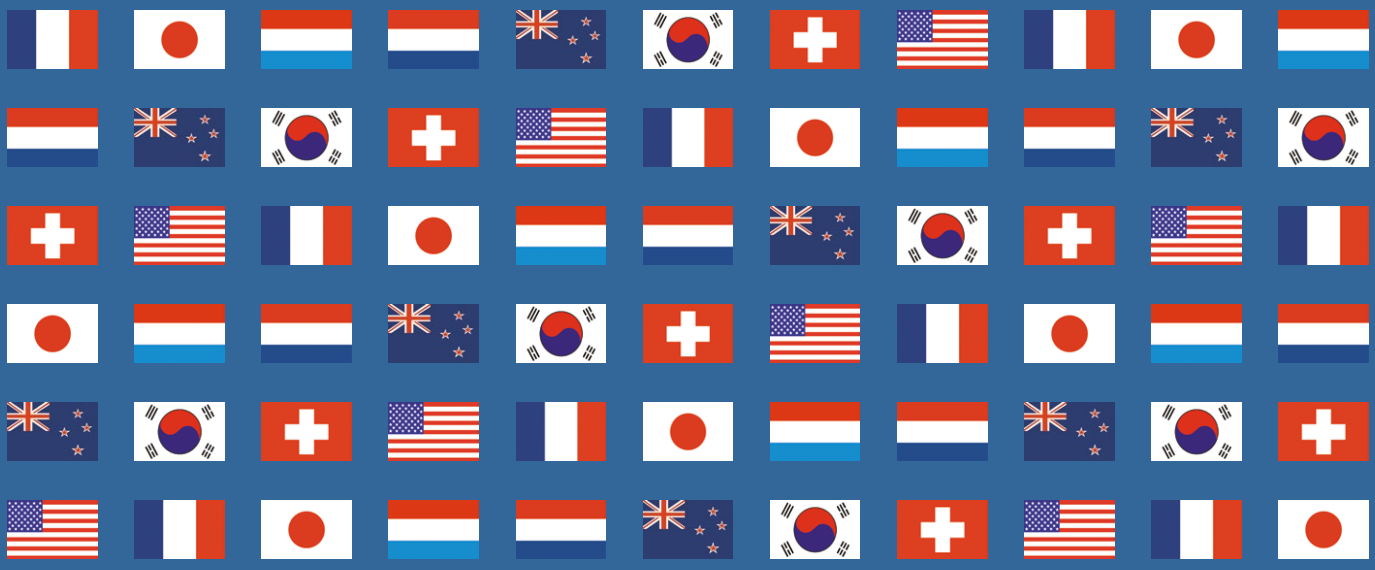
LEXOLOGY
Getting the Deal Through

SHAREHOLDER ACTIVITISM & ENGAGEMENT 2023

Consulting editors
Willem Calkoen and Stefan Wissing



LEXOLOGY
Getting the Deal Through

START READING

Jurisdictions

Published April 2023

Introduction

Willem Calkoen and **Stefan Wissing**
NautaDutilh

RETURN TO CONTENTS

In 2022, global shareholder activism activity saw a 36 per cent increase from 2021 making 2022 the busiest year for activism since 2018. Activism remains a global phenomenon; in 2022, activism against non-US companies accounted for approximately 43 per cent of campaigns. The United Kingdom remained the most-targeted jurisdiction in Europe, followed by France.

As in previous years, activist campaigns targeted companies across a range of industries. Technology was the most frequently tar geted sector in 2022, as the strong decline in valuations created an opportune environment for activists. Although some individual managers target companies in specific sectors, activist investors as a whole do not display any clear preference for any particular sector (with many activist funds remaining industry generalists). Activists remain focused more on characteristics such as market cap, undervaluation based on corporate fundamentals, lagging stock performance relative to the market generally, governance weaknesses, low leverage or strong cash positions and announced or potential M&A than the industry in which the company operates.

The list of companies targeted by activist campaigns in 2022 and early 2023, or in which activists acquired a significant stake, spans a variety of sectors and includes large-cap companies and national champions, such as Bayer, Disney, FedEx, HSBC, Humana, McDonald's, Salesforce, Shell, Spotify, TotalEnergies, Unilever, Vodafone and Western Digital. Seasoned activist funds, such as Elliott Management, Icahn and Starboard Value, continue to be responsible for many of the high-profile activist campaigns.

The year 2022 as a whole showed a sustained prominence of M&A-related activism, ranging from instigating deal activity by pressing sales, industry consolidation, divestitures and break-ups to activists intervening in announced transactions by pushing for a price increase (bumpitrage) or by opposing the transaction.

The number of board seats won by activists in 2022 was up by 21 per cent compared to 2021. Often, such board seats are secured through negotiated settlements rather than protracted public campaigns culminating in a shareholder vote. In many cases, settlements involved adding new independent directors with public company director experience rather than adding activist employees. The addition of 'activist-minded' directors to a board has an ongoing impact on companies after a campaign as it changes the dynamics within the board and may cause changes in a company's strategy that could culminate in M&A activity.

The concepts of stakeholder governance and corporate purpose beyond profits, which have long prevailed in certain jurisdictions such as the Netherlands, continue to take hold in other

jurisdictions such as the United States. In August 2019, the Business Roundtable released a Statement on the Purpose of a Corporation, signed by 181 CEOs (including the CEOs of BlackRock and Vanguard, the top two index funds collectively owning approximately 15 per cent of the S&P 500). It outlines a modern standard for corporate responsibility, moving away from the concept of shareholder primacy to a more stakeholder-oriented approach. The signatories commit to delivering value to their customers, investing in their employees (including fostering diversity), dealing fairly and ethically with their suppliers, supporting the communities in which they work (including embracing sustainable practices across their businesses) and generating long-term value for shareholders. The pandemic has underscored the continuing importance of restoring and supporting a long-term perspective and a company's commitment to serving all its stakeholders. In his 2022 annual letter to CEOs, BlackRock's Larry Fink noted that 'in today's globally interconnected world, a company must create value for and be valued by its full range of stakeholders in order to deliver long-term value for its shareholders.'

Environmental, social and governance (ESG) advocacy and activism persist, with pressure coming not just from shareholders but a more diverse universe of stakeholders. Institutional investors continue to prioritise ESG, despite increased political scrutiny and the rise of anti-ESG shareholder activism in the United States. A high-profile ESG activist campaign was Engine No. 1's success at ExxonMobil in 2021. After Engine No. 1 nominated four directors and called for ExxonMobil to increase investments in net-zero emissions energy sources and clean energy infrastructure and set carbon emission reduction targets as part of a sustainable, transparent and profitable long-term plan focused on accelerating rather than deferring the energy transition, three of the four nominees were elected to the board. Activists have also incorporated ESG into M&A-related activism, such as Third Point calling upon Shell to separate its legacy oil and gas business from its renewable and energy transition business and Elliott pressuring SSE to break up its renewables and regulated electricity business.

Outlook

Shareholder activism activity is expected to persist in 2023. Key trends that we see continuing are:

- pension funds and other institutional investors being vocal on ESG issues in the broadest sense, including diversity, board refreshment, environment, sustainability and climate change, and ESG-related disclosures;
- an embrace of diversity and ESG issues by, and integration of such ESG themes into campaigns of, traditional activist hedge funds (with a potential further rise of anti-ESG activism in the United States);
- proxy fights in the United States to gain board seats, also in light of the SEC's universal proxy card rules facilitating mixed ballot voting that took effect in September 2022; and
- awareness within boards of the risk of becoming an activist target and the need to ramp up preparedness and effective engagement with major shareholders and other stakeholders.

Read this article on Lexology

Final note

Each jurisdiction has its own regulations and practices when it comes to shareholder activism and engagement. Although the chapters in this book show that there is growing convergence in certain areas, important differences remain between countries. We hope the concise jurisdictional overviews offer the reader a helpful first look at key activist-related topics in the various countries, enable convenient comparisons between jurisdictions and give food for thought, as reading about the issues, practices and solutions in other countries often offers new insights and understanding relevant to one's own laws and best practices.

