

Shareholder Activism & Engagement

Contributing editors

Arthur F Golden, Thomas J Reid and Laura C Turano



2018

GETTING THE
DEAL THROUGH 

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Shareholder Activism & Engagement 2018

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Davis Polk & Wardwell LLP

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Preface

Shareholder Activism & Engagement 2018

Third edition

Getting the Deal Through is delighted to publish the third edition of *Shareholder Activism & Engagement*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria and Ireland.

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

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

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Arthur F Golden, Thomas J Reid and Laura C Turano of Davis Polk & Wardwell LLP, for their continued assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
January 2018

Introduction

Arthur F Golden, Thomas J Reid, Laura C Turano and Thomas D Malinowsky

Davis Polk & Wardwell LLP

In 2017 shareholder activism remained front-page news, with activist mainstays doubling down on their strategies and pursuing high-profile target companies. As in 2016, there were examples of shareholder activists suffering difficult investment returns, regulatory or legal challenges and trying proxy contest defeats. Despite these challenges, however, shareholder activism remained an undiminished force to be reckoned with, and shareholder engagement continued to be front of mind in the boardroom and the c-suite. It has become a 'chronic', as opposed to an 'acute', part of the landscape and boards regard it as such as they regularly review company strategies, risks and challenges.

In the past year, the size of average shareholder activist investments has grown, with activists investing considerable amounts in large-cap, household-name companies. For example, campaigns in the past year have included: ADP (Pershing Square), BHP Billiton (Elliott Management), Bristol-Myers Squibb (JANA Partners), CSX (Mantle Ridge), DowDuPont (Glenview, Third Point, Trian Partners), GE (Trian Partners), Honeywell (Third Point) and Procter & Gamble (Trian Partners). At an increasing rate, activists are seeking company management transitions and pushing ambitious operational changes and strategic transactions. This bull's-eye focus on company management and operational overhauls has sharpened the rhetoric on both sides of the table and has been a reminder of the importance and evolving nature of effective communications during shareholder activist battles. We have also seen the line continue to blur between activist fund and institutional investor. Institutional investors, with ever-increasing amounts under management, have also continued to demonstrate a willingness to wield (publicly and privately) their influence at portfolio companies in furtherance of their own agenda and the agenda of shareholder activists.

The chapters of this third edition of *Shareholder Activism & Engagement* are the results of the efforts of practitioners from all around the world, including some of the foremost experts in the expanding and global field of shareholder activism. This introduction identifies some of the trends and topics that we have seen as 2017 comes to a close, and we look forward to providing readers with in-depth, country-by-country coverage in the chapters that follow.

The adage remains true, no company is immune to shareholder activism

In 2017, the number of activist campaigns against target companies is reported to be relatively stable from 2016. Similarly, the breakdown of companies targeted by market capitalisation also largely remained unchanged from 2016. Despite the stagnant number of campaigns and size of companies targeted, 2017 has seen a sharp increase in deployed capital to the tune of more than double that of 2016, in effect raising the stakes from the prior year. For example, in 2017 there was Pershing Square's approximately US\$4.2 billion stake in ADP, Trian Partners' approximately US\$3.5 billion stake in Procter & Gamble, Elliott Management's approximately US\$2.2 billion stake in NXP Semiconductors and Mantle Ridge's investment of the entirety of its inaugural approximately US\$1 billion fund in CSX. Related to the increased size of individual investments, we have also seen activist funds (such as other hedge funds) attempt to persuade their investors to lock up their money with the fund for longer. This is a development that over time may impact the size and number of companies targeted by an activist fund, as well as the average holding period by the activist

prior to making a public demand and after settlement with the target company.

We would also note that while the number of campaigns and size of companies targeted has remained stagnant, the rhetoric of campaigns has been anything but monotonous. Perhaps reflecting the personal aspect of shareholder activist campaigns when management is targeted and significant changes are proposed, we have seen company spokespeople and activists speak publicly in no uncertain terms about one another. Carlos Rodriguez (the CEO of ADP) saying on CNBC that the founder of Pershing Square reminds him of a 'spoiled brat' and that the founder 'doesn't know what he's talking about', is just one example. We expect the rhetoric of the past year to cause renewed focus on maintaining a scripted message, while at the same time causing some to question (especially after ADP defeated Pershing Square) whether fiery rhetoric (within limits and depending on the circumstances) can sometimes help a company effectively deliver its message to shareholders. However, having been in the midst of many such campaigns, we continue to think that the ad hominem comments shed more heat than light on these contests, and can be counter-productive. Most shareholders, especially institutional shareholders, are more interested in, and likely to be persuaded by, the economics and value implications of the positions taken.

Institutional investors in the forefront

One focus of last year's discussion was the rise of institutional investors in the activist marketplace. At the same time that institutional investors have shown an increased desire to engage (publicly and privately) with their portfolio companies, they have also experienced a sharp rise in assets under management. In 2016, institutional investors experienced approximately US\$250 billion in net investment inflows, and net investment inflows have been estimated to be approximately US\$500 billion in 2017. The larger amount of capital at the disposal of institutional investors has had many effects on the shareholder activism and engagement landscape, including larger percentage holdings in, and resulting influence over, portfolio companies, as well as more personnel and resources dedicated to identifying and pursuing engagement strategies and policies.

In January 2017, the Investor Stewardship Group was formed. The group's initial signatories hold over US\$17 trillion in assets under management and include both institutional investors such as BlackRock, State Street and Vanguard and perennial activists such as Trian Partners and ValueAct Capital. The group is reported to have been formed in response to public criticism that governance campaigns generally amounted to no more than well-intentioned window dressing, and that words should be put into action. The group is an important reminder that institutional investors and traditional shareholder activists do not work in separate silos.

International engagement continues to climb

As in prior years, the United States remains the epicentre of shareholder activism. However, the relative rate of global campaigns continues to rise. In particular, as of the date of this writing, more capital had been deployed on activist campaigns in Europe in 2017 than in the previous three years combined, fuelled in large part by sizable engagements by activist mainstays Elliott Management (Akzo Nobel) and Third Point (Nestlé). Outside Europe, global markets for shareholder activism

continue to emerge. The number of campaigns in Asia (by nearly 50 per cent) and Australia (modestly) each rose in 2016, a trend that is likely to hold once 2017 comes to a close, and even smaller markets such as Israel and South Africa have seen recent upticks. The reasons for this trend vary, and run the gamut, from investors looking for opportunities competitors may not have identified (consider that as many as 20 per cent of US public companies are estimated to have already been targeted by activist campaigns) to seeking to apply strategies that, while hackneyed in the United States, are novel elsewhere. While global campaigns are still in their relative infancy, we expect international activist engagement to continue to rise in the coming years.

Final note

In this third edition of *Shareholder Activism & Engagement* we and the other contributing editors have prepared a number of updates to reflect the rapid evolution of the landscape of shareholder activism and engagement across various jurisdictions of interest, and are pleased to announce the addition of Austria and Ireland to this year's edition. Throughout this year's publication, we and the other contributors have identified key changes in regulations and market practice over the past year to enable our readers to better engage with the marketplace. We look forward to following continued developments with great interest as participants adapt their strategies to position themselves for future campaigns.

France

Jacques Naquet-Radiguet, Juliette Loget and Stéphane Daniel

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General

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

Shareholder activism is not as widespread in France as it is in the United States. France has long considered itself immune to activism, but despite the rather unfriendly legal environment for activists, France has recently become one of the largest markets for shareholder activism in Europe (FTI Consulting, 'Global Activism On The Rise: A 2017 Update', 28 July 2017). Between 2010 and July 2017, there were approximately 34 shareholder activism campaigns in France. During the past two years, the most important and efficient campaigns included (i) Swedish Cevian Capital's campaign against Rexel, which resulted in the removal of Rexel's chief executive officer and most members of its executive committee (2016), (ii) the French Charity & Investment Merger Arbitrage Fund's campaign against the cash tender offer of Altice over SFR, which led the French stock market regulator (AMF) to refuse to grant a clearance to the transaction in 2016 and (iii) the UK/US Children Investment Fund (TCI)'s campaign against the takeover of Zodiac by Safran, which resulted in the renegotiation and restructuring of the transaction in 2017.

Over the past 20 years, French law has increased the rights of shareholders with respect to governance-related matters. French shareholder activism legislation began with the recognition of the right of investor associations to claim collective damages for expropriated shareholders. Shareholder activism was further strengthened by the right granted to investor associations mandated by expropriated shareholders to claim individual damages. Another significant step was taken by the law of 2 July 1996, which granted shareholders of listed companies the right to create associations aiming at representing their interests within the company, provided that they hold at least 5 per cent of the voting rights and can prove an ownership of registered shares for at least two years.

In addition, the New Economic Regulation Law of 2001 increased the rights of shareholders and in effect permitted proxy fights in France. This reform enabled shareholders to vote by mail, and reduced from 10 per cent to 5 per cent the percentage of voting rights required to propose a resolution at shareholders' meetings. Also, a 2006 decree further amended in 2014 provided that the record date for a shareholders' meeting must be set two days before the meeting, thereby permitting shareholder activists to continue to acquire shares until just a few days before the shareholders' meeting.

Finally, the implementation in the French Commercial Code in 2011 of Directive No. 2007/36/EU on the exercise of certain shareholder rights in listed companies (i) further increased shareholders' rights at general meetings by providing expanded information to shareholders and facilitating the addition of draft resolutions to a shareholders' meeting agenda by shareholders and (ii) created a legal framework for active proxy solicitation by requiring anyone who actively solicits proxies to announce his or her voting policy (see question 21). This Directive has recently been amended by Directive No. 2017/828 dated 17 May 2017, to promote long-term investments and increase the transparency between issuers and investors, in particular by (i) enabling issuers to discretionarily identify their shareholders, (ii) introducing a mandatory shareholder vote on the compensation of directors and

corporate officers and (iii) requiring institutional investors to publish their shareholder engagement policy and proxy agencies to publish a code of conduct (see question 13). This Directive must be implemented by the EU member states by 10 June 2019.

In France, shareholder activism legislation and regulation are enforced by the courts.

2 What are the other primary sources of practices relating to shareholder activism and engagement?

Over the past few years, new practices relating to shareholder activism have emerged. In particular, governance codes (such as the AFEP-MEDEF, the MiddleNext and AFG codes), which recommend best practices for executive compensation and appointment of board representatives, offered a new source for shareholder activism.

The best example of the power of governance codes on shareholder activism was the introduction of the 'say-on-pay' by the AFEP-MEDEF corporate governance code in 2013, in the aftermath of several scandals concerning executive compensation. This rule has now been introduced into current French law by the Sapin Law of 9 December 2016, pursuant to which shareholders must vote (i) ex ante on the principles and rules determining the compensation of directors and corporate officers and (ii) ex post on the payment of variable and exceptional compensations to such persons.

In addition, proxy agencies also use their voting recommendations in favour of, or against, company resolutions to reduce information asymmetry between shareholders, thus potentially affecting the outcome of general meetings.

3 How is shareholder activism generally viewed in your jurisdiction? Are some industries more or less prone to shareholder activism? Why?

