Shareholder Activism & Engagement

Contributing editors
Arthur F Golden, Thomas J Reid and Laura C Turano

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GETTING THE DEAL THROUGH

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Introduction

Arthur F Golden, Thomas J Reid and Laura C Turano

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At the end of another record-breaking year for shareholder activism activity, it is appropriate that we ring in the publication of this, the inaugural edition of *Shareholder Activism & Engagement*, part of the Getting the Deal Through series. We are pleased to serve as editors of this volume because we believe that shareholder activism is and will remain in sharp focus in financial markets, in the C-suite and in the boardroom, and that shareholder engagement is, and will continue to be, a leading and increasingly sophisticated priority. The international approach of the Getting the Deal Through series is especially apt for this topic, which we expect to become increasingly global over time, with 'imports' and 'exports' of shareholder activism and engagement between jurisdictions. Although the United States remains its dominant market, such activism and a heightened sensitivity to shareholder engagement is truly a global phenomenon.

The chapters of this volume, written by esteemed practitioners around the world, outline the legal parameters of the shareholder activism and engagement landscape. This introduction takes a step back from the legal intricacies, discusses trends we are observing on the ground and speculates on the area's future direction.

Evolution of shareholder activism in light of increased 'firepower'

In the past year, we have seen hedge fund shareholder activism reach new heights, both in the number of campaigns (estimated at the time of writing as more than 230 campaigns in the United States alone in 2015) to the size and iconic nature of the companies targeted (eg, AIG, DuPont, General Electric and General Motors). However, that increase is not surprising; since the US's Great Recession nearly every year has been one of unprecedented shareholder activism. In many ways, the years leading up to and following the Great Recession have been an ideal breeding ground for activists. The corporate scandals of the early 2000s and the financial crisis have left many retail investors sceptical of management teams and the status quo. The years following the Great Recession left some companies with extra cash on their balance sheet (setting the stage for activist campaigns on how that cash should be deployed) and left other companies as apparent laggards to their peers in the recovery (setting the stage for activist campaigns on improving operations and on extreme changes, such as divestitures or a sale of the company itself).

Although we do not believe that we have reached the pinnacle of shareholder activism, we do believe that it will be important to watch how shareholder activism evolves in light of the substantial increase in assets under activist management (estimates of aggregate assets under management range from US$120 billion to over US$200 billion). While more assets under management means that activists have increased firepower, it also brings with it a confluence of challenges. We believe that the increase in assets under management will manifest in a number of ways, including in:

- the companies targeted (with respect to size, to relative performance to peers and to geography) as shareholder activists must work harder, often over-reaching to identify possible targets;
- the focus of campaigns, as shareholder activists reach for additional arguments for why change is necessary at a target company (arguments we expect to become more company-specific and operation-specific rather than generic financial engineering or balance sheet activism); and
- greater recognition that not all shareholder activists are created equal or play by the same playbook (something we already know to be the case but believe will become more apparent to outside observers as the cast of shareholder activists and the scope of their activities expand).

Shareholder activist campaigns

We also believe that it will be important to monitor how shareholder activism evolves in light of the increasingly routine nature of the shareholder activist campaign itself. It has been a few years since large-cap, household-name companies such as Apple, Microsoft and Pepsi were first targeted by shareholder activists. Although the targeting of these companies sent the message that no company is immune to shareholder activism, it also may have removed some of the sting of being in the crosshairs of an activist. The path to a settlement with a shareholder activist is now increasingly well trodden, as demonstrated by the decrease in the number of days between the announcement of an activist's stake in a target company and the announcement of a settlement (calculated by some to be within 56 days, a 24 per cent decrease from the average number of days in 2013) and by the increasingly 'standard form' nature of the cooperation agreement executed between a shareholder activist and the target company to memorialise their settlement.

The increasingly routine nature of a shareholder activist campaign may manifest itself in a number of ways. In the long term, there could be more scrutiny of companies capitulating too quickly to an activist's demands. At this time, for example, Institutional Shareholder Services does not require that a shareholder activist seeking a minority position on the board provide 'a detailed plan of action, nor that the [activist] prove their plan is preferable to the incumbent plan.' Instead, the activist only has to demonstrate that 'change is preferable to the status quo and that the [activist's] slate will add value to board deliberations of the issues at hand.' This standard lends itself to Nelson Peltz's 'chicken soup' version of shareholder activism (ie, that a shareholder activist's nominee is like chicken soup: 'How can it hurt?').