We are thankful for having so many recognised thought leaders from around the globe contribute to this essential reference guide. We look forward to following future developments with great interest as the activist landscape continues to evolve.

Willem Calkoen willem.calkoen@nautadutilh.com
Stefan Wissing stefan.wissing@nautadutilh.com

Beethovenstraat 400, Amsterdam 1082 PR, the Netherlands
Tel: +31 20 717 1000
www.nautadutilh.com

France

Bertrand Cardi and Forrest G Alogna
Darrois Villey Maillot Brochier

RETURN TO CONTENTS

Summary

GENERAL

Primary sources

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

The most notable sources of laws and regulations relating to shareholder activism include French legislation (for example, the Commercial Code (including European Directives as transposed into French law)), European regulations and the French Financial Markets Authority (AMF) regulations. Domestically, the French parliament and the AMF promulgate relevant law and regulations, which may be enforced by civil parties or the public prosecutor before the French courts or by the AMF through the AMF sanctions commission.

Shareholder activism

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

Public campaigns involving French-listed companies have remained fairly constant in recent years, with approximately five to 10 public activist campaigns per year. Consistent with the decline in worldwide and European campaigns, 2021 witnessed a significant decline in new public campaigns in France. Activism rebounded in France in 2022, with about a dozen public campaigns. Several commentators have predicted a strong year for activism in 2023.

Based on a review of activist campaigns since 2013, it appears that nearly one-third result in at least a partial satisfaction of activist demands. However, as with any data set, much depends on how success is measured. More aggressive tactics may be markedly less likely to succeed. For example, of the 31 external resolutions proposed by shareholders in 2020, only one was adopted (3 per cent).

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

Popular consciousness of activism has increased considerably over the past decade.

The French legislature has promulgated several laws in recent years designed to limit the influence of short-term investors. For example, 2019's PACTE law reinforced the corporate interest (an independent interest attributable to the entity itself and conjoining the interest of all corporate stakeholders) so that, in addition to the corporate interest, corporate decision-makers are also required to take into account the labour and environmental implications of the corporation's activity. In addition, the new law introduced the possibility to include the corporate purpose, or the raison d'être, of the company in its articles of association. These reforms may, in practice, reinforce corporate defences against short-term objectives espoused by activists. The introduction of a lower threshold for certain squeeze-outs (to 90 per cent) will also make more difficult, but not prevent, the activist strategy of seeking to block such squeeze-outs.

Other recent reforms (arising from the transposition of the shareholder rights directive (Directive (EU) 2017/828) include a comply-or-explain requirement that certain portfolio management companies put in place and make public a long-term shareholder engagement policy, with annual reporting, including regarding their voting record. Proxy advisers are also required to adopt a code of conduct and provide annual reporting regarding their compliance, also on a comply-or-explain basis, as well as publish information regarding their processes for preventing conflicts of interest.

French regulators have generally been tolerant – and at times sympathetic to – certain aspects of activism, particularly campaigns that focus on good governance, rigorous disclosure and the interests of minority shareholders. However, this tolerance has not prevented the AMF from disciplining activist abuses, including insider trading, violations of disclosure obligations (for example, in the context of stake-building or misleading statements) and market manipulation. For example, on 17 April 2020, Elliott Advisors UK Limited and Elliott Capital Advisors LP (entities affiliated with Elliott Management) were fined €20 million for, among other things, violations of their reporting obligations in connection with a tender offer. In April 2020, the AMF issued a press release proposing a number of targeted measures concerning shareholder activism; some of these proposals will involve changes to applicable law, others will require coordination at the European level and others will involve revisions to AMF regulations or interpretations. In the first half of 2021, the AMF approved a number of changes to its interpretations consistent with its April 2020 press release: notable evolutions include encouraging greater dialogue and transparency between an activist and the issuer (including in advance of any public announcement by the activist) and clarifying the right for issuers to respond to campaigns even during 'quiet' periods prior to announcing their results.

Given the relatively small number of activist interventions in France, it is difficult to draw definitive conclusions about the industries most likely to be the targets of such attacks. French listed targets have clearly grown larger in recent years (eg, Accor, Airbus, Carrefour, Danone, EssilorLuxottica, Natixis, PSA, Renault, Saint Gobain, Safran, SCOR, Suez, Unibail-Rodamco-Westfield and Vivendi). That being said, companies with a market capitalisation of between €500 million and €5 billion continue to be prime targets (eg, Altran, Engie, Esso S.A.F., Europcar, Euro Disney, Ipsos, Lagardere, Nexans, Pernod Ricard, Rexel, SoLocal, Technicolor and XPO Logistics Europe).

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

The key shareholder activists in recent campaigns in France include a number of well-known investors based in the United States, the United Kingdom and Europe such as Cevian Capital, Elliott Management, Knight Vinke, the Children's Investment Fund Management and Trian Fund Management.

French native activists include both financial and industrial concerns, including in the former category Amber Capital (UK-based but with founders with strong French ties), Charity Investment Asset Management, Phitrust, SFAM and Wendel and, in the latter category, LVMH in its acquisition of a significant position in Hermès. French associations of minority shareholders, such as the Association for the Defence of Minority Shareholders

and SOS Small Holders, continue to play a role, including in litigation, sometimes in partnership with other activists.

In addition, there has been a growing trend of more traditional institutional investors taking a more active role in their portfolios to agitate change, sometimes in tandem with activists.

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

As regards operations, activists may focus on cost-cutting and reorganisations. For governance, activists may agitate for changes in management or at the board, including seeking the nomination of activist representatives or, increasingly, independent directors proposed by the activist. Activists are focused on M&A as a creator of value, whether in opposing announced transactions with valuations that they disagree with, or seeking to trigger transactions (including divestments) if they believe it will unlock value. Activists may also work in favour of dismantling anti-takeover defences and limiting majority shareholder advantages or perceived self-dealing.

Underperformance compared with peers, capital reallocation or return opportunities and M&A or break-up possibilities are key factors that may attract attention from shareholder activists.

There has always been an occasional focus on environmental issues, but this increasingly appears to be a growth area for activist interventions in France.

SHAREHOLDER ACTIVIST STRATEGIES

Strategies

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

At the highest level of abstraction, the classic activist intervention involves acquiring a minority stake in the target company by way of an economic interest (in the form of a direct acquisition of shares, through derivative instruments or even the acquisition of debt securities or other credit exposure) and attempting to pressure the board and management (including through seeking to convince other shareholders) to take actions recommended by the activist – which often can be expected to positively influence the company's stock price.

Within this framework, common activist strategies vary considerably depending on circumstances, but may include:

- seeking to add items to the agenda of a shareholders' meeting or propose new resolutions (Charity Investment Asset Management (CIAM) regarding SCOR, Wyser-Pratte regarding Lagardère, the Children's Investment Fund Management (TCI) in *Safran/Zodiac*);

- intervening in announced M&A transactions (eg, CIAM in *Veolia/Suez*, Elliott Management (Elliott) in *Capgemini/Altran*, CIAM in *FCA/Renault* (aborted), TCI in *Safran/Zodiac*, Amber Capital as regards Gameloft SE);
- seeking board seats (eg, Cevian in relation to Rexel, CIAM as regards Alès Group, Pardus Capital Management regarding Valeo, Pardus and Centaurus Capital in relation to Atos Origin, Financière de l'Echiquier and Sterling Strategic Value as regards Latécoère, Amber Capital as regards Lagardère and SFAM as regards FNAC Darty);
- seeking a court-appointed independent expert (eg, Elliott in its countersuit against XPO);
- targeting individual members of the board or management (eg, Bluebell Capital and Artisan Partners' campaign to remove chairman and CEO Emmanuel Faber from Danone's leadership);
- blocking a squeeze-out (eg, Elliott in C*apgemini/Altran*, APRR and XPO Logistics Europe);
- orchestrating a public relations campaign, including letter writing (including lobbying individual board members or relevant regulators), press interviews and lobbying proxy advisers (eg, ShareAction orchestrating letters from major investors to BNP Paribas, Crédit Agricole and Société Générale urging them to stop financing new oil fields); and
- in relatively rare cases, threatening (eg, TCI in *Safran/Zodiac*) or actually initiating litigation (CIAM in Euro Disney and CIAM against Altice).