Shareholder activism has now become a source of concern for the directors and officers of French companies. Activist shareholders are often regarded by the French media as 'aggressive speculators' or 'short-term investors', especially because of the emerging 'short selling activists' who bet on the decline in the share prices of their targets. This happened when Muddy Waters published a report stating that the accounts of Casino were hiding declining activities and a high debt profile, resulting in a sharp fall of the share price (2015/2016). The AMF is currently investigating this complex matter for dissemination of false information.

In France, no industry leans more or less towards shareholder activism (see question 5).

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

Investor associations (such as the Association for the Defence of Minority Shareholders (ADAM), the National Association of French Shareholders and the association Regroupement PPlocal) have had a very significant role in French shareholder activism for more than two decades.

In 2017, ADAM has been very active in (i) joining forces with TCI in the campaign against the takeover of Zodiac by Safran (see question 5), (ii) challenging the reorganisation of the share capital of Crédit Agricole by launching claims against its regional banks (Crédit Agricole

Sud Rhône Alpes, Crédit Agricole Nord de France, Crédit Agricole Toulouse and Crédit Agricole Touraine Poitou) and (iii) obtaining the indictment of Natixis for misrepresentation and delivery of misleading financial information during the 2007 financial crisis.

However, even as the role of investor associations remains important, new actors, such as hedge funds and proxy agencies, are emerging in the French market. With the percentage of voting rights required to submit resolution proposals at a shareholders' meeting reduced to 5 per cent, investment entities and hedge funds have started targeting French companies and playing an important role in their governance. They typically hold minority shareholdings in undervalued companies and demand that they take governance and strategic actions to improve the share price.

Proxy agencies have also become major actors of shareholder activism in France because asset management companies rely principally on voting recommendations provided by proxy agencies. The most influential proxy agencies are: Proxinvest; Glass, Lewis & Co; PhiTrust Active Investors; the French Asset Management Association (AFG); and RiskMetrics. Proxy agencies analyse corporate governance practices and resolutions proposed at general meetings of listed firms and provide advisory services, including voting recommendations and solicitation services. Their principal objective is often viewed as promoting and encouraging better corporate governance practices generally rather than improving a company's share price.

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

In France, shareholder activism focuses principally on (i) CEO and top management compensation, (ii) governance and (iii) mergers and acquisitions activities (including takeover bids and capital increases). This trend is consistent with the figures provided in 2016 by Activist Insight for Europe (*Option Droit & Affaires*, 'Les activistes: un mal nécessaire?', October 2016) which show that European shareholder activism addresses particularly board-related matters (50.9 per cent), M&A-related issues (18.9 per cent), and compensation topics (9.4 per cent). As in Europe, French shareholder activism rarely focuses on environmental and political issues.

In particular, we have recently seen numerous and vigorous activist campaigns concerning M&A activities. For instance, Safran and Zodiac announced their combination in January 2017 by way of a cash tender offer (in which the family shareholders of Zodiac would not participate) followed by a merger of Zodiac with and into Safran. TCI (which at the time held a 4 per cent stake in Safran) immediately challenged the transaction, arguing, inter alia, that Zodiac was overvalued, that the shareholders were not consulted beforehand and that there was an unequal treatment between the family shareholders and the minority shareholders; TCI also applied strong public pressure by sending letters to the chairman of the board of Safran and to the AMF and by threatening claims against Safran's directors. Safran eventually renegotiated new financial conditions in the aftermath of yet another profit warning of Zodiac, including, in particular, a discount of circa €1 billion in the valuation of Zodiac.

In addition, shareholder activists in France often address executive compensation and golden parachute issues.

Executive compensation, governance concerns, M&A activities and/or structural underperformance, alone or combined, are the main factors attracting the attention of activist shareholders. In these contexts, activist shareholders find opportunities to apply pressure on the company to find alternative actions and strategies in order to enhance shareholder value. For instance, the acquisition by Corvex Management of 0.8 per cent of the share capital of Danone for an amount of US\$400 million in July 2017 was expressly motivated by the fact that Danone was alleged to be undervalued.

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

Except with regard to the removal of one or more directors or supervisory board members and their replacement, the shareholders' meeting cannot make a decision that is not on the agenda.

One or more shareholders representing at least 5 per cent of the share capital of a company, or a recognised shareholders' association whose members hold together at least 5 per cent of the voting rights, is entitled to request the inclusion of items for discussion or draft resolutions in the agenda of a shareholders' meeting.

The request must be sent at least 25 days prior to the date of the meeting. Any such items and draft resolutions must be included in the agenda and sent to shareholders with all of the other documents relating to the meeting. Companies whose stock is listed on an exchange are also encouraged to include the names and addresses of the proposing shareholders (so that other shareholders can reach out to them) and, to the extent available, an explanation of the proposed resolutions.

In addition, French law allows one or more shareholders representing at least 5 per cent of the voting rights to make inquiries in writing to the chairman of the board of directors about management decisions. In the absence of a satisfactory response within one month, these shareholders may request that the French courts appoint an independent expert to inquire about these matters.

Furthermore, one or more shareholders representing at least 5 per cent of share capital may make written inquiries twice a year to the chairman of the board of directors about any matter likely to jeopardize the continued operation of the company. The chairman of the board must reply within one month and such response is communicated to the statutory auditors of the company.

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

The activist shareholders' strategy is typically based on two stages.

The first stage is confidential and consists of private discussions between activist shareholders and management in order for activist shareholders to present their analysis and requests. If they cannot reach an agreement, then the second stage might begin.

The second stage is more hostile: activist shareholders and managers publicly confront the opposing positions. In addition to exercising their right to submit discussion items and resolution proposals, as discussed above, in order to pursue their objectives, shareholder activists mostly make use of their right to submit written questions prior to general meetings. In addition, they often use the public media (press releases, open letters, interviews, etc) to advertise their positions. In extreme cases, activist shareholders do not hesitate to bring the action before French commercial courts in order to add pressure on the target company and, in particular, file a claim for (i) the appointment by way of summary judgment of one or more experts to submit a report on one or more management transactions (see question 6), (ii) the appointment of a designee to convene a general meeting if the board of directors or the executive board failed to do so (see question 8) or (iii) mismanagement by directors and officers, as in the Safran/Zodiac campaign.

The board of directors of a French company is required to respond during a shareholders' meeting to written questions submitted by shareholders prior to the meeting.

Certain shareholder activists also write directly to the AMF to allege that certain practices of a target company are contrary to best corporate governance practices and shareholder rights. For instance, in 2015, Proxinvest submitted five written questions to the AMF and Alcatel concerning the information provided to Alcatel's shareholders regarding the golden parachute and the non-competition payment to be made to its departing CEO.

Also, shareholder activists in France often publicise their positions and use two principal means to achieve this goal: issuers' annual reports as well as press releases and media interviews. Proxy agencies publish annual reports on their websites. In these reports, proxy agencies present their analysis of the governance practices of listed companies, sometimes even using the 'name and shame' card to draw attention to what they believe are undeserving companies. They sometimes also provide advice to companies in order to improve their governance. More generally, activist investors in France use the media to spearhead their voting campaigns. For example, in 2014, proxy agencies went public to criticise the automatic allocation of double voting rights to shares held in the registered form for at least two years provided by French law and encouraged shareholders to vote against double voting rights. However, the use of social media by French activists remains in the early stages.

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

First, shareholders' meetings may be called by a successful bidder who holds more than 50 per cent of the shares or voting rights of a company following a tender offer or the acquisition of a majority interest in the relevant issuer, if the board of directors of the issuer has failed to so convene a shareholders' meeting despite a request by the new majority shareholder. This provision enables successful bidders to quickly replace incumbent board members (and, as applicable, senior management) if they do not resign or no amicable arrangement is found for their replacement.

In addition, as a general French corporate law matter, if the board of directors or the executive board failed to do so, shareholders' meetings may be convened either:

- by any interested party in the event of an emergency; or
- by one or more shareholders who together hold more than 5 per cent of the share capital, including, with respect to listed companies, through an association of shareholders.

In order to call a shareholders' meeting, the applicant must file, at its expense, a request with the president of the commercial court acting in summary proceedings. The president of the court will verify that the request is in the interests of the company and does not relate solely to the private interests of the claimant. If the president of the commercial court grants the request, he or she then appoints a designee responsible for convening the meeting and determining the agenda.

In principle, general meetings of shareholders must be held physically. However, the Sapin Law authorised non-listed companies to hold general meetings by exclusive use of videoconferencing or telecommunication means. This possibility must nevertheless be provided for in the by-laws, and shareholders representing at least 5 per cent of the share capital may request the convening of a physical general meeting.

9 May directors accept direct compensation from shareholders who nominate them?

In their capacity as directors of a French corporation, directors are to be compensated by the company only and cannot receive any direct compensation from the shareholders who nominate them.

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

Shareholders are entitled to request the inclusion of a draft resolution proposing the appointment of a director to the agenda of a shareholders' meeting, in which case the draft resolution must be circulated by the company to all shareholders. See question 6, concerning the right of shareholders to submit resolution proposals.

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

Officers and directors may be held liable, individually or jointly, as regards the company or third parties, as a result of mismanagement. The qualification of 'mismanagement' is left to the relatively broad interpretation of the court.

Company legal actions against a director or an officer are engaged through the company's corporate officers, failing which French law also allows any stockholder (or a group of stockholders under certain conditions) to initiate a derivative action known as the 'ut singuli' action against a director or officer in order to obtain compensation for damages suffered by the company as a result of a mismanagement by the company's CEO or members of the board. Any damages awarded are paid to the company despite the fact that the legal action is brought at the shareholders' expense. In addition, any stockholder may engage an action against a director or officer in order to have its personal damage compensated to the extent such damage is distinct from the damage caused to the company, although such cases are rare.

Shareholders are not entitled to bring class actions on behalf of all shareholders. The new class actions regime introduced into French law

allows only consumer associations to bring class actions against companies, but only with respect to consumer goods.

French Law prohibits provisions of by-laws that limit director or officer liability.

Company response strategies**12 What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?**

Corporate boards are finding that offence may be the best defence when dealing with shareholder activism. To that end, it is imperative that companies be well prepared, and thus they try and identify the issues which could attract activists' attention. To this effect, executives should (i) regularly review corporate governance policies (composition of the board, appointment and removal of directors, executive compensation, etc.), (ii) evaluate strategic and transaction alternatives to improve the company's performance and (iii) pay attention to proxy agencies' recommendations in order to anticipate institutional investors' voting policy.

Companies might also consider establishing a White Paper listing ideas and suggestions for enhancing shareholder value. For instance, this paper could analyse the strategic initiatives to be undertaken by the company to maximise shareholder value and whether:

- management has recently become distracted by non-core businesses and needs a strengthened focus on the company's core business;
- executive compensation has been sufficiently correlated with the company's performance;
- executives are sufficiently motivated to enhance shareholder value; and
- the company has been proactive enough in publicly disclosing its recent successes and accomplishments.

In addition, executives should pay attention to their relationships with the company's main shareholders and maintain an ongoing dialogue with all shareholders to provide them with feedback on significant company issues (eg, by posting reports and videos on the company's website, platforms and social media). This communication will enable management to better understand the view of the market and help investors understand the business model of the company and its capital allocation decisions.

Finally, executives should be attentive to the policies and recommendations of institutional shareholders.

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

Structural defences available to French companies are very limited. Only a small minority of companies have adopted the equivalent of US poison pills.