Many long-term investors are beginning to question the 'chicken soup' theory. They note that it is rarely the case that the activist's idea is for a company to 'innovate and invest' in long-term growth with the highest net present value, as opposed to seizing immediate opportunities to 'divest and distribute' with a high internal rate of return. In this regard, many have likened activism to 1980s-style leveraged buyout-driven private equity, without having to buy all of the company. As the shareholder activism asset class reaches maturation, activist strategies will have to develop because it cannot be the case that 'divest and distribute' is the right strategy for shareholder value as often as is advocated by activist funds relative to other ideas. An activist fund that occasionally saw opportunities to work with a management team with an innovative, value-creating idea that required a major investor to support the financing of the innovation would be a refreshing development.

Settlement or cooperation agreements

If shareholder activist campaigns continue to be resolved at an increasingly rapid rate, we also question whether the 'chicken soup' philosophy will be tested in the long term, and whether there will be increased scrutiny of boards agreeing to such settlements. In addition, we question whether shareholder activists will continue to be satisfied in the long term with settlements that are easily reached, or if the speed of recent settlements may encourage activists to push settlement terms that are more difficult for a target company to swallow (motivated either by the recognition that those terms are important or a belief that prolonging the activist fight has some other value to the shareholder activist).

Finally, it will be important to monitor how international practice evolves regarding settlements. As the various chapters in this volume

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illustrate, the legal landscape in which shareholder activism and engagement operates differs greatly from jurisdiction to jurisdiction. However, it would be unduly provincial to believe that the settlement framework in one jurisdiction will not inform the settlement framework in another jurisdiction, especially with respect to shareholder activists that target companies in multiple jurisdictions.

Political tides may increasingly influence shareholder activist campaigns

Shareholder activism and engagement does not occur in a vacuum. In Japan, increasing shareholder activism is likely tied to the corporate governance reforms promoted by Prime Minister Shinzo Abe, as part of the 'third arrow' of his economic growth policy of Abenomics. We expect politics to continue to impact shareholder activism and engagement this upcoming year. The supposed short-term attitude of shareholder activists has already been fodder for Hillary Clinton, currently a Democratic candidate for US president. We would not be surprised if shareholder activism, which is inextricably linked to, among other things, the securities disclosure regime and the tax regime in which the activist operates, continues to receive attention in the US presidential campaign and becomes a political topic in other countries as well.

14a-8 proposals and proxy access

Shareholder activism is not limited to well-publicised campaigns waged by activists with billions under management. Shareholder activism in the US includes proposals submitted under Securities Exchange Act Rule 14a-8, which requires a company to include a shareholder proposal in its proxy materials if certain requirements are met (eg, the shareholder owns at least US$2,000 or 1 per cent of the securities entitled to vote on the proposal). This past year, 'proxy access' demonstrated the outsized influence that 14a-8 proposals can have on corporate governance policies and trends. 'Proxy access' refers to the right of shareholders (who meet certain requirements) to include their nominees for director on the company's proxy card, allowing the shareholder to avoid the expense of sending out his or her own proxy card. In 2011, the DC Circuit struck down Securities 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 held their shares for at least three years. In 2015, proxy access was thrust back on the agenda by 14a-8 proponents. In the 2015 proxy season, more than 100 companies received proxy access proposals, which, on average, received shareholder support of more than 54 per cent.

In addition, a 14a-8 proxy access proposals also demonstrate:

- how companies are increasingly adept at responding to shareholder proposals and navigating the preferences of their shareholder base; and
- how institutional investors (eg, BlackRock, T Rowe Price and Vanguard) are increasingly vocal and have bespoke policies on corporate governance issues. As a result, we fully expect most companies that receive a proxy access proposal in the 2016 proxy season to evaluate it and to respond in light of the voting policies and practices of the company's shareholder base.

We also expect institutional investors to continue to be vocal on corporate governance issues. In the last year we saw, among others, BlackRock, State Street, T Rowe Price and Vanguard sending well-publicised letters (and in some cases, multiple letters) to their investee companies on corporate governance topics. We expect this trend to continue and for other investors and public policy groups to join the fray.

