreme Court Permits Stockholders to Overcome Corporation's Attorney-Client Privilege for "Good Cause", 8/18/2014

Halliburton: Supreme Court Changes Little About Securities Fraud Class Actions, 6/24/2014

Amgen Does Not Mean the Sky is Falling for Defendants in Securities Class Actions, 3/5/2013

Supreme Court Finds No Fraud Exception to Five-Year Statute of Limitations for Government Lawsuits Seeking Civil Penalties, 3/4/2013

Court: Bank's Redemption of Trust Preferred Securities Due to Dodd-Frank Changes Is OK, 7/30/2012

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Debate Continues Over Class Action Waivers in Consumer Contracts, 6/30/2011

Supreme Court Limits 10b-5 Liability to Those Who "Make" Misstatements, Rejecting "Substantial Participation" Theory, 6/15/2011

Supreme Court: Securities Fraud Class Action Is Certifiable Without Proof of Loss Causation, 6/8/2011

US Supreme Court Gives Green Light to Class Action Waivers in Consumer Contracts, 4/28/2011

High Court Rejects 'Statistical Significance' as Materiality Test for Pharma Securities Fraud, 3/30/2011

Attention Credit Card Issuers: Time to Review Your Credit Card Disclosures, 7/26/2010

U.S. Supreme Court Adopts *Gartenberg* Standard for Mutual Fund Advisers' Fees, 4/5/2010

9th Circuit: CFO's Statements to Counsel in an Internal Investigation Can Be Used at Trial, 10/8/2009

Ninth Circuit Affirms Dismissal of Securities Class Action Asserting Failure to Disclose Violations of Foreign Corrupt Practices Act, 12/19/2008

Supreme Court Decision May Spur Individual and Class Actions Against ERISA Fiduciaries for Defined Contribution Plans, 3/5/2008

California Adopts "Continuous Ownership Rule" for Shareholder Derivative Suits, 2/15/2008

Supreme Court in Stoneridge Rejects Application of "Scheme Liability" to Customers and Vendors of Issuers Accused of Securities Fraud — Impact on Professionals and Securities Market Participants Less Clear, 1/15/2008

Supreme Court Clarifies Securities Fraud Standards, 6/22/2007

Supreme Court to Clarify Securities Fraud Pleading Standards, 1/10/2007

Plan Sponsors Sued over 401(k) Fees: Class Actions Highlight Need for Fiduciaries to Focus on Fees Paid by Plans, 10/30/2006

Using Dabit, the Supreme Court Plugs a Gap in Federal Securities Laws to Preempt "Holder" State Law Class Action Claims, June 2006

Stock Option Questions May Hit Close to Home, 6/13/2006

Regulation FD after Siebel Systems: No longer "the hobgoblin of little minds"?, November 2005

Supreme Court to Resolve Circuit Split Over Scope of Securities Litigation Uniform Standards Act, 11/3/2005

Life After *Dura* - Courts Begin to Define Loss Causation in Securities Fraud Cases, 8/17/2005

California Supreme Court Clarifies Rules for Punitive Damages Awards, 6/20/2005

Supreme Court Rejects “Price Inflation” Theory of Pleading and Proving Loss Causation in Securities Fraud Cases Under Rule 10b-5, 4/29/2005

The Class Action Fairness Act of 2005, 2/18/2005

The WorldCom and Enron Settlements: Imposing Personal Liability on Public Company Directors, 1/20/2005

California Voters Limit Private Enforcement of Unfair Competition Law, 11/4/2004

Narrow Construction of New York Statute Results in Limitation of Rights Automatically Transferred to Purchaser of Security, 7/20/2004