From a purely financial perspective, activists have had recourse to equity collars in connection with their stakes. This structure is adopted as a matter of stakebuilding (to avoid disruption in the stock price) – however, in the longer term, this tool may also be used to limit the activist's financial exposure to the target, misaligning the activist's economic interests from those of other shareholders (eg, as had been reported regarding Elliott in its Telecom Italia investment).

Processes and guidelines

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

Shareholders that meet the applicable minimum shareholding threshold in a listed entity in France, as well as qualifying minority shareholder associations, may seek to add items for discussion to the agenda for any shareholders' meeting or propose additional draft resolutions to be included in 'proxy' materials distributed to shareholders. The applicable minimum threshold depends on the share capital of the issuer and is calculated on a sliding scale. It cannot be more than 5 per cent; in the very largest companies, it may approach 0.5 per cent.

External shareholder resolutions may include, for example, major strategic or financial initiatives (such as an exceptional dividend, a share buy-back or a spin-off), material governance changes (including a separation of the CEO and chair roles or a resolution for a special committee of independent directors to be formed to undertake a strategic review of management's performance, compensation or succession planning) or various other disruptive proposals (eg, the transformation of the corporate form into a takeover-friendly structure).

However, in accordance with the fundamental principle under French law regarding the proper competence of the respective decision-making organs of the corporation, some

boards have resisted the proposal to include an item that does not fall within the competence of the shareholders' meeting (eg, a change of strategic direction).

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

Yes. In France, upon a proposal by any shareholder, and irrespective of a director's term, any director may be removed and replaced at any shareholders' meeting by a simple majority vote of the shareholders even if the matter is not on the meeting agenda. In addition, under a shareholder proposal right, a draft resolution proposing the removal and replacement of any director may be included in the company's proxy materials circulated to shareholders in advance of a shareholders' meeting.

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

Shareholders holding 5 per cent as well as certain minority shareholder associations may request the president of the commercial court to convene a shareholders' meeting in the event that the company has failed to call the relevant meeting following a specific request. The court assesses whether the request is for legitimate purposes and in the corporate interest of the company, and not solely to satisfy the plaintiff's personal interests. If the request is granted, the court sets the agenda and appoints an agent to convene the meeting.

Shareholders of French listed companies are not permitted to act by written consent in lieu of a meeting.

Litigation

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

While shareholder litigation is relatively unusual in France, shareholders' recourse is available against corporations and directors. For instance, shareholder litigation can be commenced on the merits by way of derivative action. Derivative suits may not be pursued as a class action as this procedure is not available under French law with respect to shareholder claims. The cost of the derivative suit is borne entirely by the shareholder, while any recovery is allocated to the company. A personal cause of action is also available; however, the plaintiff must demonstrate that the relevant loss is personal to him or her and distinct from any loss incurred by the company or the other shareholders.

Other litigation, such as litigation based on an abuse by majority shareholders, criticism of insider transactions, seeking the liability of managers or seeking redress for procedural failings, may also be available to activists.

There are also a variety of criminal actions available in France in connection with corporate conduct; however, such actions depend on the relevant authority exercising its prosecutorial discretion to pursue the matter. Regulatory enforcement actions may be brought against activists, or against the issuer and its management.

Shareholders have certain general information rights that generally only concern public documents and information that must, in any event, be publicly communicated. An additional and much broader right available generally under French civil procedure also permits 'any interested party' (including a minority shareholder) to seek, on an ex parte basis, the seizure of evidence that may be necessary for contemplated litigation.

SHAREHOLDERS' DUTIES

Fiduciary duties

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

Shareholders do not owe any fiduciary duties to the company per se, but they have an obligation not to abuse their position by way of oppressive action (often a hostile vote) or inaction (eg, abstention from a vote) wrongfully designed to benefit certain shareholders and that is contrary to the company's corporate interest.

Compensation

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

Although no French court has considered the question, it does not appear that such a compensation scheme would, in and of itself, violate any statutory provision of French law. However, such a scheme would clearly be problematic in practice if it were to interfere with a director's duty to act in good faith and to put the interest of the company ahead of any personal interest, as well as the director's duty to take decisions with, as the sole consideration, the company's corporate interest. The director would also need to comply with applicable confidentiality obligations, significantly limiting his or her ability to communicate and coordinate with the activist fund. Such a compensation scheme may also have to be disclosed in the company's annual report and it may call into question the director's independence under applicable corporate governance codes.

Mandatory bids

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

In France, where a person, acting alone or in concert, comes to hold directly or indirectly more than 30 per cent of a company's equity securities or voting rights (or 50 per cent for Euronext Growth), it is required, on its own initiative, to inform the French Financial Markets Authority (AMF) immediately and to file a proposed offer for all the company's equity securities, as well as any securities giving the right to acquire its share capital or voting rights, on terms that have to be acceptable to the AMF. The same obligations apply to persons, acting

alone or in concert, who directly or indirectly hold between 30 per cent and 50 per cent of the total number of equity securities or voting rights of a company and who, within a period of less than 12 consecutive months, increase such holding by at least 1 per cent. Exceptions and waivers to the obligation to file a proposed offer may apply in both cases.

Under French law, persons are deemed to act in concert if they enter into an agreement with a view to acquiring, selling or exercising voting rights, to implement a policy with respect to a company or to obtain control of the company. Circumstantial evidence that shows a tacit or hidden agreement may be taken into account in assessing the existence of such an agreement.

Disclosure rules

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

In accordance with primary disclosure obligations in France, any person acting alone or in concert with others that comes to hold more than 5, 10, 15, 20, 25, 30, 33.33, 50, 66.66, 90 or 95 per cent of the share capital or voting rights in a publicly listed company is required to report the crossing of these ownership thresholds (in either direction) to the company and the AMF no later than the close of market on the fourth trading day following the date on which the threshold was crossed. In April 2020, the AMF recommended lowering the initial threshold for investors to publicly disclose their ownership from 5 per cent to 3 per cent (as is already the case in a number of other European jurisdictions).

Persons holding temporary interests in 2 per cent or more of the voting rights in a publicly listed company must notify the issuer and the AMF of these holdings no less than three business days prior to any shareholders' meeting at which those rights may be exercised.

More generally, persons preparing a financial transaction that may have a significant impact on the market price of public securities must disclose the transaction to the public as soon as possible.

The disclosure obligations also require that any holder that comes to hold 10, 15, 20 or 25 per cent of the share capital or voting rights of an issuer report to the AMF its intentions for the next six months with respect to the issuer and its shareholding no later than the close of market on the fifth trading day following the crossing of the relevant threshold. To the extent any such statement of intentions becomes inaccurate, the holder in question is required to rapidly communicate its new intentions.

In addition to the legal thresholds, the company's articles of incorporation may provide that shareholders must inform the AMF and the company of the crossing of additional ownership thresholds below 5 per cent in increments of no less than 0.5 per cent.

Any agreement that provides preferential rights with respect to the sale or purchase of shares representing at least 0.5 per cent of the share capital or voting rights of a publicly listed company must be reported to the AMF within five trading days of its signature.

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

The disclosure requirements apply to persons acting alone or in concert. In addition, for the purpose of calculating the disclosure thresholds, the 'share capital or voting rights' include, in addition to ordinary shareholdings, all derivative products entitling the reporting person at its sole option to acquire existing shares (or corresponding voting rights) and cash-settled or physically settled derivative instruments providing an economic exposure equivalent to a long position in the underlying shares. The disclosure obligations also require that net short positions in shares be reported to the AMF upon crossing the threshold of 0.2 per cent of issued share capital (and every 0.1 per cent above that), and disclosed to the public when they reach 0.5 per cent of issued share capital (and every 0.1 per cent above that).