Shareholder engagement

Shareholder engagement continues to be a leading and increasingly sophisticated endeavour for companies. It has now become relatively commonplace for companies to devote substantial internal resources and engage external advisers to manage shareholder engagement efforts. After years of advisers echoing the importance of shareholder engagement in the proxy off-season, so many companies have heeded such advice that proxy advisory firms and institutional investors have had to ask companies not to request meetings unless there are concrete items to discuss. We are hopeful that best practices for shareholder engagement will evolve to recognise that the substance and frequency of shareholder engagement efforts is not a one-size-fits-all endeavour, and that high-quality, thoughtful engagement is more important than quantity.

Final note

This first edition of *Shareholder Activism & Engagement* aims to provide an overview of the global shareholder activism and engagement landscape, the laws and regulations that may promote or harness shareholder activism and engagement, and the campaigns that have both coloured perceptions and influenced the course of shareholder activism and engagement.

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France

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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. However, France has recently become the second largest market for shareholder activism in Europe, following the United Kingdom (*Option Droit & Affaires, 'La France, un terreau fertile pour l'activisme actionnarial'*, October 2014). Between 2010 and 2014, there were 26 shareholder activism campaigns in France (representing 10.9 per cent of total European shareholder activism during such period). These campaigns included Vector Capital's campaign regarding JP Morgan's proposed private investment in media and entertainment technology leader Technicolor in 2012, and the campaign led in 2014 by the French investor Association for the Defence of Minority Shareholders (ADAM) to increase the price of the takeover bid for the French holiday resort Club Med.

Over the last 20 years, the French legal environment has changed significantly and increased the rights of shareholders with respect to governance-related matters. French shareholder activism legislation began with the recognition of the right for investor associations to claim collective damages for expropriated shareholders (Law No. 89-421, 23 June 1989). Shareholder activism was further strengthened by the possibility granted to shareholders holding at least 5 per cent of the share capital or voting rights of a listed company to prevent a squeeze-out offer (Law No. 89-531, 2 August 1989) and the right granted to investor associations mandated by expropriated shareholders to claim individual damages (Law No. 94-679, 8 August 1994).

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. Furthermore, a 2006 decree provided that the record date for a shareholders' meeting must be set three 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 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.

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 and AFG codes), which recommend best practices for executive compensation and appointment of board representatives, offered a new source for shareholder activism. The latest example of the power of governance codes on shareholder activism is the introduction of the 'say-on-pay' by the AFEP-MEDEF corporate governance code, in the aftermath of several scandals concerning executive compensation.

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

3 Are some industries more or less prone to shareholder activism? Why?

In France, no industry leans more or less towards shareholder activism, and shareholder activists usually target specific governance and M&A issues rather than specific companies (see question 5).

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

Investor associations (such as ADAM, the National Association of Shareholders in France, the Association of Small Bearing Assets and SOS Small Carriers) have had a crucial role in French shareholder activism for more than two decades. From 1989 to 2000, ADAM initiated campaigns in 32.4 per cent of 97 French companies that were subject to shareholder activism, and had a 59.38 per cent success rate. In 2013, ADAM challenged the price of the €939 million takeover bid initiated by Chinese private equity fund Fosun on Club Med, and finally secured a 41 per cent increase of the offer price (€24.6 per share, instead of €17 per share at the outset). Very recently, ADAM also requested – without success – the opening of an investigation by the French securities regulator (the Financial Markets Authority (AMF)) against XPO Logistics for having allegedly provided misleading information in connection with its €3.24 billion takeover bid for French global transportation provider Norbert Dentressangle. However, even if the role of investor associations remains important in France, new actors, such as hedge funds and proxy agencies, are emerging in the French market.

With the 2001 reduction to 5 per cent of the percentage of voting rights required to submit resolution proposals at a shareholders' meeting, investment entities and hedge funds (such as Vector Capital, Knight Vinke, Pardus and Colony Capital) 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. In 2012, Vector Capital successfully fought against the proposed private investment in public equity by JP Morgan in Technicolor, by proposing additional resolutions for its own competitive private investment. As a result, Vector Capital became Technicolor's largest shareholder and obtained from Technicolor's management the implementation of various strategic actions. In 2013, private equity fund Colony Capital successfully removed Accor's CEO. In 2015, Amber Capital successfully obtained the split of the chairman and CEO positions at the cable manufacturer Nexans and the replacement of its CEO.