Current structural defences used to fight shareholder activism include:

- the introduction of an article in the by-laws to require the disclosure of certain shareholdings thresholds that are lower than those provided for in the French Commerce Code (ie, between 0.5 per cent and 5 per cent; see question 19);
- the implementation of a double voting rights system to the benefit of long-term shareholders whose shares are held for at least two years;
- the capping of voting rights. For example, voting rights are capped at 30 per cent per shareholder at Pernod Ricard regardless of how many shares are held by such shareholder; and
- the stabilisation of the share capital of the company through the combination of the main shareholders into a joint holding company or the conclusion of a shareholders' agreement to organise their rights and obligations with respect to the governance and the share capital of the company.

Other companies have adopted the corporate form of a French *société en commandite par actions*; in other words, a partnership with general partners bearing unlimited liability and shareholders with limited liability, to protect the incumbent management (eg, Hermès, Lagardère, Michelin). The articles of association of this form of

company may include provisions that make it very difficult to replace management. In addition, certain French issuers include in their global portfolio regulated activities (eg, sensitive contracts with the French government) so that a change in their control may only occur with the prior approval of the French government or other regulatory authorities.

14 May shareholders have designees appointed to boards?

Significant shareholders often seek board representation rights with the issuer. If the situation is not hostile and the circumstances warrant it, companies are sometimes amenable to entering into an agreement providing for board representation rights. Pursuant to these agreements, which must be disclosed publicly, the issuer typically undertakes to propose and support the appointment of a designee of the large shareholder. In exchange, the large shareholder typically agrees to support the strategy of the company. As a matter of corporate law, any board member, whether appointed as a designee of a large shareholder or not, represents all of the shareholders and must act in the company's best interests.

While some of these agreements provide for a standstill obligation by the large shareholder (ie, an undertaking not to purchase shares of the company beyond an agreed threshold), standstill obligations are not always negotiated (and, when they are, they typically provide for customary exceptions; eg, if a third party acquires a significant interest in the company or launches a takeover bid).

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

The company by-laws are publicly available on the commercial register (at www.infogreffe.com). In addition, the AMF recommends that listed companies publish an updated version of their by-laws on their website.

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

The AMF recommends that listed companies provide in their annual reports a table setting out the allocation of their share capital and voting rights as of the end of the past three years. This ownership table should list shareholders in order of decreasing level of ownership and show the most important sub-categories of shareholders (eg, shareholders belonging to the same group of companies, family groups and shareholders acting in concert) and, as applicable, certain specific groups of shareholders (eg, employee shareholding and treasury shares). The ownership table may also provide an explanation of significant changes in share capital and voting rights over the last three years (including acquisitions, transfers, allocation of double voting rights) together with references to threshold-crossing notices and, if applicable, statements of intent (see question 19).

Moreover, companies must establish a list of their shareholders 16 days before the shareholders' meeting. The list must individually identify the shareholders holding their shares in the registered form and indicate the number of shares held and the shareholders holding their shares in the bearer form. Any shareholder of the company has the right to obtain the communication of this list at the head office of the company at any time during the 15 days preceding the meeting.

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

The AMF recommends that listed companies create a shareholder consultative committee in order to improve the quality of the company's communications with its individual shareholders (better organisation of the general meetings or studies to better address shareholder expectations). Listed companies usually disclose information on this committee either in their annual reports (eg, shareholder consultative committee's role, members, etc) or on their websites (eg, shareholder consultative committee's internal regulation, dates of meeting, minutes, materials of presentations and so on).

Companies also regularly interact with shareholders through different forms and tools ranging from the company website to the

Update and trends

Shareholder activism is becoming a permanent and important feature in the French market.

In particular, recent reforms are likely to encourage shareholder activism in France, such as the 'Sapin law' dated 9 December 2016, which implemented a mandatory say-on-pay pursuant to which shareholders must vote on the principles determining directors' and corporate officers' compensation and the payment of variable and exceptional compensations to such persons or, the new Directive dated 17 May 2017, which aims to promote long-term investment and transparency between issuers and investors.

In addition, a noteworthy trend in the French market is the strengthening of shareholder activism in relation to M&A transactions, including the vigorous battle between TCI and Safran about the acquisition of Zodiac by Safran or the French Charity & Investment Merger Arbitrage Fund's campaign against the cash tender offer of Altice over SFR, which attracted public scrutiny and mass media attention.

shareholder newsletter, the shareholder guide, the shareholder club, shareholder meetings, financing training courses, etc. Each company aims to choose the solutions that offer the best fit with its shareholder relations strategy.

Even if companies have closer relationships with certain shareholders (see question 22), they must make sure that all shareholders are provided with the same level of information. Equality of information is at the cornerstone of French securities and corporate laws.

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

During the period of time that precedes a shareholders' meeting, companies receive written voting proxy forms from shareholders who cannot attend the meeting. These proxy forms must be:

- mailed to the company at least three days prior to the meeting, unless a shorter period has been provided by the by-laws; or
- electronically sent to the company by three o'clock in the afternoon on the day prior to the meeting, in the case of electronic voting proxy forms.

Moreover, as the authority responsible for monitoring the quality of information provided to investors in France, the AMF has issued a recommendation for proxy advisors addressing (i) the establishment and the implementation of voting policies, (ii) the issuance of voting recommendations, (iii) the communication channels with listed companies and (iv) the prevention of conflicts of interest. In this respect, the AMF recommends that proxy agencies send their reports on the proposed resolutions to the companies and their shareholders. In their reports, proxy agencies should provide their voting recommendations for each resolution, thereby allowing issuers to be aware of the likely position of those shareholders who follow proxy agencies reports.

19 Must shareholders disclose significant shareholdings?

Under French law, any person or legal entity who, acting alone or in concert, holds shares representing more than 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, one-third, 50 per cent, two-thirds, 90 per cent or 95 per cent of the capital or voting rights of a listed company must inform the company and the AMF of the total number of shares and voting rights so held within four trading days.

A failure to comply with this disclosure requirement:

- results in the cancellation of the voting rights attached to the shares exceeding the threshold for which notice has not been duly made for all shareholders' meetings held during a two-year period;
- may result in all or part of the shares held by the defaulting shareholder being deprived of voting rights for a maximum period of five years, if a competent commercial court so decides;
- may expose the defaulting shareholder (as well as its directors and executive officers) to administrative sanctions by the AMF; and
- may, after consultation of the AMF by the public prosecutor, expose the defaulting individuals, to a criminal fine of €18,000.

In addition, upon crossing the thresholds of 10 per cent, 15 per cent, 20 per cent and 25 per cent of the capital or voting rights, the relevant shareholder must also inform the company and the AMF, within five trading days, of its objectives for the following six-month period, by stating:

- the means of financing the share purchases;
- whether it is acting alone or in concert;
- whether it intends to continue to purchase shares or not;
- whether it intends to take the control of the target;
- whether it intends to request the appointment of new board members;
- its strategy relating to the target and actions required to implement it;
- any temporary securities transfer agreement; and
- its intention with respect to the settlement of any equity or cash-settled derivatives it may own.

If the acquirer's stated objectives change during the following six-month period, it must file a new statement to run for a further six-month period.

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

Shareholders who, acting alone or in concert, cross the threshold of 30 per cent of the share capital or voting rights of a listed company, or, for those who hold between 30 per cent and 50 per cent of the share capital or voting rights of a listed company, increase their shares or voting rights by more than 1 per cent over a rolling 12-month period, must file a mandatory tender offer for the remainder of the share capital and voting rights of the company.

Under French law, persons acting in concert are those who have entered into an agreement to buy or sell or exercise voting rights in order to implement a common policy or to acquire the control of a company. The following persons are deemed to be acting in concert (which presumption may be rebutted if the facts so allow):

- a company, the chairman of its board of directors and its chief executive officer;
- a company and the companies it controls;
- companies controlled by the same person or people; and
- the shareholders of a simplified joint-stock company and the companies controlled by this company.

Shareholders acting in concert are jointly and severally bound by the obligations imposed on them by applicable laws and regulations, including the above-mentioned mandatory bid requirements and disclosure requirements (see question 19).

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders?

French law provides for a formal soliciting votes procedure. Anyone who actively solicits proxies, by proposing directly or indirectly to one

or more shareholders, in any form and by any means whatsoever, to receive a proxy to represent them at the meeting of a company mentioned, must announce its voting policy on its website. That person can also announce its voting intentions on the draft resolutions presented to the shareholders. In that case, for any proxy received without voting instructions, the person must vote in a way that is consistent with the voting intentions announced. In practice, when the company sends to the shareholders the draft resolutions to be submitted to the general meeting, it informs them of the voting recommendations proposed by the board of directors of the company. As stated in question 7, the use of social media by French activists remains in the early stages.

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

Over the past few years, French companies (such as Accor, Carrefour, LVMH, Vinci and Total) have tried to strengthen their relationships with individual shareholders by creating shareholders' clubs. These clubs not only offer minor perks to shareholders (eg, special discounts on company goods and services), but also develop an ongoing communication channel between companies and shareholders through newsletters, a dedicated information website, specific newspapers and private meetings with top management teams regarding strategic priorities, outlook, results and dividend policy.

23 Are directors commonly involved in shareholder engagement efforts?

Shareholder engagement efforts are typically led by the senior management of the company, and sometimes with the chairman of the board. However, it remains rare for individual directors to have a significant involvement with the implementation of shareholder engagement efforts.

Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

As a general matter, directors of French companies must consider activists' proposals with the same standard of care as that applied to other board decisions. In practice, given the potential strategic or governance impact of many activists' proposals, directors are likely to pay special attention to these proposals.

Activists who are significant or majority shareholders have a duty not to abuse their positions in a manner that is contrary to the interest of the issuer. Where an activist shareholder is in a position to appoint a board member, it must do so with a view to pursue the best interests of the company, for the benefit of all shareholders and not in a self-interested manner.

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General

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

The primary sources of law and regulation that are relevant to shareholder activism and engagement are the Companies Act 2006 (the Companies Act), the Listing Rules, the Disclosure Guidance and Transparency Rules (DTRs), the EU Market Abuse Regulation (MAR) and the City Code on Takeovers and Mergers (the Takeover Code).

The Companies Act was introduced by Parliament and applies to all companies incorporated in the UK.

The Listing Rules and the DTRs are made and enforced by the Financial Conduct Authority (FCA). The Listing Rules apply to all companies (whether incorporated in the UK or elsewhere) with a listing on the premium segment of the Official List. Chapter 5 of the DTRs (DTR 5) is particularly relevant in the context of shareholder activism and applies to:

- UK companies with shares admitted to trading on a 'regulated market' (such as the Main Market of the London Stock Exchange);
- UK public companies with shares admitted to trading on a 'prescribed market' (such as AIM); and
- non-UK companies whose shares are admitted to trading on a 'regulated market' whose home state is the UK.

MAR is an EU regulation that is directly applicable in the UK. It is enforced in the UK by the FCA.

The Takeover Code is a set of rules administered and enforced by the Takeover Panel and applies, inter alia, to takeover offers for:

- companies incorporated in the UK, Channel Islands or Isle of Man if any of their securities are admitted to trading on a regulated market or multilateral trading facility (such as AIM) in those jurisdictions; and
- public companies incorporated in the UK, Channel Islands or Isle of Man that are considered by the Takeover Panel to have their central place of management and control in any of those jurisdictions.