Insider trading

16 Do insider trading rules apply to activist activity?

Activists can be, and have been, found guilty in France of insider trading.

Under French rules, insider trading consists of using 'privileged' information by acquiring or selling, or attempting to acquire or sell financial instruments to which that information relates. 'Privileged' information is defined under French law as any information of a precise nature that has not been made public and that, if it were made public, would be likely to have a significant effect on the price of the relevant financial instruments or on the prices of related financial instruments. The AMF considers information to be precise when it is sufficiently detailed and complete to permit it to be used by an investor as the basis for an investment decision.

The information does not need to be 'inside' information and, accordingly, there is no need under French law to demonstrate the violation of any duty, whether in relation to the company or a third party.

COMPANY RESPONSE STRATEGIES

Fiduciary duties

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

A defining duty of directors in France is to act in accordance with the corporate interest of the company.

There is no different standard applicable to activist proposals.

Preparation

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

Appropriate planning for an activist attack includes laying the groundwork for strong teamwork in a crisis by and among the board, management and advisers as well as other key internal constituencies. Maintaining strong relationships and lines of communication with external constituencies, notably including significant shareholders, is essential.

Companies should engage in ongoing monitoring and be ready to respond to early warning signs, particularly during vulnerable periods (eg, when an active M&A operation is under way, when results or other metrics remain below those of peers, enduring criticism of governance or leadership, etc). Continuously assessing corporate strategy to ensure that it is rigorously defensible becomes paramount in the event that the business underperforms compared with peers. Maintaining good governance and a relationship of trust with regulators are also worthwhile investments.

Shareholder activism and engagement has been a subject of increasing focus in French boardrooms in recent years.

Defences

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

In the event an activist does emerge, a strong response by the company often includes rallying the company's financial, legal and communications advisers at short notice and making sure that any public communications by the company are coherent and disciplined across all key constituencies. The board and management should redouble efforts to maintain strong cohesion. Individualised outreach may be appropriate to key shareholders. In addition, ongoing monitoring should be maintained to ensure the company can rapidly respond to any additional 'tag along' attacks or related activity. An open line of communication should typically be maintained with the relevant authorities such as the French Financial Markets Authority (AMF), as well as proxy advisers and other key constituencies, including other significant shareholders. Given the likely heightened focus on the company and its conduct during the time of the attack, a particular effort should be made to avoid legal or other missteps that will be seized upon by the activist or others (including the AMF). Likewise, the activist's actions and statements should be carefully reviewed for missteps or weaknesses in its strategy. In certain cases, seeking regulatory intervention or even initiating litigation against the activist may be appropriate.

Proxy votes

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

In France, the record date for shareholder voting is legally set at two trading days prior to the meeting. Many companies listed in Paris outsource their share registrar (including the management of voting at shareholders' meetings) to external service providers. These service providers may keep issuers apprised of the general tendency of votes received as from the date of the initial notice of the meeting; however, in any event, the bulk of the voting returns are not available until the last few days preceding the shareholders' meeting.

French public companies must provide their proxy voting guidelines in a notice that must be made at least 35 days prior to the meeting. Shareholders must be provided with a supplemental notice of meeting no less than 15 days prior to the meeting. Both notices must specify, among other details, the deadline for the return of the proxy forms.

Shareholders may choose between one of the four following options of participation:

- attend the general meeting in person;
- grant proxy to the chair of the shareholders' meeting or to any individual or legal entity of their choice;
- vote by post; or
- participate by electronic means.

Under the relevant legislation, the proxy forms must be provided by mail to the company at least three days prior to the meeting, except if a shorter period is permitted under the company's by-laws. If they are to be provided electronically, the proxy forms must be received by the company no later than 3pm CET on the day prior to the meeting.

Settlements

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

Formal settlements with activists are relatively rare; however, there are precedents, including Valeo and Saint-Gobain. It may be necessary to disclose the main terms of such agreements under AMF rules.

These agreements may include board representation, an undertaking not to vote in favour of resolutions that do not have board approval, a cap on voting rights or a standstill and pre-emption rights.

SHAREHOLDER COMMUNICATION AND ENGAGEMENT

Shareholder engagement

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

Companies may adopt a variety of different organised shareholder engagement efforts, including communication via the company website, shareholder newsletters, shareholder guides, shareholder clubs, consultative committees, meetings with shareholders and educational outreach, and preferred dividends and loyalty shares.

23 Are directors commonly involved in shareholder engagement efforts?

Promoting direct dialogue between directors and shareholders has been a subject of increased focus in France, notably in response to growing pressure from institutional investors. In this respect, the AFEP-MEDEF Governance Code (as applied by the majority of the CAC 40) was amended in June 2018 and introduced the concept of the chair of the board of directors, or a 'lead' director, being entrusted with shareholder relations, in particular with regard to corporate governance, although other subjects are not excluded.

In March 2021, the French Financial Markets Authority (AMF) introduced an express recommendation that a dialogue be established between an issuer's board and shareholders, if necessary through a lead director, on the main topics of interest to shareholders, including issues relating to strategy and environmental, social and governance performance.

Disclosure

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

Subject to certain exceptions, French law imposes on issuers an ongoing obligation to disclose any inside information directly concerning the issuer as soon as possible. The issuer is responsible for ensuring the effective and complete disclosure of the inside information; among other things, this requires that the issuer promptly posts the information on its website. Thus, for example, in the event that non-public information is inadvertently shared with the activist, that information must generally be promptly disclosed to the market.

The AMF specifically recommends that the presentation materials prepared for governance roadshows be posted on the company's website.

Communication with shareholders

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

Under French law, shareholders are permitted to solicit proxies from other shareholders, with limited requirements and restrictions compared to other jurisdictions. In this respect, any person who actively solicits proxies must present its voting policy on its website. Such a person may also publicise its intentions as to any draft resolutions that may be before the shareholders, in which case the person soliciting proxies is required to vote consistently with the intentions that it has publicised. A person who represents others at a shareholders' meeting may also, under certain circumstances, be subject to other disclosure requirements.

Proxy solicitation may lead to a risk of acting in concert with other shareholders who come to share the activist's views, which may be the case either in the context of true proxy solicitation or in the context of more general efforts to persuade and coordinate with other shareholders. In addition, it is a criminal offence to agree to any payment or other benefit in exchange for voting or abstaining from voting at a shareholders' meeting.

As part of shareholder engagement efforts, management is in a position to communicate its views on the best direction for the company. In addition, the draft resolutions provided to shareholders in the notice of the meeting will typically include the board of directors' recommendations on how shareholders should vote for each resolution.

Access to the share register

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

Any shareholder may request a list of the nominal shareholders (including the number of shares held) at any time during the 15 days that precede a shareholders' meeting. Shareholders may also request at any time the shareholder attendance sheets for the shareholders' meetings held in the previous three years. However, only the company may seek out the identity of the ultimate beneficial shareholders, and even the company may only do so in the event that its by-laws specifically so provide. In any event, beneficial shareholders holding in excess of 5 per cent of the share capital or voting rights are required to disclose this (and the crossing of various other thresholds) to the company and the AMF, and the AMF provides these disclosures to the public on its website.

UPDATE AND TRENDS

Recent activist campaigns

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

Following Capgemini's 2019 announcement of its takeover bid for Altran Technologies, Elliott Management (Elliott) took a position and stated that it would not tender its shares. Capgemini subsequently increased its offer price, and the offer was successfully closed in early 2020 following Capgemini's acquisition of a majority of Altran's share capital. In the context of the covid-19 crisis, Elliott subsequently tendered its participation, allowing Capgemini to secure over 98 per cent of Altran's capital shares and voting rights at the end of the second reopening period of the takeover bid. Capgemini squeezed-out minority shareholders and Altran was delisted on 15 April 2020.