Proxy agencies have also become major actors of shareholder activism in France. 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 not so much to improve a company's share price but rather to promote and encourage better corporate governance practices generally. They are usually considered to have a long-term investment horizon.

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5 What are the main operational, governance and sociopolitical areas that shareholder activism focuses on?

In France, shareholder activism focuses on mergers and acquisitions activities (including takeover bids and capital increases) and CEO and other top management issues. French shareholder activism rarely addresses environmental and political issues.

In addition to the campaign led by ADAM in connection with the takeover bid on Club Med described above, the ongoing battle between Elliott Capital Management and XPO Logistics relating to the acquisition of Norbert Dentressangle is a good illustration of shareholder activism in connection with takeover bids in France. XPO Logistics bought a 67 per cent stake in Norbert Dentressangle in April 2015 and then launched a mandatory buy-out offer for the shares held by the minority shareholders. The stated objective of XPO Logistics was to reach ownership of at least 95 per cent of Norbert Dentressangle through this buyout offer so it could then do a squeeze-out and make the company private. However, Elliott Capital Management purchased a 9.06 per cent interest in Norbert Dentressangle in July 2015 and is thereby in a position to block the squeeze-out and delisting of the company.

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

Shareholder activist strategies

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

One or more shareholders representing at least 5 per cent of the capital of a company, or a recognised shareholders' association, is entitled to request the inclusion of items for discussion or draft resolutions to the agenda of a shareholders' meeting. For companies listed on an exchange, 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.

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

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. They also often use the public media to advertise their positions.

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. By way of example, PhiTrust submitted five written questions to the CEO of Alstom prior to the 2015 shareholders' meeting relating to his exceptional bonus payment of €4 million and the information provided to shareholders concerning the sale by Alstom of its energy business to General Electric. Certain shareholder activists also write directly to the French regulator (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 concerning 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; and
- 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. Proxinvest, the leading French proxy agency, also publishes an annual report on the compensation of senior executives of companies included in the French SBF 120 index and an annual report of general meetings of listed companies.

More generally, activist investors in France often 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 the 'Florange Law' and, together with investment companies and hedge funds, encouraged shareholders to vote against double voting rights.

Finally, the use of social media by French activists remains in the early stages as shown by the very limited number of Twitter followers of Proxinvest and PhiTrust followers: 413 and 420 respectively, at the time of writing.

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 dismiss and replace 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, 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.

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

In their capacity as directors of a French corporation, directors are compensated by the company 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?

Shareholders, individually or collectively through an association of shareholders who together hold at least 5 per cent of the share capital, may bring a derivative action known as the *ut singuli* action to seek damages to compensate the company for the losses it suffered as a result of mismanagement by the company's CEO or members of the board in the fulfilment of their duties. Any damages awarded are paid to the company despite the fact that the legal action is brought at the shareholders' expense. This explains why these legal actions remain relatively rare in practice.

Shareholders are not entitled to bring class actions on behalf of all shareholders. The new class actions regime introduced in France by the Hamon Law in 2014 only allows consumer associations to bring class actions against companies, and only with respect to damage to goods.

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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?

It is imperative that companies be well prepared, and thus that they try and identify the issues which could attract activists' attention. To that end, executives should regularly review corporate governance policies (composition of the board, appointment and removal of directors, executive compensation, etc) and evaluate strategic and transaction alternatives to improve the company's performance. Companies might 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 or not:

- 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 to shareholder value;
- 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 major 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 to 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. While some companies have adopted the equivalent to US poison pills, they remain a small minority. 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. Indeed, the articles of association of this form of company may validly include provisions that make it very difficult to replace management. Finally, 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. 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 AMF recommends that listed companies publish an updated version of their by-laws on their website. In any event, company by-laws are publicly available on the website of the companies and commercial register (at www.infogreffe.com).

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 last three years.

This ownership table lists shareholders in order of decreasing level of ownership. It also shows 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).