2 What are the other primary sources of practices relating to shareholder activism and engagement?

Corporate governance rules and market guidance and institutional investor expectations on 'best practice' for listed companies are also relevant in the context of shareholder activism and engagement.

All companies (whether incorporated in the UK or elsewhere) with a listing of equity shares on the premium segment of the Official List are subject, on a 'comply or explain' basis, to the UK Corporate Governance Code (the Governance Code) issued by the Financial Reporting Council (FRC). However, certain provisions of the Governance Code apply only to FTSE 350 companies, including, for example, provisions requiring the annual re-election of directors.

In addition, the FRC's UK Stewardship Code (the Stewardship Code) sets out good practice for institutional investors seeking to engage with boards of listed companies and also applies on a 'comply or explain' basis.

Representative bodies, such as the Pension and Lifetime Savings Association (PLSA), Pensions Investment Research Consultants, Hermes and the Investment Association, as well as Institutional

Shareholder Service, the US-based proxy advisory service, regularly issue voting guidelines recommending the positions investors should take on shareholder votes. These guidelines carry significant influence in practice.

3 How is shareholder activism generally viewed in your jurisdiction? Are some industries more or less prone to shareholder activism? Why?

Shareholder activism has grown in prevalence both in the UK and, more generally, in Europe in recent years. While shareholder activism in the US has tended to be viewed as more adversarial, hostile or opportunistic in nature, in the UK there is growing support for activist investors, particularly as many have taken a more collaborative approach to activism and engaged with companies privately instead of taking public action at the outset.

Activists in the UK are not restricted to any particular industries. Natural targets are characterised by poor share price performance compared with industry peers, high cash reserves, business lines that can be sold or spun off, corporate governance concerns or a receptive shareholder base.

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

US hedge funds and alternative investors with event-driven strategies are often considered to be the principal shareholder activists in the UK. However, in recent years, long-term institutional investors have become increasingly involved in activist campaigns (outside takeover or merger arbitrage situations) and, on occasion, have formed alliances with hedge funds or alternative investors for this purpose.

The apparent behavioural shift of institutional shareholders is due to a number of factors, including the publication of best practice guidance aimed at promoting effective engagement between institutional shareholders and listed companies (see question 22) and the introduction of 'say-on-pay' legislation (see question 6).

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

Activism in the UK has historically focused on board composition and remuneration, with specific attention given to companies with entrenched, long-standing boards that are under-performing or unwilling to contemplate a change in strategic direction. However, long-term institutional investors have become increasingly involved in what some may regard as activist-like campaigns (outside takeover or merger arbitrage situations) and, on occasion, have formed alliances with hedge funds or alternative investors for this purpose.

The apparent behavioural shift of institutional shareholders over recent years can be attributed to a number of factors, including the introduction of 'say-on-pay' legislation (see question 6) and a political shift in favour of the active engagement of investors in public companies as evidenced by the establishment of the Investor Forum and the publication of best practice guidance aimed at promoting effective engagement between institutional shareholders and listed companies (see question 22) and recently published UK government proposals on corporate governance (see update and trends).

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

Certain matters are reserved for shareholders of a UK company under the Companies Act and must be approved by ordinary resolution (passed by a simple majority) or special resolution (passed by a 75 per cent majority). These thresholds are determined by reference to those who vote at the meeting in question, which, in reality, would typically represent a much lower percentage of the overall shareholder base. An ordinary resolution is the more common and is used, inter alia, to authorise directors to allot shares, approve the board's remuneration policy, remove directors from office, ratify board decisions and, for premium-listed companies under Listing Rules 10 and 11, respectively, approve significant (Class 1) transactions or transactions with related parties. Special resolutions, on the other hand, are required to reduce a company's share capital (which is commonly used to create or increase distributable reserves) and to amend the company's constitution. In addition, as a result of guidance issued by the Institutional Investor Committee, listed companies are expected to approve share repurchases by way of special (rather than ordinary) resolution.

The requirement that the board's remuneration policy is subject to a binding vote by way of ordinary resolution, which must be passed every three years, is particularly significant in an activism context as it provides an effective means for shareholders to express their dissatisfaction with the performance of management. It is coupled with an annual advisory (non-binding) vote on the company's implementation report, which sets out how the remuneration policy has been implemented during the previous financial year. Advisory votes are otherwise uncommon in the UK, but may be used by shareholders to request (rather than formally require) the board to take particular actions as an indication of their collective wish.

If a shareholder (or shareholders) of a UK company wishes to make a proposal, it can require the company to call a general meeting under the Companies Act, provided that it holds at least 5 per cent of the paid-up share capital which carries voting rights (excluding treasury shares). The requisition must state the business to be dealt with at the meeting and may include the text of any ordinary or special resolution which the relevant shareholder proposes to be tabled. Any such resolution must not be ineffective (eg, due to illegality), defamatory, frivolous or vexatious, although a company's board may be accused of obstructing shareholder engagement if it were to challenge a resolution on this basis. If a valid requisition request is made, the board must call a general meeting within 21 days and the meeting itself must be held not more than 28 days after the date of the notice of the meeting. Where the board fails to do so, the shareholder who requisitioned the meeting (or, where more than one shareholder, any of them representing more than half of the total voting rights of the requisitionists) may himself or herself call the meeting.

Additional rights are available to a shareholder (or shareholders) holding at least 5 per cent of the total voting rights (excluding voting rights attached to treasury shares) and to any group of 100 shareholders with the right to vote on the resolution (provided that each holds, on average, £100 of paid-up share capital). The latter may be satisfied by an activist shareholder holding less than 5 per cent voting rights by splitting its shares between nominee accounts. A shareholder satisfying these criteria is permitted to require resolutions to be put before an annual general meeting (AGM) of a public company or to require the company to circulate a statement to shareholders. Any resolution to be put before an AGM must not be ineffective, defamatory, frivolous or vexatious and must be received by the company at least six weeks before the later of the AGM and the circulation of the AGM notice. A statement to shareholders, on the other hand, must be limited to 1,000 words and relate to a matter referred to in a proposed resolution or other business to be dealt with at the meeting. The company must send the statement to every member entitled to receive notice of the meeting in the same manner as the notice of meeting and at the same time as, or as soon as reasonably practicable after, it circulates the notice of meeting. Subject to limited exceptions, the shareholder who requests the circulation of the statement will be responsible for the costs associated with its circulation, unless the company determines otherwise.

As described above, the availability of certain procedures to investors will depend on whether they hold a sufficient stake in the company or can gather a sufficient amount of support among other shareholders.

As noted in question 3, US activist shareholders are more likely to use public measures at an early stage in the campaign process, such as requisitioning general meetings and voting against resolutions for the appointment of new directors. On the contrary, UK-based institutional investors tend to first engage in private discussions with the board before submitting a formal proposal.

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

In general, activist tactics in the UK are more cooperative than in the US. Any public form of engagement would usually represent a last resort, largely because it involves considerably more expense and risk (both in execution and reputation). Typically, therefore, an activist would pursue its objectives through private engagement with the company's board. While there is a multiplicity of private engagement strategies, it would be common for the activist not to involve other shareholders in the first instance in order to reduce the risk of leaks and divergent views on solutions and objectives. However, where collective engagement is preferred, an activist shareholder will be entitled to request a copy of the shareholder register under the Companies Act (see question 16) and review notifications of significant shareholdings in public announcements made in accordance with DTR 5 (see question 19) with a view to contacting other shareholders.

If the activist is satisfied that its objectives will not be met through private engagement, it may use public announcements, open letters, website campaigns and even social media to voice its concerns and obtain support for its proposals from other shareholders and representative bodies (such as the Investment Association and PLSA).

Depending on the activist's percentage shareholding, it may be able (either alone or with other shareholders) to requisition a resolution at the AGM or convene a general meeting to consider resolutions to effect changes. Ideally, the activist will have received letters of intent or voting undertakings from other shareholders to support its proposals at the meeting. Legal action of the kind described in question 11 is uncommon.

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

Shareholders of a UK company may call shareholder meetings in accordance with the process outlined in question 6.

There is no statutory procedure for shareholders of a UK public company to pass written resolutions in lieu of a meeting. However, a written record of the passing of a resolution, which has been signed by all shareholders of the company in full knowledge of what they are resolving, should be accepted as a valid expression of member approval.

9 May directors accept direct compensation from shareholders who nominate them?

It would be highly unusual for a listed company not to remunerate board members for the services they perform in their capacity as directors of the company. Ordinarily, executive directors are remunerated under the terms of their service contracts with the company, and non-executive directors receive a fee for their services to the company under letters of appointment.

However, a director nominee or designee may be separately employed by the relevant shareholder and directly remunerated by that shareholder under the terms of his or her employment contract. If a director nominee is separately employed and remunerated by a shareholder, the director will need to ensure compliance with the requirements of the Companies Act relating to conflicts of interest and, in particular, the positive duty to avoid a conflict.

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

Shareholders of a UK company may nominate directors for election to the board by requisitioning a shareholder meeting or a resolution to be tabled at the meeting in accordance with the process outlined in question 6.

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

Under the Companies Act, a shareholder may bring a derivative action on behalf of a UK company for negligence, default, breach of duty or breach of trust by a director (even if the director has not benefited personally from the breach). Only a single share needs to be held for this purpose, and this can be acquired after the event in question.

Two facets of the English legal system operate to reduce the likelihood of shareholders bringing derivative actions for nuisance value (akin to a US 'strike suit'). First, the shareholder must demonstrate that it has a prima facie case. The court will dismiss the claim where it is satisfied that the director's action has been authorised or ratified by the company (which would therefore operate as a defence against the claim) or where no director of the company would seek to continue the claim on the company's behalf. If the action has not been ratified but is capable of ratification, it is likely that the court will adjourn to enable the shareholders to hold a meeting. Second, while a derivative action is brought in the name of the company, the shareholder bringing the claim is responsible for funding the action unless the court orders the company to reimburse its costs.

In the UK, multiparty litigation (akin to US class actions) may be brought only in respect of competition claims in the Competition Appeal Tribunal. Outside competition claims, the UK rules would permit shareholder actions to be managed collectively under a group litigation order, but each such action would have to be issued separately and to a significant extent would still be treated individually, which can increase cost and complexity.

Company response strategies

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

The principle of shareholder engagement is a key feature of UK corporate governance (see question 22). A company will be less vulnerable to challenge from an activist shareholder if it engages regularly with its major shareholders, and we advise our clients to do so.

We also advise certain clients to take additional proactive steps to protect themselves from being challenged by activist shareholders – for example, by conducting regular strategic reviews to identify potential areas of challenge (including, if appropriate, through a 'fire-drill' exercise, where management is put through mock attack scenarios); and by monitoring unusual trading (or other) activity that may indicate that the company is being targeted.

The directors of UK listed companies are becoming increasingly focused on this area and preparing for shareholder activism in the same manner in which they would prepare to defend a hostile takeover bid for the company.

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

Notwithstanding a rise in shareholder activism in the UK generally, structural or 'poison pill' defences are not prevalent in the UK. Their adoption would, in all but extreme cases, constitute a breach of fiduciary duty by the directors of a UK company.

Further, and in the context of a possible takeover offer for a UK-listed company, General Principle 3 of the Takeover Code prohibits a target company's board from denying its shareholders the opportunity to decide on the merits of a bid. This General Principle is supplemented by Rule 21 of the Takeover Code, which prohibits the board from taking certain actions without shareholder approval during the course of an offer or if it believes that an offer might be imminent, which would include issuing shares, selling material assets or entering into non-ordinary course contractual arrangements.