In January 2021, Bluebell Capital and Artisan Partners began a campaign that ultimately ended in the removal of Emmanuel Faber, chairman and CEO of Danone in March 2021.

If current conditions and trends continue, activism appears poised to continue to play an important role in France. Based on worldwide trends, we may see a maturing of the international component of French activism, including:

- more major activist interventions in France;
- non-activist institutional investors becoming more 'active', ranging from supporting activists' campaigns (eg, Financière de l'Echiquier in its team-up with Sterling Strategic Value concerning Latécoère) to themselves opportunistically becoming activist (eg, occasional activist P Schoenfeld Asset Management in its Vivendi campaign);
- companies becoming the targets of distinct serial activist interventions (in addition to wolf packs); and
- more sophisticated and increasingly M&A-focused activist campaigns.

We may also see an increase in activism against targets that had previously been sheltered by the state as the state reduces its exposure in certain listed companies. In addition, as activism becomes commodified, we have seen the growth of a new generation of smaller European and French players.

DARROIS VILLEY MAILLOT BROCHIER

Bertrand Cardi bcardi@darroisvilley.com
Forrest G Alogna falogna@darroisvilley.com

69 Avenue Victor Hugo, Paris 75116, France
Tel: +33 1 45 02 19 19
www.darroisvilley.com

Read more from this firm on Lexology

Read this article on Lexology

Japan

Yo Ota, Shigeru Sasaki and Bonso Morimoto
Nishimura & Asahi

RETURN TO CONTENTS

Summary

GENERAL

Primary sources

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

The Companies Act and its relevant ordinances provide for the rights of shareholders in regard to the company and its organisation, such as the right to make a shareholder proposal or initiate a derivative suit against directors. The rights stipulated in the Companies Act are, in principle, of a civil nature and enforced through court rulings.

The Financial Instruments and Exchange Act (the FIE Act) and its relevant orders and ordinances regulate or provide for the following:

- disclosure obligations of companies whose securities are widely held;
- rights of investors to sue the company or its related parties;
- rules regarding a tender offer bid (TOB);
- disclosure obligations of an investor with large shareholdings;
- rules protecting market fairness, such as prohibitions against market manipulation and insider trading; and
- rules regarding a proxy fight.

The FIE Act deals with both civil and administrative matters. It is, therefore, enforced through court rulings and administrative actions by the relevant authorities, such as the Financial Services Agency and the Securities and Exchange Surveillance Commission. In some cases, criminal sanctions may be imposed for certain violations.

Both the Companies Act and the FIE Act are legislated and amended by the Diet, while relevant Cabinet orders and ordinances are enacted by the Cabinet or by various ministries or agencies, such as the Financial Services Agency, as the case may be.

Securities exchange rules and guidelines also regulate disclosures by listed companies, and their communications with investors. While such rules and guidelines are not enforced through court rulings or administrative procedures, securities exchange regulatory entities may impose various sanctions against a violating company, including a suspension of transactions of the company's shares on the securities exchange, a designation as a security on alert, a monetary penalty for a breach of the listing contract, submission of an improvement report, and, in extreme cases, delisting.

Shareholder activism

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

Activists' campaigns have been very frequent in the Japanese market recently. Based on a financial paper, the number of shareholder proposals hit the record high in 2022, and in this vein, some funds are trying to have a dialogue with management to improve the governance structure, management plan or financial structure of the targeted company.

They will sometimes launch a formal shareholder proposal at a general shareholders' meeting to elect outside directors, to increase dividends, or to make a share buyback. As these proposals are generally in line with other shareholders' common interests, and due to the fiduciary duty of financial institutions and non-activist types of funds as shareholders complying with the Stewardship Code (which may also be applied if a shareholder voluntarily chooses to accept the Code and does not have any legally binding power) – it is not uncommon for these proposals to attract general shareholder support even without intensive proxy campaigning.

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

Historically, shareholder activism has been viewed negatively in most cases, as such activism is sometimes deemed to constitute short-termism, and is criticised in the Stewardship Code and the Corporate Governance Code. However, in some instances, especially in recent years, activists' proposals have been supported by other shareholders, including mid-term and long-term investors. Although there is little observable bias among the industries targeted by activist shareholders on an individual company level, one or more of the following factors often apply to the targeted listed companies:

- low price-to-book ratio;
- excess reserved cash or cash equivalents;
- management scandals or inefficient management;
- status as a conglomerate;
- status as a listed subsidiary; and
- through M&A transactions.

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

Although there are some individual activist shareholders who make shareholder proposals, or in some instances bring a lawsuit against the targeted company, most activist shareholders of Japanese companies are financial funds. While the boundaries are not entirely clear, such activist funds can be categorised into three types.

The first are 'aggressive' or 'dogmatic' activists who seek short-term returns by putting pressure on the company's management in various ways. They criticise the existing management's plans or skills or, as the case may be, any management scandals to put pressure on management, via either private or public methods such as media appeals, proxy campaigns or partial tender offers. Although their arguments are often too dogmatic and myopic to attract the support of other shareholders, to avoid wasting management resources and damaging the company's reputation, management will sometimes compromise with an activist's proposal or support an exit of an activist's investment.

The second are 'soft' activists. They would prefer to have a dialogue with management to improve the governance structure, management plan or financial structure of the targeted company. They will sometimes launch a formal shareholder proposal at a general

shareholders' meeting to elect outside directors or to increase dividends. As such proposals are generally in line with other shareholders' common interests, it is not uncommon for such proposals to attract general shareholder support even without intensive proxy campaigning.

The third type are 'M&A activists'. They invest in a company that is the target of or a party to an M&A transaction, especially with respect to tender offers. These funds do not necessarily object to the transaction itself but demand, as minority shareholders, more favourable conditions for the transactions. When such favourable conditions have been reached, the funds exit.

Recently, some activists have advocated strongly for environmental, social and governance issues, including global warming. This trend is expected to strengthen in the coming years.

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

Traditionally, activist shareholders in Japan have demanded that the targeted companies increase dividends or buy back shares. Another common request by activist shareholders is the introduction of or increase in the number of outside directors. By contrast, US-based activist shareholders have sometimes requested that Japanese companies make drastic business divestures.

Traditional proposals for the increase of dividends or share buy-backs are still made, but recently, activist shareholders have been campaigning over governance concerns more often. In addition to proposals regarding outside directors or opposition to a company's slate, activist shareholders, especially US-based activist shareholders, have campaigned for divestitures of cross-held shares (or *mochiai*). In addition, certain US-based activist shareholders have conducted campaigns to raise the TOB prices in some Japanese listed companies that were the targets in friendly M&A transactions by way of the TOB.

On the other hand, some individual activists tend to focus more on social issues, such as the abolition of atomic power plants.

SHAREHOLDER ACTIVIST STRATEGIES

Strategies

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

In most cases, activist shareholders first try to negotiate with management privately. Aggressive activist shareholders sometimes disclose their proposals or requests publicly without any private negotiation, in order to put pressure on management.

With respect to general shareholders' meetings, which must be held at least annually, activist shareholders may submit shareholder proposals, and sometimes wage proxy fights to pass their proposals. Such shareholder proposals include proposals to appoint one or

more outside directors. Another form of proxy fight is opposing a company's slate. Activist shareholders have rarely been successful in gaining mainstream investor support of such proxy fights. However, in 2017, Kuroda Electric's general shareholders' meeting approved the only candidate on the dissident slate.

In addition to the above strategies, while it is not so common, activist shareholders can also threaten to launch a tender offer for target shares. Some activists use the threat of a lawsuit against the targeted company or its management. However, regulations on giving benefits to shareholders prohibit any person, including activists, from demanding money or any form of benefit, including a company buy-back of activist shares, in return for withdrawing their shareholder proposals or requests.