Finally, the ownership table may 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 and make it available until the meeting. The list must individually identify the shareholders holding their shares in the registered form and indicate the number of shares held, together, by the shareholders holding their shares in the bearer form.

17 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure?

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, studies to better address shareholder expectations, letters to shareholders, etc). Some listed companies disclose information about this shareholder consultative committee, such as its role, its members and the dates of its meetings.

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.

Consequently, based on a review of the proxy forms so received, companies are aware shortly before the meeting of the position of these shareholders who voted by proxy.

Moreover, the AMF recommends that proxy agencies send their report on the proposed resolutions to the companies and its 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, 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. The determination of these thresholds includes derivative holdings. A failure to comply with this disclosure requirement results in the removal of the voting rights attached to the shares exceeding the threshold for which notice has not been duly made for all shareholders'

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Update and trends

Although shareholder activism is still in the developmental phase in France, it is likely to become a permanent feature of the French market.

Indeed, the development of new corporate governance rules in the French legal environment, such as the recent introduction of the say-on-pay, encourages the development of shareholder activism. An expected increase in shareholder activism is also likely to result from the future implementation in France of the EU directive on shareholders rights that is currently under review.

Finally, activists who have gained significant experience in other jurisdictions such as the US are likely to continue to try to import their strategies in France in order to attempt to extract additional value from companies that have been weakened by the current economic environment.

meetings held during a two-year period following the due information of the company and the AMF as per a regularisation notice.

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 shareholders must also indicate whether they envisage making further acquisitions and whether they seek to acquire a controlling interest in the company or to have seats on the management board or the supervisory board.

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 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 control of a company. The following persons are deemed to be acting in concert (which presumption may be rebutted):

- 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 the laws and regulations, including the above-mentioned mandatory bid requirements.

21 What are the primary rules relating to communications to obtain support from other shareholders?

See question 7.

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 (visits of current and completed projects of the companies (Vinci, LVMH) and 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 (Total) and private meetings with top management teams regarding strategic priorities, outlook, results and dividend policy (Vinci).

In addition, where a known shareholder activist has acquired a stake in a French issuer, it is not uncommon for representatives of the issuer to engage a dialogue with the activist in order to ensure that there is no misunderstanding on the strategy pursued by the company.

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 directors to have a significant involvement in the implementation of shareholder engagement efforts (even though directors are very much involved, in their capacity as board members, in the strategy to be adopted with respect to 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 designate a board member, he or she must also do so with a view to pursue the best interests of the company, for the benefit of all of its 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 in this area are the Companies Act 2006 (the Companies Act), the Listing Rules, the Disclosure and Transparency Rules (DTRs) 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.

The Takeover Code is a set of rules administered 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 which 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?

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 (the 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 National Association of Pension Funds (NAPF), Pensions Investment Research Consultants, Hermes and the Investment Association, formed in 2014 through the merger of the Investment Management Association with the Investment Affairs Division of the Association of British Insurers (ABI), regularly issue voting guidelines for their members recommending what positions to take in various circumstances. These guidelines carry significant influence in practice.

Institutional Shareholder Service, the US-based proxy advisory service, published its first UK voting guidelines in January 2015, having previously followed the guidelines issued by the NAPF.

3 Are some industries more or less prone to shareholder activism? Why?

Activists in the UK are not restricted to 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. In the first half of 2015, the financial sector saw the most activity, accounting for 37 per cent of companies where public demands have been made. Other dominant sectors have been services (23 per cent), basic materials (12 per cent) and technology (11 per cent) (*Activism Monthly*, August 2015).

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?

Activism in the UK has focused primarily on board composition and remuneration (see 'Update and trends'). However, there has also been significant activity in operational areas in recent years. This includes strategic reviews, restructurings, spin-offs and other divestitures, and (in a takeover context) actions to increase the takeover offer price. Balance sheet strategies, such as share repurchases, dividends and leveraged recapitalisations, are not uncommon.

While low in number, there have also been examples of sociopolitical activism in the oil and gas industry. The 'Aiming for A' coalition, for example, recently requisitioned special resolutions at BP and Royal Dutch Shell relating to climate risks.

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

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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 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.

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

In general, activist tactics 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 NAPF).

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.

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.

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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 which may indicate that the company is being targeted.