In any event, shareholder consent would be required to implement any poison pill involving an amendment to the company's capital structure or the rights attaching to its share capital, which is unlikely to be granted by UK institutional investors; and for companies with or seeking a premium listing it is unlikely to be consistent with the requirements of the Listing Rules.

For completeness, we note that a classified or 'staggered' board is not a concept embedded within English company law: directors of a UK company may always be removed by ordinary resolution under the Companies Act notwithstanding any agreement to the contrary between the company and the director. We also note that the Governance Code provides that all directors of FTSE 350 companies should be elected (or re-elected) annually.

14 May shareholders have designees appointed to boards?

The composition and structure of the board of a UK-listed company is governed by the Governance Code. This requires that the board consist of directors with the appropriate balance of skills, experience, independence and knowledge of the company to enable it to discharge its duties and responsibilities effectively. Ancillary to this requirement, the board should include an appropriate combination of executive and non-executive directors (and, in particular, independent non-executive directors) such that no individual or small group of individuals can dominate the board's decision-making. For FTSE 350 companies, the Governance Code requires that at least half the board, excluding the chairman, comprise independent non-executive directors.

Notwithstanding this, UK-listed companies have been willing to grant board representation to significant shareholders (typically, shareholders holding at least 10 per cent of the company's shares) by the appointment of a non-executive director nominated by that shareholder. In the context of an initial public offering and listing, it is relatively common for large shareholders to retain board representation. It is less common for board representation to be granted to an investor who actively builds a stake in a UK-listed company.

Where a shareholder is entitled to nominate or appoint a non-executive director, the shareholder would be expected to enter into a relationship agreement with the company, which would regulate their future interaction and support the company's independence. The relationship agreement would typically impose non-compete, non-solicitation, confidentiality or standstill commitments on the shareholder and require the shareholder to procure compliance with corporate governance standards. In return, the shareholder's right to nominate or appoint a director would be enshrined in the contract, together with information and consultation rights.

For premium listed companies with a 'controlling shareholder' (meaning any person who, together with its concert parties, controls at least 30 per cent of the votes of the company), there is a mandatory requirement under the Listing Rules to have a relationship agreement in place. Such listed companies must also have a dual voting structure for the election or re-election of independent non-executive directors to ensure that they are separately approved by both the shareholders as a whole and independently of any controlling shareholder.

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

A UK company's constitutional documents are publicly available at Companies House, the UK Registrar of Companies. These documents can be accessed online on the Companies House website.

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

A UK company is required by the Companies Act to comply with any request from a shareholder to inspect or receive a copy of the company's shareholder register. The company may resist the request only if it has not been made for a 'proper purpose'; in which case the company must apply to the court and demonstrate that, on the balance of probabilities, this is the case. The words 'proper purpose' are given their ordinary meaning in this context. A non-binding (non-exhaustive) list of matters constituting a 'proper purpose' has been published by the Institute of Chartered Secretaries and Administrators, which includes shareholders seeking to contact other shareholders generally about matters relating to the company, their shareholding or a related exercise of rights.

The shareholder register will only show the legal owners of the shares. However, under the Companies Act, a UK public company must also make available to shareholders on request (either for inspection or by providing copies of entries) a register of interests in its shares that

has been disclosed to the company, unless the request is not made for a proper purpose. An interest in shares will have been disclosed only where the company has required, by service of notice, that such disclosure is made by a person who it knows or suspects is interested in its shares beneficially or otherwise. A significant proportion of UK public companies instruct brokers to serve such notices on a monthly basis.

In addition, UK companies (other than those that are subject to DTR 5) are required to maintain a publicly available register of persons with significant control over the company. A person with significant control includes any individual who:

- holds (directly or indirectly) 25 per cent or more of the company's shares or voting rights;
- has the power (directly or indirectly) to appoint or remove a majority of the board; or
- otherwise has the right to, or actually does, exercise significant influence or control over the company.

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

As detailed further under questions 22 and 23, it is best practice for a UK-listed company's board to ensure that there is an effective mechanism to facilitate direct communication between shareholders and the board, and for the board to provide details of its engagement with shareholders in the company's annual report.

Generally, a UK-listed company must not selectively disclose information to third parties, including to shareholders. With effect from 6 July 2016, MAR, which is directly applicable in the UK, sets out a pan-EU regime dealing, among other items, with the disclosure of 'inside information'. Under MAR, a UK-listed company must generally disclose inside information (that a reasonable investor would use when making investment decisions) to the market as soon as possible through a Regulatory Information Service (RIS).

MAR does allow the disclosure of inside information to be delayed where immediate disclosure is likely to prejudice the issuer's legitimate interests; delay of disclosure is not likely to mislead the public; and the issuer is able to ensure the confidentiality of the information. Selective disclosure of inside information is permitted where the person receiving the information owes the company a duty of confidentiality and requires the information to carry out duties for the company. In any event, UK-listed companies must draw up and update 'insider lists' indicating the persons working for or on behalf of the company who have access to inside information.

In addition to the obligations of the UK-listed company, it is also critical that any recipient does not trade on the basis of the selective disclosure, which would likely constitute an offence under MAR. See question 21 for further information.

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

A UK company's registrar would typically provide daily proxy updates to a company in advance of a general meeting.

A proxy vote is usually given in favour of the chairman of the company and is confidential to the company in the period prior to a general meeting. The quantum of the proxy votes for or against a resolution could constitute inside information (see question 17).

19 Must shareholders disclose significant shareholdings?

DTR 5 imposes an obligation on a person to give notice of an acquisition within two trading days where that person acquires (directly or indirectly through other group entities) in aggregate 3 per cent or more of the voting rights in a UK company to which DTR 5 applies. A further notice has to be given each time a percentage holding above 3 per cent increases or decreases through a 1 per cent threshold (rounding down to the nearest whole percentage point). The notification thresholds for non-UK companies to which DTR 5 applies are 5, 10, 15 per cent, 20 per cent, 25, 30, 50 and 75 per cent; and the deadline for making the notification is four trading days. In either case, the company must then disclose any notifications to the market.

For the purposes of making a notification, an investor is required to aggregate voting rights held by any third party with whom that investor has agreed to adopt, by concerted exercise of voting rights, a lasting common policy towards the management of the company. Helpfully, the Financial Services Authority, the predecessor to the FCA, previously indicated that a high threshold would be applied in this context: it is unlikely to include the kind of ad hoc discussion and understandings that might be reached between institutional shareholders in relation to particular issues or corporate events. However, advice should be sought at an early stage where shareholders adopt an agreed approach to voting at an upcoming general meeting.

Notification obligations under DTR 5 also extend to financial instruments, provided that they give the holder a long position on the economic performance of the company's shares, whether the instrument is settled physically in shares or in cash. In effect, anyone holding a financial instrument that may provide access to the company's shares (eg, as a result of the counterparty having hedged the underlying shares) is intended to be captured.

Notifications under DTR 5 must include, inter alia, details of the resulting situation in terms of voting rights, the chain of controlled undertakings through which voting rights are effectively held and the date on which the threshold was reached or crossed. The notification must be sent to the FCA and the company. Failure to do so may result in the FCA imposing a penalty on the relevant person or issuing a public censure. The investor might also find himself or herself in breach of the market abuse rules (see question 20 for further information).

In addition, where the company is subject to the Takeover Code, a person interested in 1 per cent or more of its securities must disclose details of his or her interest under the Takeover Code no later than 12pm on the 10th business day after the company enters an offer period or an announcement is made that first identifies the bidder. Thereafter, the relevant person must report any dealings to an RIS no later than 3.30pm on the following business day and an electronic copy of such disclosure must be sent to the Takeover Panel. An 'interest' is broadly defined to include options and long derivative positions.

As detailed in question 16, a UK public company may also require a person to disclose his or her interest in the company's shares by service of a notice.

Certain companies in the defence and civil aviation industries impose restrictions on the percentage of their shares in which a person may be interested. For example, a 15 per cent limit on the ownership of shares by non-UK persons has been incorporated into the constitutional documents of Rolls-Royce and BAE Systems. In addition, the approval of the FCA is required where a person seeks to become a 'controller' (by acquiring 10 per cent or more of the shares or voting power) of a company authorised to carry on banking, insurance or investment services or seeks to increase its control through a notification threshold (at 20 per cent, 30 per cent or 50 per cent).

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

If shareholders acting in concert acquire an interest in shares of a UK public company (or any other company subject to the Takeover Code) and such interest carries, in aggregate, 30 per cent or more of the voting rights, they will be required by the Takeover Code to make a cash offer to acquire the remainder of the shares.

The Takeover Panel will not normally regard shareholders voting together on a particular resolution as acting in concert. However, shareholders who requisition or threaten to requisition a 'board control-seeking' proposal at a general meeting will be presumed to be acting in concert with each other and with any proposed directors. This would ordinarily require the replacement of existing board members with directors who have a significant relationship with the requisitioning shareholders.

A 'white list' of activities on which shareholders should be able to cooperate without being presumed to be acting in concert was published by the European Securities and Markets Authority in 2013.

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders?

Where a communication by a listed company or an investor includes non-public, price-sensitive information, the recipient is prohibited from

Update and trends

In the 2016/17 proxy season, institutional shareholders and activists continued to focus on executive remuneration and perceived corporate governance failings at UK-listed companies. Many FTSE 100 companies appear to have listened to concerns raised by activists in previous years and submitted more conservative remuneration policies for approval, with only Pearson and Crest Nicholson losing their advisory votes. Among FTSE 250 companies, Thomas Cook and Playtech were subject to shareholder dissent in relation to remuneration, and a number of other FTSE 250 companies decided to withdraw or amend remuneration plans ahead of their AGMs as a result of feedback from shareholder consultations.

As a result of the continued scrutiny, directors and senior management are having to commit an increasing amount of time and focus to shareholder engagement. Several companies have established measures for shareholder consultation and engagement, including Marks & Spencer, which created a private shareholder panel and has given its members access to its board, and Royal Bank of Scotland, which hosted an event specifically for private shareholders.

Furthermore, in August 2017, the UK government announced a package of proposed corporate governance reforms with the aim of increasing the transparency and accountability of large companies to their employees and shareholders. The reforms will require all listed companies to reveal and justify the pay ratio between CEOs and their average UK worker, and listed companies with significant shareholder opposition to executive pay packages will have their names published on a new public register, which will be run by the Investment Association. In addition, companies of a significant size will be required to explain publicly how their directors take employees' and shareholders' interests into account, and all large companies will

also have to make their responsible business arrangements public. The package also contains a proposal to extend the scope of the Governance Code to cover large private companies, which the FRC will consult with the business community and the government to help develop.

Institutional shareholders and activists have also remained focused on building stakes in, and securing representation on the boards of, UK listed companies to achieve strategic change. In August 2017, Elliot Management disclosed that it had increased its stake in BHP Billiton to 5 per cent and increased the pressure on BHP to sell its US shale oil unit, having earlier publicly demanded BHP drop its dual London/Australia listing, increase shareholder returns and make changes to its board. By late September 2017, the new chairman of BHP had promised to bring 'fresh perspective' to the company's review of its portfolio of mines and assets. In October 2017, Elliott Management disclosed it had taken a stake in Smith & Nephew, a FTSE 100 artificial hip and knee maker, and has subsequently pushed for the company to make disposals in order for the company to be more attractive for a potential takeover.