Processes and guidelines

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

In principle, in a listed company, a shareholder who satisfies certain requirements may propose a matter to be discussed at a general shareholders' meeting up to eight weeks prior to the meeting (section 303, the Companies Act). The eligible shareholder must possess 1 per cent or more of the issued and outstanding shares, or 300 or more voting rights, for more than six months before submitting the proposal. The same shareholding minimum and shareholding period apply if a shareholder demands that the company describe the specific content of a proposal in the convocation notice of a general shareholders' meeting at the company's cost. A company may limit the number of words of the proposal description in accordance with its internal rules and procedures for managing shares. If the proposal violates any law or the articles of incorporation of the company, or if a substantially similar proposal was not supported by more than 10 per cent of the voting rights of all shareholders during the three-year period immediately preceding the proposal, the company may decline to include the proposal in the convocation notice. In 2019, though the National Diet discussed amending the Companies Act to limit the number of proposals and the abuse of proposals, that amendment was not made.

If a shareholder does not demand the inclusion of its proposal in the convocation notice, there are no shareholding minimums or shareholding period requirements, and every shareholder who has a voting right may submit a proposal at any time. However, a proposal is not permitted if it violates any law or the articles of incorporation of the company, or if a substantially similar proposal was not supported by more than 10 per cent of the voting rights of all shareholders during the three-year period immediately preceding the proposal.

The above rules apply to every shareholder regardless of the nature of the shareholder.

As a result of several public incidents in shareholders' meetings, the Ministry of Justice, which drafts the Companies Act and its amendments, submitted a bill in 2019 to defend against abusive proposals by limiting the number of shareholders' proposals and prohibiting certain proposals that mainly disparage others or disturb the shareholders' meeting. The National Diet amended the Companies Act in 2019 to entitle a company to reject any shareholder proposals exceeding 10 (ie, if 12 proposals are made, a company has to accept 10 proposals but can reject two such proposals). The Diet, however, rejected the amendment to prohibit certain shareholder proposals based on the contents thereof.

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

Shareholders may nominate directors who are not on the company's slate. Nominations are considered to be shareholder proposals.

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

For a listed company, a shareholder who has more than 3 per cent of all voting rights during the six-month period immediately preceding the proposal may call an extraordinary shareholders' meeting (section 297, the Companies Act).

If the company does not send the convocation notice promptly, or if the convocation notice does not indicate that the extraordinary shareholders' meeting will be held within eight weeks of the shareholder's demand, the demanding shareholder may call, by themselves on behalf of the company, an extraordinary shareholders' meeting with court approval (section 297, the Companies Act). The courts must approve such convocation unless circumstances indicate that the shareholder is merely abusing their rights to create a nuisance or other similarly irrelevant purposes.

If shareholders unanimously approve a proposal by written consent in lieu of a meeting, the approval is deemed to be the equivalent of a resolution of a shareholders' meeting (section 319, the Companies Act). If the consent is not unanimous, the consent is not equivalent to a resolution. In listed companies, each shareholder may exercise its voting rights in writing or through a website without physically attending the meeting.

Litigation

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

Shareholders may bring derivative actions (section 847, the Companies Act). Although it may be theoretically possible to bring a tort claim against the company in some instances, derivative actions are the main type of litigation that shareholders initiate.

Shareholders who have continuously held shares for more than six months may demand that the company sue its directors (and other officers, if applicable). If the company does not file the lawsuit within 60 days of the demand, the shareholders may bring a derivative action on behalf of the company. The shareholders of the parent company may also file a derivative suit against directors (and officers, if applicable) of wholly owned subsidiaries of the parent company (ie, a double or multiple derivative suit) if such subsidiary does not file the lawsuit within 60 days of the demand against the subsidiary by the parent company's shareholders.

The company cannot strike down the lawsuit by itself even if it is an abusive action by a shareholder. However, if it is abusive, in theory, the company may pursue a tort claim against the shareholder and request damages. To ensure that the company can recover damages if a derivative action is found to be abusive, the court may order the shareholder to place a certain amount in escrow prior to the start of a derivative action (section 847-4, paragraph 2, the Companies Act).

Japan does not have class action lawsuits similar to those in the United States, and a person cannot file a multi-plaintiff litigation without obtaining the approval of each plaintiff. Although a new type of 'consumer litigation' was introduced on 1 October 2016, securities transactions may be outside its scope. This is because tort claims under the new type of litigation are limited to claims based on the Civil Code of Japan, even though litigation in Japan regarding securities transactions belongs to the wider category of tort claims.

SHAREHOLDERS' DUTIES

Fiduciary duties

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

It is not commonly considered that the shareholders owe fiduciary duties to the company. The listing rules requires intensive disclosures with respect to the transactions between the parent company and its listed subsidiary.

Compensation

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

The Companies Act is silent on this issue. However, a director must act in the best interests of the company. If an individual shareholder directly compensates a director, the payment is treated as a gift, not salary, for tax purposes. In addition, if a director acts for the benefit of any specific shareholders instead of for the benefit of the company due to being directly compensated by such shareholder, it may be a criminal breach of trust that violates regulations on giving benefits to shareholders.

However, some subsidiaries of listed companies are also listed companies themselves, and directors of such subsidiaries are often employees seconded or dispatched from their parent companies. Under such circumstances, the compensation a director receives as an employee of the parent company may inevitably appear to be compensation for acting as a director of a subsidiary. Even in such circumstances, the director must act for the benefit of the subsidiary, not for the parent company.

Mandatory bids

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

The Financial Instruments and Exchange Act (the FIE Act) requires that a mandatory tender offer bid (TOB) be conducted when a party acquires shares from off-market trading and consequently holds one-third or more of all voting rights. If multiple purchasers act in concert, the threshold of one-third is determined in aggregate. Therefore, if the aggregate shareholding ratio of shareholders acting in concert exceeds one-third and such shareholders intend to acquire additional shares in an off-market transaction, they must make a TOB. This requirement, however, does not apply to share acquisitions in the market. In addition, even a mandatory TOB does not necessarily result in the acquisition of all the shares of the targeted company, and the purchaser may make a capped TOB as long as the cap is set at less than two-thirds of all voting rights.

Under the FIE Act, persons that have agreed to (1) jointly acquire or transfer the shares, (2) jointly exercise voting rights or other rights as shareholders, or (3) transfer or accept a transfer of the shares between them after the planned acquisition are deemed to be acting in concert. In addition, those who (1) have certain family relationships or capital relationships (in the latter case, including the entities) or (2) serve as an officer of the acquiring company or other certain company that has certain capital relationships with the acquiring entity, are deemed to be acting in concert.

Disclosure rules

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

The FIE Act requires a shareholder of a listed company to file a report of the possession of a large volume of shares within five business days after the shareholding ratio of the shareholder exceeds 5 per cent. In the report of the possession of a large volume of shares, the purpose of the investment has to be disclosed. If the shareholders intend to make certain managerial proposals and shareholders proposals, such intention has to be disclosed.

If multiple persons acquire shares of the same company in concert, or if multiple persons agree on the exercise of voting rights, the threshold is determined based on the aggregate of those persons' shares. However, determining whether multiple persons are acting in concert is difficult and is not necessarily enforced.

Certain institutional investors, including banks, broker-dealers, trust banks and asset management companies, may file the report based on the ratio on the record date, which in principle is set once per two weeks if the investor holds 10 per cent or less and does not intend to act to significantly influence the operation or management of the issuer company.

A violation of the reporting obligation may result in an administrative monetary penalty.

Additionally, in certain transactions where an acquiring company and a targeted company are considered to be large by industry standards, antitrust laws require a prior filing,

including disclosure of the shareholding ratio, and mandate an appropriate waiting period. Further, the Japanese Foreign Exchange and Foreign Trade Control Law requires non-Japanese investors to make the filing prior to acquiring 1 per cent (or 10 per cent, under certain exemptions) or more shares of listed companies in certain industries designated by the Japanese government as vital to national security, public order, the protection of public safety or the smooth operation of the Japanese economy. Such industries include weapons, aircraft, nuclear facilities, space and dual-use technologies, and part of the electricity, gas, telecommunications, water supply and railway industries, among others.