The directors of UK listed companies are becoming increasingly focused on this area.

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

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 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. They 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 have 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 whom 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, from April 2016, UK companies (other than those which are subject to DTR 5) will be required to maintain a publicly available register of persons with significant control over the company. A person with significant control includes any individual who either:

- holds (directly or indirectly) 25 per cent 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?

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 disclose 'inside information' selectively to third parties, including shareholders, without disclosing the information publicly through a Regulatory Information Service (RIS). However, Chapter 2 of the DTRs (DTR 2) allows selective disclosure where:

- the purpose of delaying public disclosure is to avoid prejudicing the legitimate interests of the company (eg, where there are negotiations in course which would likely be affected by public disclosure);

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- the person receiving the information owes the company a duty of confidentiality; and
- disclosure is in the normal course of such person's employment, profession or duties (ie, there has to be a good reason for the person to receive the information).

It is also critical that the recipient does not trade on the basis of the selective disclosure, which would likely breach insider dealing and market abuse rules. 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 whom DTR 5 applies are 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, 50 per cent 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 (FSA), 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 which 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 has been incorporated into the constitutional documents of Rolls-Royce, BAE Systems and NATS Holdings (although, in respect of Rolls-Royce Holdings and BAE Systems, this limitation applies only to non-UK persons). 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?

Where a communication by a listed company or an investor includes non-public, price sensitive information, the recipient is prohibited from dealing on the basis of that information by the UK insider dealing and market abuse rules under the Financial Services and Markets Act 2000, the Criminal Justice Act 1993 and the Financial Services Act 2012.

In the context of communication between shareholders, the FSA 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 ABI, 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. 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 have also used social media to voice concerns and persuade other shareholders of their viewpoint.

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 NAPF, 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

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Update and trends

UK institutional shareholders and activists alike have remained focused on executive remuneration and securing board representation to effect change throughout 2015, but towards the end of the year have focussed more visibly on disrupting M&A activity.

There have been numerous further examples of shareholder dissatisfaction with UK board remuneration in 2015, including the vote against Intertek Group's implementation report at its 2015 AGM (as a result of which the board determined that a compensatory award would no longer be made to the incoming CEO). Even where remuneration reports have been approved, a number of companies have had to take steps to address significant shareholder opposition to the proposals, including Man Group, RSA Insurance Group, HSBC, Balfour Beatty and Sports Direct. In a similar vein, Stelios Haji-Ioannou has stated publicly that he will not approve the board's remuneration at Fastjet going forward unless the company has implemented pay cuts or increased profits beforehand.

An example of a high profile campaign for board representation is that run by Sherborne Investors in relation to Electra Private Equity. Having built an initial shareholding, Sherborne claimed that Electra would be able to unlock significant value through a strategic change in approach. It requisitioned a general meeting in October 2014 for shareholders to consider the appointment of two of its nominees to the board. This proposal was defeated, in part due to the efforts made by Electra's board to warn shareholders against the consequences of changes to the company's existing management structure. However, having increased its shareholding further and requisitioned a further meeting, Electra's shareholders eventually agreed to the appointment of two Sherborne nominees at a meeting in November 2015. Elsewhere, ValueAct Capital built stakes in two FTSE 100 industrial groups, Smiths Group and Rolls-Royce, only to subsequently abandon its stake in Smiths Group with a view to focusing on securing board representation at Rolls-Royce.

In terms of M&A activity, in October 2015 activist hedge fund Elliott Management built a stake in Dialog Semiconductor with a view to encouraging shareholders to vote against its proposed merger with Atmel (although notwithstanding Elliott's opposition, Dialog secured the necessary shareholder approval) and in November 2015 Irish billionaire Dermot Desmond ran an unsuccessful campaign to persuade Ladbrokes' shareholders to vote against its proposed merger with certain businesses of Gala Coral.

responsibility to improve engagement in this way is now enshrined in the Stewardship Code.

There has also 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.

23 Are directors commonly involved in shareholder engagement efforts?

Best practice guidance recommends that directors are 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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United States

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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 is growing consensus around corporate governance best practices, proxy advisory firms, institutional investors and others in the investment community issue guidelines that may 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 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 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, T Rowe Price and Vanguard) and of others in the investment community (such as the Council of Institutional Investors, TIAA-CREF and CalPERS). These sources are viewed as very influential in practice (for example, an ISS recommendation is estimated by some to influence up to 20 per cent of the shareholder vote in certain situations) and, as a result, companies have a complex web of preferences for directors and management to wade through.