In March 2017, Crown Ocean Capital managed to successfully replace all but one of Bowleven's directors after questioning their independence and Premier Foods agreed to appoint a representative of Oasis Management, a Hong Kong based activist, as a director on its board. Oasis began building its stake in Premier Foods last year after the board of Premier Foods rejected a takeover approach from McCormick & Co, a US spice maker, stating that the offer price was inadequate, and before later issuing a profit warning. Premier Foods has also been subject to public criticism by London-based activist Cape Wrath Capital, which said that Premier Foods' management and board had a disregard for long-term value creation, while US hedge fund Paulson & Co said the company was grossly mismanaged.

dealing on the basis of that information by the market abuse and insider dealing rules under MAR, the Financial Services and Markets Act 2000, the Criminal Justice Act 1993 and the Financial Services Act 2012.

Under MAR, insider dealing arises where a person possesses inside information and uses that information to acquire or dispose of (for its own account or for the account of a third party), directly or indirectly, financial instruments to which that information relates. In the context of communication between shareholders, the recitals to MAR explain that information regarding a third party's plans and strategies for trading may amount to inside information. Albeit in the context of the pre-MAR regime, the FCA has also previously indicated that an investor's strategy for investing in a UK-listed company can itself constitute inside information. An activist, therefore, often makes details of its strategy public at the outset of a campaign by writing an open letter to obtain support from other shareholders. In doing so, it must ensure that it is not giving shareholders a misleading impression or expectation in order to take advantage of the resulting share price movements.

Where communication is between shareholders and the company, institutional shareholders would typically have appropriate procedures in place to enable them to receive inside information and become insiders with appropriate safeguards. According to the Association of British Insurers, 60 per cent of its members have developed Chinese wall procedures to enable their corporate finance or corporate governance team to be contemporaneously inside while the portfolio managers continue to be able to trade in the company's securities. This enables investors to give non-binding feedback to companies and reflect investment views without having to implement stock restrictions.

The FCA has adopted an increasingly robust approach to the enforcement of market abuse and insider dealing offences, and the rigorous requirements relating to the control and dissemination of inside information (see question 17) and insider dealing under MAR will likely reinforce this trend. While market abuse is a civil offence for which the FCA may impose an unlimited fine, public censure or a restitution order, insider dealing may result in criminal prosecution.

Accordingly, communications are usually private and involve a small number of shareholders (see question 7). Where the company or a shareholder decides to make a communication public, electronic communications and websites are often used. Activists increasingly use social media to voice concerns and persuade other shareholders of their viewpoint.

To overcome various limitations associated with obtaining copies of and inspecting the register of shareholders of a UK company, activist

investors may engage proxy solicitation agents and financial advisers to help obtain information on the company's shareholder base. In addition, activist investors, together with their advisers, typically use a company's announcements made under DTR 5, as well as information in the company's annual reports and accounts to collect and analyse information on the company's shareholder base. Once identified, the activist investors or proxy solicitation agents, or both, as the case may be, make contact with the other shareholders.

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

Organised shareholder engagement has become increasingly common in recent years and now forms a key feature of best practice guidance. The Governance Code recommends that companies ensure satisfactory dialogue with shareholders as one of its main principles. This is supported by guidance published by shareholder representative groups, including the Investment Association and PLSA, which recommend that dialogue take place at regular intervals throughout the year. Further, engagement efforts are often initiated by investors rather than by the company. Investor responsibility to improve engagement in this way is now enshrined in the Stewardship Code.

Over recent years there has been an increased focus on collective engagement by the UK government. In 2011, at the request of Vince Cable, Secretary of State for Business, Innovation and Skills, the government commissioned a review of UK equity markets to be undertaken by the economist John Kay. In July 2012, the Final Report of his independent review was published. It identified that traditional forms of shareholder engagement had focused disproportionately on corporate governance matters, leading to a vacuum in respect of companies' strategies for long-term, sustainable competitive advantage. It also highlighted impediments to engagement arising from increased international ownership, increasingly fragmented shareholding and the perceived regulatory barriers that inhibit collective engagement. The review recommended the formation of an independent 'investor forum', to be championed and developed by the asset management industry. In October 2014, the Investor Forum was constituted with a view to fostering better relationships between UK-listed companies and investors and encouraging shareholder engagement. Over the course of 2015/16, investors engaged the Investor Forum to investigate 16 company situations including 14 UK listed companies. Of the 14 UK listed companies, eight situations led to a comprehensive collective

engagement, facilitated by the Investor Forum, between the investors and companies concerned including Standard Chartered, Tate & Lyle, Sports Direct International, Rolls-Royce, Royal Dutch Shell/BG Group, Cobham and Mitie Group.

Despite an increased focus from policy makers and regulators on promoting better corporate governance, proxy fights and US-style legal threats remain relatively uncommon in the UK. Rather, activist investors typically prefer to engage with companies on an informal basis, for example, by lobbying shareholders behind closed doors and attempting to resolve issues on an amicable basis. Further, UK companies remain less prone than their US counterparts to giving board positions to activists.

23 Are directors commonly involved in shareholder engagement efforts?

Best practice guidance recommends that directors be involved in shareholder engagement efforts. The Governance Code, for example, states that the directors of a company should be accessible to shareholders and should make themselves available to engage on any issues (whether or not related to a vote at a company's general meeting). While, in practice, most shareholder contact is with the chief executive and finance director, best practice guidance emphasises the role of the chairman and senior independent director for maintaining shareholder relations. Under the Governance Code, a company with a premium listing of equity securities must include details in its annual report of the steps taken by the board to develop an understanding of the views of major shareholders.

Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

Directors are not required to consider an activist proposal under any different standard of care as compared with other board decisions.

Equally, a director who is a majority or significant shareholder, or any director appointed or nominated to the board by that shareholder, would be subject to the same fiduciary duties as all other directors of the company. These include duties to act in a way that the director considers would most likely promote the success of the company for the benefit of its members as a whole, to exercise independent judgement and to avoid actual or potential conflicts of interest. In the event of a conflict, the courts have held that the nominee director's primary loyalty is to the company and the company's interest must ultimately prevail over those of the appointing shareholder.

However, an activist acting in its capacity as a shareholder of a UK-listed company will owe no fiduciary duties to the company regardless of the size of its shareholding.

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General

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

The primary sources are state corporate law and federal law. In addition, publicly traded companies must comply with the listing rules of the exchange on which they are listed. Beyond laws and regulations, there are best practices advocated by proxy advisory firms, institutional investors and others in the investment community that issue guidelines that often touch on shareholder activism and engagement issues.

State law

State corporate law establishes the fiduciary duties of directors of both privately held and publicly traded companies. Delaware is, by far, the most popular state of formation of legal entities in the United States. In addition, Delaware is often viewed as having a major influence on the corporate law of other states. For that reason, Delaware General Corporate Law (DGCL) will serve as a reference point in this chapter.

Federal law

Federal laws related to shareholder activism and engagement include the Securities Act of 1933 (the Securities Act), the Securities Exchange Act of 1934 (the Exchange Act), the Hart-Scott-Rodino Antitrust Improvements Act (the HSR Act), the Public Company Accounting Reform and Investor Protection Act of 2002 (the Sarbanes-Oxley Act) and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act). For example, shareholder activists are required to comply with beneficial ownership reporting requirements under section 13 of the Exchange Act, which generally require a person or 'group' who has acquired direct or indirect beneficial ownership of more than 5 per cent of an outstanding class of equity securities to file a report with certain information with the Securities and Exchange Commission (SEC) within 10 calendar days of crossing the 5 per cent threshold. Companies must navigate the disclosure requirements of the Exchange Act in reporting on corporate governance matters in their periodic disclosure and their annual meeting proxy statement disclosures.

2 What are the other primary sources of practices relating to shareholder activism and engagement?

Other primary sources of practices relating to shareholder activism and engagement include the policy guidelines of proxy advisory firms (such as Institutional Shareholder Services (ISS) and Glass Lewis), of large institutional investors (such as BlackRock, State Street, T Rowe Price and Vanguard) and of others in the investment community (such as the Council of Institutional Investors, Investor Stewardship Group, TIAA-CREF and CalPERS). These sources are viewed as very influential in practice (for example, a recent study found that a negative ISS recommendation on a say-on-pay proposal reduces voting support for that proposal by 25 percentage points) and, as a result, companies have a complex web of preferences for directors and management to wade through.

3 How is shareholder activism generally viewed in your jurisdiction? Are some industries more or less prone to shareholder activism? Why?

Shareholder activism and engagement is increasingly viewed as a fixture in the investment landscape. Even industry leaders that have outperformed their market peers have been recent targets of shareholder activism. In 2017, ADP, General Motors and Procter & Gamble were targets of activist campaigns, while Apple, DuPont, eBay, Microsoft, PepsiCo and Sony, to name just a few, have been subject to similar campaigns since 2014. Companies in highly regulated industries, such as banks and insurance companies, were once seen as less likely targets for a shareholder activist campaign. Although this may still be true, the targeting of AIG (by Carl Icahn) and the Bank of New York Mellon (by Nelson Peltz) makes it clear that companies in highly regulated industries can also be subject to shareholder activism. In 2017, it has been reported that the industrials, technology, power/energy and consumer industries continued to have the highest aggregate value of activist positions.

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

In discussing shareholder activism in the United States, it is helpful to separate shareholder activists into two separate categories:

- hedge fund or other 'fund' activists: this category consists of professional investors who make sizeable (but still minority) investments in a target company and then publicly or privately advocate for change; and
- 14a-8 activists: this category consists of shareholders who submit proposals under Exchange Act Rule 14a-8, which requires a company to include a shareholder proposal in its proxy materials if certain requirements are met (for example, the shareholder owns the lesser of US\$2,000 or 1 per cent of the securities entitled to vote on the proposal for at least one calendar year prior to submission of the proposal). 14a-8 proponents vary widely and include retail shareholders, social justice groups, religious organisations, labour pension funds and other coalitions.

Traditional long shareholders, including large institutional investors, have been known to support both types of activists, although a 2015 letter from the CEO of BlackRock, the world's largest asset manager, to the CEOs of every S&P 500 company, stressed that companies should 'resist the pressure of short-term shareholders to extract value from the company if it would compromise value creation for long-term owners'. In another letter in 2016, the CEO of BlackRock further cautioned against yielding to the pressures of investors focused on maximising short-term profit. Also, a 2015 open letter from the chairman and president of Vanguard, which has US\$3.6 trillion of global assets under management, stressing that 'boards [should not] capitulate to things that aren't in the company's long term interest,' indicated that while institutional investors may be willing to support shareholder activists in some instances, institutional investors will carefully evaluate whether a shareholder activist's proposal is damaging to long-term value creation. This being said, large institutional investors have shown a willingness to consider activist campaigns when appropriate and consistent with their investment goals, with each of BlackRock and Vanguard,

among others, issuing guidance on activist efforts and even launching activist campaigns.