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

To determine the shareholding ratio for a report of the possession of a large volume of shares, shares obtained by certain types of stock lending and certain share options have to be aggregated. Though the long positions of total return swaps are generally not included, certain types of total return swaps conducted for purposes other than pure economic profit or loss must also be aggregated.

Consequently, in some cases, activists have not filed a report of the possession of a large volume of shares even though they purported to 'own' more than 5 per cent and have made certain demands or held certain conversations as large shareholders.

Insider trading

16 Do insider trading rules apply to activist activity?

Trading by an activist is regulated by the insider trading rules. If the activist is aware of any material non-public information of the company through the activist activity, market trading by the activist is prohibited until the information becomes public. The mere fact that the activist made the shareholders' proposal, may not be material non-public information, depending on the discussions with the company, but there is still a possibility it may be.

COMPANY RESPONSE STRATEGIES

Fiduciary duties

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

In general, a director's duty with respect to an activist proposal is similar to other board decisions; namely, the business judgement rule. Unless there is a conflict of interest between the company and the directors, and unless there is a violation of laws or the articles of incorporation of the company, the courts generally respect the wide discretion of the board, assuming that the board made a reasonable decision that duly recognised the applicable facts and circumstances. However, even under this Japanese business judgement rule, Japanese courts may sometimes carefully scrutinise the context and situation surrounding

the board's decision. In Japan, it has thus far been understood that no controlling shareholder owes any fiduciary duty to minority shareholders.

Preparation

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

As activist shareholders have enhanced their presence in Japanese businesses, we generally advise our clients to periodically check the shareholders' composition and improve their governance structures, business plans or financial structures, and recommend that they engage in proactive communication with their shareholders.

Defences

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

Against a corporate raider, the Japanese rights plan or 'large-scale share purchasing policies' may be a structural defence, even though the ratio of companies adopting such plans has been gradually decreasing (in comparison, the ratio is higher among larger market capitalisation companies); and, as at the end of July 2022, less than 10 per cent of the companies listed on the Tokyo Stock Exchange have adopted such plans. Under this plan, a company implements procedures in advance that a potential raider must follow, although the company does not issue rights or warrants (unlike poison pills in the United States). If a potential raider crosses the shareholding threshold (typically, 20 per cent) without complying with the procedures, or a potential raider is recognised as an 'abusive raider', new shares will be issued and allocated to all shareholders except the violating raider. Thus, the raider's shareholding ratio will be diluted. If an activist does not intend to cross the threshold, such a plan is not a defence against the shareholders. However, companies that have been targeted by activists rarely have such a plan in place.

Other than the above-mentioned plan, structural defences such as dual capitalisation are rarely possible. In addition, as the term of office of a director at a Japanese listed company is one or two years (depending on the company's governance), a staggered board is not an effective measure, in practice.

In 2020, there was an instance where a company (Shibaura Machine (FKA Toshiba Machine)) successfully activated the 'shelf' Japanese rights plan and the activist's tender offer was unsuccessful, even though there was no court ruling on this plan because the activist had withdrawn its campaign after the plan was supported by shareholders at the shareholders' meeting. Therefore, the Supreme Court judgment in the *Bull-Dog Sauce* case in 2006 is still important as a precedent. In the *Bull-Dog Sauce* case, the company (Bull-Dog Sauce) had not adopted the rights plan and the anti-takeover defence measures in the case were adopted after the raider announced its intent to launch a tender offer. The Supreme Court stated, obiter, that the rights plan had a net positive effect, as it increased the predictability of the outcome of a takeover. The Supreme Court also followed this logic in the guidelines for defence measures against hostile takeovers issued by the Japanese Ministry of Economy,

Trade and Industry, and recognised the validity of an anti-takeover defence (similar to a poison pill in the United States) implemented by a target.

In 2021, there were also some remarkable cases. In *Fuji Kosan v Aslead Strategic Value Fund*, Fuji Kosan, an oil distributing company, successfully defended itself against Aslead by implementing a rights plan via a resolution at a board of directors meeting and subsequent ratification by a simple majority vote (in favour of implementation) of the shareholders at a general shareholders' meeting. Although this was a Tokyo High Court case, it paved the way for listed companies to implement a rights plan in a timely manner during a hostile acquisition. In *Tokyo Kikai Seisakusho v Asia Development Capital et al*, Tokyo Kikai Seisakusho (TKS), a manufacturing company, successfully defended itself against Asia Development Capital (ADC), an investment company, and Asia Development Fund (ADF), ADC's subsidiary, by implementing a rights plan via a resolution at a general shareholders' meeting, which was approved by majority vote (in favour of implementation) of shareholders other than the relevant parties, including ADC, ADF and the directors of TKS. This was an important Supreme Court case, which justified the implementation of rights plan against a shareholder building a stake through market trading. In 2022, there were no changes to laws and regulations or court rulings to limit the anti-takeover defences available to a company, while there are some cases relating to the defence against the 'wolf pack' by corporate raiders.

Proxy votes

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

Trust banks that act as standing agents receive voting forms from shareholders. Consequently, in practice, a company may receive an early voting ratio and other information during the period for sending back voting forms (ie, after the convocation notice but before the due date of the voting forms). The company is not obliged to disclose any information it receives from the voting forms prior to the date of the general shareholders' meeting. During a proxy fight, however, a company does not have any way of determining how many proxies an opposing shareholder will receive.

Settlements

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

'Soft' activists would prefer to have a dialogue with management to improve the governance structure, management plan or financial structure of the targeted company. Although soft activists sometimes launch a formal shareholder proposal at a general shareholders' meeting, the company may agree on the proposals without the proxy campaign.

SHAREHOLDER COMMUNICATION AND ENGAGEMENT

Shareholder engagement

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

While organised engagement among activist shareholders is not common, when an activist shareholder launches a campaign, other activist shareholders may support the campaign. Consequently, engagement efforts tend to be public and formal. Even during a public campaign, the company may choose to compromise by accepting the activist's proposal or presenting the proposal during the shareholders' meeting as the company's proposal.

23 Are directors commonly involved in shareholder engagement efforts?

Although the Corporate Governance Code recommends that directors take a leading role in engaging with shareholders, in most cases, management or the executive team is in charge of shareholder engagement efforts. Executive directors are sometimes directly involved in shareholder engagement, but it is at the company's discretion.

Disclosure

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

Under the Corporate Governance Code, the board of a listed company must determine and approve a corporate governance policy that facilitates constructive dialogue with shareholders, and disclose the policy in a corporate governance report that must be filed under section 419 of the Securities Listing Regulations. Individual communications need not be disclosed.

Through an amendment to the Financial Instruments and Exchange Act (the FIE Act) and Cabinet orders and ordinances that were implemented from 1 April 2018, listed companies are required to make an equal disclosure, to a certain degree, to all shareholders. The new regulation is similar to Regulation FD in the United States, rather than the EU Market Abuse Regulation. Even under the new regulation, a listed company may make a selective or an unequal disclosure if the recipient has a non-disclosure obligation and is prohibited from making a transaction of the company's securities. If disclosure to a shareholder, investor or other third party is not exempted and is intentionally made, the company must make a public disclosure at the same time as the disclosure to that third party. If the disclosure is not intentionally made, the company must make a public disclosure immediately after the disclosure to the third party. The company may make a public disclosure through the Electronic Disclosure for Investors' Network run by the Financial Services Agency, TD-net (the electronic disclosure system of the Tokyo Stock Exchange) or its corporate website.

In addition to the above fair disclosure regulation, the disclosure of insider information to specific shareholders under certain circumstances may result in a violation of insider trading regulations.