3 Are some industries more or less prone to shareholder activism? Why?

No company is immune to shareholder activism. Even industry leaders that have outperformed their market peers have been recent targets of shareholder activism. Apple, DuPont, eBay, Microsoft, PepsiCo and Sony, to name just a few, have been subject to shareholder activist campaigns within the last few years. 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 recent 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.

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 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 at least 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 recent letter from the CEO of BlackRock, the world's largest asset manager, to the CEOs of every S&P 500 company, stressed that companies 'resist the pressure of short-term shareholders to extract value from the company if it would compromise value creation for long-term owners.' Also, a recent open letter from the chairman and president of Vanguard, which has US$3.3 trillion of global assets under management, stressing that 'boards [should not] capitulate to things that aren't in the company's long term interest,' indicates 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.

5 What are the main operational, governance and sociopolitical areas that shareholder activism focuses on?

Shareholder activists have focused on a wide variety of capital structure changes, such as increasing leverage (Ethan Allen), share dividends and repurchases (Apple, eBay), and strategic changes such as a company sale or breakup (DuPont, AIG) or other operational changes (Canadian Pacific). 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.

During the 2015 proxy season, about half of the 14a-8 proposals focused on corporate governance topics (an increase from 2014 when approximately 38 per cent of the proposals focused on corporate

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governance matters, which increase is largely attributable to the number of proxy access proposals), about 40 per cent focused on environmental and social issues and about 10 per cent focused on compensation matters. 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) 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 on 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, at least 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).

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:

- apply pressure through the media or investor communications, for example, by issuing 'white papers' or open letters to management, the board or shareholders;
- 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 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.

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.

In the past year, proxy access was thrust back onto the agenda in large part through Exchange Act Rule 14a-8 proposals. In the 2015 proxy season, more than 100 companies received proxy access proposals. On average, these proposals received shareholder support of more than 54 per cent. Following the 2015 proxy season, many large cap companies 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. It will be important to watch how companies that receive a proxy access proposal in the 2016 proxy season decide to respond.

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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 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 (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 advisors in some of these conversations, as appropriate;
- it is also important for a company to critically evaluate its 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 whether the company's governance structure meets its current needs; and
- 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.

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. 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 recently 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 standstill agreement by the shareholder activist, 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. 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 Securities and Exchange Commission (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.

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

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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?

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. 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, but SEC chair Mary Jo White recently discussed either conditioning the broker's exemption from the proxy rules on a requirement to provide everyone with preliminary vote tallies, or to permit brokers to provide issuers with the total votes cast only in order to determine a quorum. At the same time, White noted that rulemaking may not be the only way to solve these concerns, and encouraged the corporate governance community to work together and achieve a compromise on this issue. This will be an interesting area to watch going forward, although we do not expect change in the short term.

19 Must shareholders disclose significant shareholdings?

Accumulations of large blocks of equity securities trigger reporting under section 13 of the Exchange Act, which requires that 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 must 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 control 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. 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 may also be triggered by membership in a 'group' that beneficially owns more than 5 per cent, as discussed below. Acquisitions 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 after 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 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 control, 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 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. And, because the group's ownership exceeds 10 per cent, each member will have to report beneficial ownership of his, her or its shares under section 16(a) of the Exchange Act and, more importantly, 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).

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$76.3 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'

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(effectively providing the equivalent of dissenters' rights applicable to the acquiror rather than the issuer).

21 What are the primary rules relating to communications to obtain support from other 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).

In March 2014, the SEC staff 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. Since the guidance has been issued, we have seen shareholder activists and companies use Twitter and other social media outlets in a proxy solicitation context.

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 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.

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 recent push by investors (including Vanguard) and corporate governance groups (such as SDX) for independent directors to have greater involvement in shareholder engagement.

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 owe a duty of care to the corporation. 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. Directors have the same duty of care when considering an activist proposal as they do with any other board decision. 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 judgement is arrived at 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.

Generally, fiduciary duties of a controlling or a significant shareholder are most 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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