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

Shareholder activists have focused on a wide variety of capital structure changes, such as increasing leverage (Ethan Allen), stock splits, dividends and repurchases (Apple, eBay, General Motors, Microsoft), and strategic changes such as a company sale or breakup (AIG, DuPont, Whole Foods) or other operational changes, including changes to management (Arconic, Buffalo Wild Wings, CSX) and boards of directors (ADP, Procter & Gamble, Tiffany & Co). Often, shareholder activist campaigns will couple a call for capital structure changes and strategic changes with criticism of and suggested changes to corporate governance (eg, eliminating structural defences, board refreshment, management changes, criticism of executive compensation and other governance changes). Shareholder activists often stick to a similar playbook campaign-to-campaign with respect to governance changes. For example, some shareholder activists are known for criticising or suggesting an overhaul of management. In 2016, activists surveyed indicated that the top three metrics in screening for target companies are (i) underperformance compared to peers, (ii) underperformance compared to market and (iii) cash on hand and leverage.

During the 2017 proxy season, about half of the 14a-8 proposals focused on corporate governance topics (relatively steady as compared to 2016), approximately 45 per cent focused on environmental and social issues (a slight increase from the previous year) and 1 per cent focused on compensation matters (a significant decrease from the same category in 2016). It is important to note that a large percentage (approximately 25 per cent) of 14a-8 proposals never end up on ballots, either because they are withdrawn by the proponent (usually following negotiations with the target company, an increasing trend in recent years) or because they are excluded by the company on the basis of an SEC 'no action' position. In addition, the great majority of 14a-8 proposals that go to a shareholder vote do not receive majority support.

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

A shareholder may propose that business be brought before a meeting of shareholders by providing notice and complying with applicable provisions of state law and the company's by-laws and charter. The company's by-laws will generally set forth the time requirements for delivering the proposal (for example, that the proposal be received by the company's corporate secretary not more than 90 days and not less than 30 days before the meeting), other procedural requirements (such as a description of the ownership and voting interests of the proposing party) and limitations on the types of proposals that can be submitted (for example, that a proposal may not be submitted that is substantially the same as a proposal already to be voted on at the meeting). It is often costly to submit a proposal in this manner because the soliciting shareholder must develop its own proxy materials and conduct its own proxy solicitation.

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

- that the proposing shareholder have continuously held, for at least one year by the date the proposal is submitted to the company, the lesser of US\$2,000 in market value or 1 per cent of the company's securities entitled to vote on the proposal and continue to hold those securities through the meeting date;
- that the proposal be no longer than 500 words; and
- that the proposal be received at least 120 calendar days prior to the anniversary of the date of release of the company's proxy statement for the previous year's annual meeting.

If the shareholder has complied with the procedural requirements of Rule 14a-8, then the company may only exclude the proposal if it falls within one of the 13 substantive bases for exclusion under Rule 14a-8

(eg, that the proposal would be improper under state law, relates to the redress of a personal claim or grievance, deals with a matter relating to the company's ordinary business operations, relates to director elections, has already been substantially implemented, is duplicative of another proposal that will be included in the company's proxy materials or relates to a specific amount of cash or stock dividends). A company will often seek 'no action relief' from the SEC staff to exclude a shareholder proposal from the company's proxy materials. If no action relief is not granted, a company could, but rarely does, seek a declaratory judgment from a court that the shareholder proposal may be excluded from the company's proxy statement.

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

Rule 14a-8 eligibility requirements have been widely debated in recent years. It is important to note that the US House of Representatives-approved CHOICE Act would increase the ownership threshold to 1 per cent of the company's securities (eliminating the alternative US\$2,000 threshold) and would extend the holding period requirement from one to three years. We remain sceptical that changes to the Rule 14a-8 eligibility requirements will be adopted in the short term.

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

Activist shareholders may use a number of different tactics to pursue their objectives. For example, an activist shareholder may:

- privately engage the target's management or directors in order to reach a settlement before raising issues in a more public forum;
- apply pressure by reaching out to, and seeking support from, the company's other shareholders;
- apply pressure through the media or investor communications, for example, by issuing 'white papers' or open letters to management, the board or shareholders and asking tough questions on analyst calls;
- threaten or conduct a 'vote no' campaign (ie, an exempt solicitation);
- threaten or launch a proxy contest for director elections;
- demand a list of shareholders (either as a threat or precursor to formal action);
- make a shareholder proposal (either a precatory or binding resolution); or
- call a special meeting of shareholders.

The particular strategy pursued depends on the type of activist, the company's defensive measures and the activist's goals. Of course, within a single activist campaign multiple strategies may be employed.

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

Whether a shareholder may call a special meeting depends on state corporate law. With respect to Delaware corporations, under DGCL section 211(d), a company's certificate of incorporation or by-laws may authorise shareholders to call a special meeting of shareholders. The certificate of incorporation or by-laws would then set forth the procedural requirements for calling a special meeting, including the minimum holding requirements for a shareholder to call a special meeting.

We note that ISS and Glass Lewis are both in favour of providing shareholders with the right to call a special meeting. ISS prefers a 10 per cent holding threshold; Glass Lewis prefers a 10-15 per cent holding threshold, depending on the size of the company. In practice, the threshold varies considerably from company to company, although 25 per cent is sometimes cited as the most common threshold.

Whether shareholders may act by written consent without a meeting depends on state corporate law. With respect to Delaware corporations, under DGCL section 228, shareholders may act by written consent in lieu of a shareholders' meeting, unless the company's charter provides otherwise.

9 May directors accept direct compensation from shareholders who nominate them?

Under federal securities law and Delaware corporate law, direct compensation from shareholders is generally permitted. This, however, is only part of the answer. Under Delaware corporate law, it would be important to analyse whether acceptance of the compensation is contrary to the directors' fiduciary duties to the corporation. Under federal securities laws, the compensation would also likely have to be disclosed. In addition, the corporation itself may have limitations in its by-laws or charter with respect to directors accepting direct compensation from shareholders who nominate them.

It is important to bifurcate compensation paid to a nominee prior to nomination and ongoing compensation paid to a director after the director is on the board. Although some in the corporate governance community have asserted that separate compensation can create dysfunctional boards with poisonous conflicts, it is important to recognise that reasonable compensation in exchange for agreeing to stand for re-election is often necessary to recruit high-quality independents to run in a proxy contest, and that this is distinguishable from ongoing compensation, which may create questions regarding alignment of economic incentives depending on the circumstances.

It is not unusual for shareholder activist director nominees to purchase target company stock prior to the public disclosure of the shareholder activist's holdings in the target company and campaign. (Often a director nominee's holdings must be disclosed in the activist's director nomination notice under the company's by-laws and under federal securities laws.) Although these purchases can be structured to not run afoul of insider trading laws, it will be interesting to watch whether over time they attract criticism from governance groups and institutional shareholders given the potential to create perverse incentives, or if they will become an accepted part of the activist landscape.

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

Companies are not required by state or federal law to permit shareholders to nominate directors for election to the board and use the company's proxy infrastructure, at the company's expense, to do so (ie, proxy access is not legally mandated). In 2011, the DC Circuit struck down Exchange Act Rule 14a-11, which would have granted proxy access (limited to 25 per cent of the board) to 3 per cent shareholders who have held their shares for at least three years.

Proxy access was thrust back onto the agenda in large part through Exchange Act Rule 14a-8 proposals. In the 2017 proxy season, approximately 55 companies received proxy access proposals, a decrease from the previous year, when approximately 200 companies received such proposals that likely largely reflects the number of companies that had already adopted proxy access prior to the 2017 proxy season. While proxy access proposals brought to a shareholder vote received on average less than 50 per cent support, a substantial majority of companies that adopted proxy access by-laws in 2016 and 2017 did so voluntarily in advance of their annual meetings. At the time of writing, approximately 60 per cent of the S&P 500 have adopted a proxy access by-law with most allowing nominations for 20 per cent of the board seats by a shareholder or group of shareholders who have owned 3 per cent or more of the company's shares for three years or more. Given the relative infancy of proxy access by-laws, we have not yet observed a critical mass of shareholders utilising this new option to nominate directors, but it will be interesting to observe the existence and magnitude of such nominations in the 2018 proxy season and beyond.

Historically, shareholders wishing to nominate directors needed to submit their own competing proxy and stand-alone ballot, in each case a costly endeavour. In October 2016, the SEC proposed long-expected changes to the proxy rules to require, among other things, the use of universal proxy cards in the case of contested director elections at annual meetings. The universal proxy card would include the nominees of all parties to better simulate freedom in voting by allowing shareholders to vote for any combination of management and dissident nominees of their choice. Accordingly, each party in a contested election – management and one or more dissident shareholders – would distribute their own proxy materials but each proxy card would be required to include the nominees of all parties. At the time of writing, the fate of the SEC's universal proxy proposal is unclear. After soliciting public comment,

the proposed rule is now under SEC review. We think it is unlikely that the universal proxy will remain high on the SEC's agenda given the new SEC Chairman Jay Clayton, the composition of the rest of the SEC and the prohibition on its implementation by the Financial CHOICE Act of 2017 (a proposed alternative to the Dodd-Frank Act).

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

Shareholders may bring derivative actions on behalf of a corporation, or class actions on behalf of a class of shareholders where there has been an alleged breach of the directors' or officers' fiduciary duty of care, fiduciary duty of loyalty or other wrongdoing. The purpose of a derivative suit is to remedy harm done to the corporation usually by directors and officers. In contrast, individual shareholder actions or class actions address harms to the shareholders in their capacity as shareholders. Whether a lawsuit should be brought as a derivative action or as a class action depends on the nature of the wrongdoing alleged, the type of relief sought, who suffered the harm (the corporation or the shareholder) and to whom the relief would go.

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

While shareholder derivative suits are brought for the benefit of the corporation, shareholder direct and class actions address unique, direct harms to the particular shareholder plaintiffs. In such cases, a critical factor in determining the outcome of the litigation will be which standard of review is applicable to the board's conduct; in other words, the deferential 'business judgement rule' or a heightened standard of review that some jurisdictions have adopted (such as *Revlon*, *Unocal* or entire fairness). Many public companies have adopted 'exculpation' provisions in their governance documents, which provide that directors cannot be personally liable for damages arising out of breaches of the duty of care. However, a director generally cannot be indemnified or exculpated for breaches of the duty of loyalty, including the obligation to act in good faith.

Company response strategies

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

Our advice is always situation-specific; that being said, a few good rules of thumb are:

- companies should 'think like an activist,' and the board and management should routinely have conversations about the company's strengths and vulnerabilities. Outlining potential arguments a shareholder activist may make for change can help facilitate tough conversations. Companies may wish to consider involving outside advisers in some of these conversations, as appropriate;
- companies should critically evaluate their shareholder engagement efforts. Being aware of concerns before they reach a boiling point should be the ultimate goal. The company should spend time developing a consistent and coherent message outlining the company's key strengths and addressing potential concerns and vulnerabilities. The process of developing these materials often airs out additional issues;

- companies should periodically review their by-laws, governance guidelines and structural defences, and focus not just on evolving 'best practices,' but on whether the company's governance structure meets its current needs;
- companies should monitor their shareholder base and be aware of the corporate governance and other preferences of its shareholders. Institutional shareholders increasingly have bespoke policies. It is important to be aware of these policies; and
- companies should be thoughtful about whether and when to enter into settlements with activist shareholders.

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

There are a number of structural defences available to companies, including: staggered boards, poison pills, not permitting shareholders to call a special meeting, not permitting shareholder action by written consent and not permitting replacement of directors without cause (and permitting only directors to fill director vacancies because of removals). In addition, stringent advance notice and other requirements for shareholder proposals and director nominations and the voting standard for director elections (plurality versus majority) can serve as a structural defence. Some states, such as Delaware, have an anti-takeover statute that restricts a shareholder that has acquired 15 per cent or more (but less than 85 per cent in the same transaction) of the company's outstanding shares, without approval of the board, from engaging in certain business combination transactions with the company for a period of three years.

The effectiveness of structural defences varies depending on the situation, and none of the defences make a company immune to shareholder activism. We would also note that because proxy advisory firms and others will scrutinise a company for having defensive mechanisms in place, many companies have lost the appetite to maintain structural defences. For example, 53.2 per cent and 56 per cent of S&P 500 companies had a poison pill or staggered board, respectively, in place in 2004, compared to just 5.8 per cent and 11 per cent in 2014. Entering the 2017 proxy season, the number of S&P 500 companies that had a poison pill or staggered board has fallen even further, down to 3.4 per cent and 10.2 per cent, respectively. This reflects widespread acceptance that there is little advantage to having a poison pill in place (and generating negative attention from proxy advisory firms) since a poison pill can usually be quickly and effectively adopted when a threat emerges. Exceptions to this trend are newly IPO'd companies. Such companies often have the most structural defences in place because it is easiest to adopt these mechanisms before going public. However, even here the proxy advisory firms have warned that they will recommend 'withhold' votes against directors if the defences are not dismantled early in the company's public life.

14 May shareholders have designees appointed to boards?

Shareholders may seek to nominate a director for election to the board in accordance with the company's charter and by-laws. As noted above, proxy access would allow the shareholder to nominate a director for election to the board and avoid the expense of developing independent proxy materials and conducting an independent proxy solicitation.

Often, when a shareholder activist and company have reached a settlement, they memorialise the agreement in a cooperation agreement. The form of cooperation agreements has become increasingly standard and typically includes a voting agreement by the shareholder activist to vote for the company's nominees, an agreement by the company to nominate the shareholder activist's nominees to the board (and to renominate them for election at the next annual meeting if certain conditions are met) and a mutual non-disparagement covenant. Companies typically seek to have the cooperation agreement include a standstill agreement by the shareholder activist as well, although recently many activists have successfully resisted inclusion of a standstill. The appointment of a new director to the board requires public disclosure under Form 8-K, and many companies conclude that entry into the cooperation agreement itself requires public disclosure under Form 8-K as well. In any event, the shareholder activist and company generally issue a joint press release.

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

Item 601 of Regulation S-K requires US public companies to file their charter and by-laws with the SEC. SEC filings can be accessed on the SEC's EDGAR database. In addition, many public companies include their charter and by-laws on their website. An amendment to a company's charter or by-laws triggers an 8-K filing requirement.

In addition, New York Stock Exchange listing rules require that a listed company include on its website the company's nominating and corporate governance committee charter, audit committee charter and compensation committee charter along with the company's corporate governance guidelines (ie, a purpose reasonably related to the shareholder's interest as a shareholder).

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

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

In addition, state corporate law and a company's charter and by-laws may provide for access to shareholder lists under additional circumstances. For example, Delaware corporate law allows shareholders to inspect the company's stock ledger and its other books and records so long as the shareholder submits a demand under oath and explains the 'proper purpose' of the request.

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

Generally speaking, companies are not required to publicly disclose their shareholder engagement efforts, although companies often choose to disclose such efforts in their annual meeting proxy in order to show responsiveness to shareholder concerns. In their annual meeting proxy, companies are required to disclose how security holders may communicate with the board of directors.

Regulation FD is intended to ensure that companies do not engage in selective or unequal disclosure. Regulation FD applies when a company or a person acting on the company's behalf (ie, all senior officers and any other officer, employee or agent of the company who regularly communicates with the financial community) discloses material non-public information to investors or security market professionals. If such disclosure is intentional (ie, the person communicating the information either knows, or is reckless in not knowing, that the information is both material and non-public), then to cure the violation the information must be simultaneously disclosed to the public. If such disclosure is inadvertent (ie, the person communicating the information did not know, and should not have known, that the information is both material and non-public), then to cure the violation the information must be promptly disclosed to the public. Disclosures under Regulation FD often consist of furnishing the information on Form 8-K with the SEC but may also include other widely disseminated sources, including press releases.

It is important to note that disclosures to persons who expressly agree to maintain the disclosed information in confidence are expressly exempted from Regulation FD. For this reason, before discussing material non-public information with a shareholder activist, a company will insist on signing a confidentiality agreement. We note for completeness that the shareholder activist may not want the company to disclose material non-public information to it, because the shareholder's ability to trade in the stock may then be limited (because of insider trading concerns).

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

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

Historically, Broadridge, which is the single largest agent collecting vote tallies, would provide the vote tallies both to the shareholder proponent and the company. However, in May 2013, after certain brokers objected to the release of this information to shareholder proponents, Broadridge changed its policy to provide vote tallies to the shareholder proponent only if the company affirmatively consents. Proxy rules are currently silent on preliminary vote tallies. We would also note that some companies have received Rule 14a-8 shareholder proposals regarding vote tallies. Depending on the language of the specific proposal, it may be possible to exclude the proposal on 'ordinary business' grounds.

19 Must shareholders disclose significant shareholdings?

Accumulations of large blocks of equity securities trigger reporting obligations under section 13 of the Exchange Act, which requires any person or group that acquires beneficial ownership of more than 5 per cent of a class of a public company's registered voting equity securities to file a beneficial ownership report with the SEC disclosing its ownership and certain other information. For this purpose, 'beneficial ownership' generally means direct or indirect voting or dispositive power over a security, including through any contract, arrangement, understanding, relationship or otherwise. A person is also deemed to be the beneficial owner of securities over which the person can acquire voting or dispositive power within 60 days (provided that where any such rights to acquire securities are acquired with a control purpose or effect, beneficial ownership is triggered, regardless of whether the rights are exercisable within the 60-day time frame). Thus, an option, warrant, right or conversion privilege that results in voting or dispositive power and that can be exercised within 60 days creates current beneficial ownership. Disclosure obligations may also be triggered by membership in a 'group' that beneficially owns more than 5 per cent of a class of equity securities of a public company, as discussed below. Acquisition or ownership of a class of non-voting securities does not trigger any filing obligations for these purposes.

Generally, an individual investor or group that beneficially owns more than 5 per cent of a class of equity securities of a public company must report its holdings on Schedule 13D within 10 days of its holding exceeds 5 per cent, unless it is eligible to report its holdings on a short-form Schedule 13G. Importantly, a Schedule 13D requires detailed disclosures regarding the filer's control persons, source of funds and the purpose of the acquisition of the securities, including any plans for further acquisitions or intention to influence or cause changes in the management or business of the issuer. Material changes in the previously reported facts require prompt amendment of a Schedule 13D.

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

As 'beneficial ownership' is based on the power to vote or dispose of a security, whether ownership of a significant derivative position in the equity securities of a public company will trigger a Schedule 13D or Schedule 13G filing requirement depends on the type of the particular derivative. Cash-settled derivatives generally do not give rise to beneficial ownership because they do not create a contractual right to acquire voting or dispositive power, but other types of derivatives may constitute beneficial ownership of the underlying securities.

An investor may generally talk with other investors and management about its investment in a company (see question 21). However, if the investors coordinate activities or agree to act together with other investors in connection with acquiring, holding, voting or disposing of the company's securities, the investors may be deemed to have formed

a 'group' for purposes of sections 13 and 16 of the Exchange Act. An investor group will have its holdings aggregated for purposes of determining whether the relevant reporting thresholds have been crossed. For example, if three investors, each with beneficial ownership of 4.9 per cent of a company's voting shares, form a group, they will have to file a Schedule 13D or Schedule 13G because their shares collectively exceed the 5 per cent threshold. In addition, because the group's ownership exceeds 10 per cent, each member will have to (i) report beneficial ownership of such member's 4.9 per cent under section 16(a) of the Exchange Act and, more importantly, (ii) be subject to section 16(b)'s short-swing profit disgorgement rules (even though each investor, by itself, owns less than 10 per cent of the public company) unless section 16 is not applicable to the issuer's securities (eg, an FPI) or the group's holdings can be reduced below 10 per cent under the Rule 16a-1(a) exemption that allows institutional investors to disregard shares held on behalf of clients or in fiduciary accounts when determining section 16 beneficial ownership.

The HSR Act may also impose a filing obligation with the Federal Trade Commission and the Department of Justice on certain investors that acquire more than US\$80.8 million of a company's voting securities or assets (this dollar amount is adjusted annually) as well as a 30-day waiting period, during which the transaction cannot close. These filings are not public but either party may choose to make the fact of the filing public. In addition, if either party requests and is granted early termination of the waiting period, the fact of the grant of early termination will be made public. Finally, there are certain structures that can be used (involving put-call options or the use of multiple funds as acquisition vehicles) that may effectively allow an investor to accumulate the right to stock well in excess of the HSR Act threshold. Counsel should be consulted regarding the use of such methods as the risks are highly technical.

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

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

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

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders?

The federal proxy rules are the primary rules relating to communications to solicit support from shareholders. In addition, companies that choose to hold private discussions with certain shareholders must be mindful of Regulation FD (see question 17). Companies solicit formal votes from shareholders at both annual and special meetings, each of which are subject to federal proxy rules and certain notice requirements under the DGCL or a company's by-laws, or both. Shareholders may cast absentee ballots or designate a proxy to vote either at such proxy's discretion or with specific and binding guidance.

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

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

See question 12. Proactively engaging with shareholders has become increasingly common and crucial to earning the trust (and voting support) of shareholders. It is not unusual for companies to plan tours to meet with large shareholders and discuss their concerns, and to prepare presentations outlining not just the company's performance but also the company's governance structure. At the same time,

engagement has, in some instances, become so pervasive that it has actually overwhelmed proxy advisory firms and institutional shareholders. Shareholder engagement without a clear purpose can be counterproductive. Companies should also recognise that often proxy advisory firms and institutional shareholders prefer conference calls over in-person meetings, given the demands on their schedules.

23 Are directors commonly involved in shareholder engagement efforts?

There is no requirement for directors to be involved in shareholder engagement efforts. Senior management is usually at the forefront of these efforts, but there has been a continued push by some investors and some corporate governance groups for independent directors to have greater and more direct involvement in shareholder engagement. It is important for a company to carefully analyse with its advisers whether director involvement in shareholder engagement efforts is appropriate and will be effective given the company's circumstances. Care should also be given to make sure the director is appropriately prepared for meetings with investors.

Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

Directors have the same duty of care when considering an activist proposal as they do with any other board decision. That is, directors must make decisions regarding the corporation with due care, which entails acting in a fully informed and deliberate manner and with the care of a prudent person in a similar situation. It is important to note that director actions are generally entitled to the business judgement rule presumption. This is the presumption that directors act in a non-negligent manner, in good faith and in the best interest of the corporation. When the business judgement rule applies, courts will not second-guess the judgement of the board if the board arrives at such judgement through reasonable procedures and without conflicts of interest. Under certain circumstances (for example, in the context of a sale of the company, when the board of directors has a conflict of interest and with respect to defensive measures), enhanced scrutiny of the board action may apply.

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

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