Communication with shareholders

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

Regulations on proxy solicitations or Japanese proxy rules apply to both companies and shareholders when they solicit proxies (section 194, the FIE Act; section 36-2 to 36-6, Order for Enforcement of the FIE Act; and Cabinet Office Order on Solicitation of Proxy Voting for Listed Shares). The regulations set forth certain requirements on the proxy, and also require that certain information be provided to the shareholders during a proxy solicitation. However, if the same information is disclosed in the reference documents that are typically enclosed with the convocation notice of a shareholders' meeting for which proxies are solicited, those who solicit the proxies (the company or the shareholders) do not have to separately provide the above-mentioned required information. Further, if a company solicits proxies, offering certain economic benefits to shareholders to facilitate favourable voting results may violate regulations on giving benefits under the Companies Act. Currently, social media platforms (such as Twitter and LinkedIn) are not commonly used as communication tools during campaigns between targeted companies and activists.

Access to the share register

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

A shareholder on the shareholders' list may request access to the shareholders' list (section 125, paragraph 2, the Companies Act). The company may reject such a request on certain grounds, including:

- if the request is made for purposes other than exercising general shareholder rights;
- if the request is made with the purpose of interfering with the execution of the operations of the company or prejudicing the common benefit of the shareholders;
- if the request is made to report facts obtained through a request to a third party for profit; or
- if the requesting shareholder reported facts obtained through a request to a third party for profit within two years (section 125, paragraph 3, the Companies Act).

The shareholders' list in a listed company only records nominee shareholders, and the beneficial owners are not recognised by the shareholders' list.

UPDATE AND TRENDS

Recent activist campaigns

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

In 2022, no hostile takeover bid was actually launched but the hostile takeovers (without hostile takeover bid) have remained high. In particular, some mid-and small-cap-companies have been subject to hostile or unsolicited takeover actions. In such companies, certain groups of investors have acquired in aggregate significant portions of shares of companies (for example, more than 20 per cent of the issued and outstanding shares of a company) through trading in the market (in other words, in securities exchanges), and submit shareholder proposals to companies, or request that extraordinary shareholders' meetings be held to change the entire board members. In those instances, there is typically little information available about these investors as those investors sometimes did not properly disclose their relationships in a mandatory report of the possession of a large volume of shares (or even did not file the report at all). Consequently, it may be sometimes practically difficult for the listed company to establish that those investors as 'acting in concert.'

In *Mitsuboshi v Adage Capital LLP*, Mitsuboshi Co, Ltd (Mitsuboshi), a long-established Japanese electronic wire manufacturer, introduced a rights plan as a defence against Adage Capital LLP and other relative shareholders, including SUCCESS INVESTMENT LLC, WAEN Corporation, CMC Corporation, and an individual investor, who is a representative director of WAEN Corporation, claiming that they jointly acquired a more than 20 per cent stake in Mitsuboshi through market trading (hereafter Adage Capital LLP, SUCCESS INVESTMENT LLC, WAEN Corporation, CMC Corporation, and the individual investor are collectively referred to as the 'Involved shareholders'). After reaching an ownership ratio of more than 20 per cent through market trading, the Involved shareholders ceased purchasing additional shares; Mitsuboshi's board, however, decided to implement the rights plan. The rights plan allowed Mitsuboshi to dilute the stake of the Involved shareholders by issuing new warrants to existing shareholders that allowed such shareholders (other than the Involved shareholders) to obtain new shares, and an extraordinary shareholders' meeting later approved the rights plan via a majority vote of shareholders. The Osaka High Court rejected Mitsuboshi's implementation of the rights plan primarily because the rights plan disproportionally restricted the Involved shareholders' rights without sufficient evidence to support its findings that the Involved shareholders acted jointly by engaging in parallel conduct. The Supreme Court of Japan eventually upheld this decision even though the Supreme Court did not explain the detailed reason.

In addition to such market trend, there was an lower court ruling that may open doors for activists to submit shareholder proposals requesting the implementation of spin-offs, which has been uncommon in Japan as a formal shareholder proposal.

In *Faith, Inc v RMB Japan Opportunities Fund, LP*, RMB Japan Opportunities Fund, LP (RMB) submitted a shareholder proposal for the general shareholders' meeting in Faith Inc (Faith) requesting that Faith implement a dividend in which the property to be distributed consisted of 100 per cent of the common shares of NIPPON COLUMBIA CO, LTD (NIPPON

COLUMBIA), Faith's wholly owned subsidiary, on the condition that (1) Faith receive approval of a corporate restructuring plan from the Minister of Economy, Trade and Industry under the Act on Strengthening Industrial Competitiveness and (2) all such common shares of NIPPON COLUMBIA be listed on the TSE. Faith treated the proposal unlawful because such actions are subject to the business judgement by the board (rather than the resolutions of shareholders' meetings). The Kyoto District Court, however, ruled that RMB's shareholder proposal requesting that all common shares of NIPPON COLUMBIA be distributed as dividend in kind was potentially permissible (even though the court reject the injunction because the convocation notice had been made for the general shareholders' meeting). Based on this lower-court decision, some activists might consider to submit shareholder proposals requesting the spin-offs of wholly owned subsidiaries.

NISHIMURA & ASAHI

Yo Ota y.ota@nishimura.com
Shigeru Sasaki s.sasaki@nishimura.com
Bonso Morimoto b.morimoto@nishimura.com

Otemon Tower, 1-1-2 Ōtemachi, Chiyoda-Ku, Tokyo 100-8124, Japan
Tel: +81 3 6250 6200
www.nishimura.com

Luxembourg

Margaretha Wilkenhuysen*

NautaDutilh

RETURN TO CONTENTS

Summary

GENERAL

Primary sources

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

Luxembourg's main statutes on corporate governance include the Act of 10 August 1915 on Commercial Companies (the Companies Act), which was revamped in 2016 to modernise Luxembourg corporate law, the Market Abuse Regulation and the Act of 24 May 2011 (the Shareholder Act).

Shareholder rights and governance in Luxembourg are statute-based, consisting primarily of the Civil Code, the Companies Act and, for listed companies, the Shareholder Act and the rules and regulations of the Luxembourg Stock Exchange (LuxSE).

The Shareholder Act came into force on 1 July 2011. It implemented Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies, aiming to increase shareholders' activism and setting out a number of shareholders' rights. It has been amended by the Act of 1 August 2019, transposing the Second Shareholders' Rights Directive (EU) 2017/828 into Luxembourg Law. The amended Shareholder Act sets out rules on, inter alia, say on directors' pay, identification of shareholders, facilitation of shareholders' rights (including transmission of information) and transparency of institutional investors, asset managers and proxy advisers.

As a supplement to the general statutory law, the LuxSE's 10 Principles of Corporate Governance, as modified in October 2009 and revised in March 2013 (third edition) and December 2017, provide guidelines on best practice in corporate governance for all companies listed on the LuxSE. Luxembourg companies listed abroad often find inspiration in these LuxSE. The rules and regulations of the LuxSE have been substantially updated in January 2020 to take into account recent developments, in particular the Act of 16 July 2019 on prospectuses for securities.

Moreover, in 2018, Luxembourg implemented Directive 2014/65/EU on markets in financial instruments, aiming at increasing transparency, better protecting investors, reinforcing confidence, addressing unregulated areas, and ensuring that supervisors are granted adequate powers to fulfil their tasks. In addition, as of the entry into force of the EU Regulation on Markets in Financial Instruments, the provisions of the regulation are directly applicable in Luxembourg.

Companies whose shares are admitted to trading on a regulated market in a member state of the European Union, including Luxembourg, may also be subject to the Act dated 19 May 2006 on Takeover Bids, as amended (the Takeover Bid Act). The Takeover Bid Act notably provides for minority shareholder protection, the rules of mandatory offers and disclosure requirements.

In 2008, the Transparency Directive (Directive 2004/109/EC) was transposed into Luxembourg legislation through the Act of 11 January 2008, as amended.

A breach of certain statutory provisions of the Companies Act and, for listed companies, the Shareholder Act qualifies as a criminal offence, although prosecution is rare.

Shareholder activism

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

There are very few publicly available examples of shareholder activism in Luxembourg-listed companies. The most prominent example was the takeover of Arcelor by Mittal, which was only finally made possible following pressure from shareholders. A more recent example is Deer Park Road's investment in a Luxembourg-based company in 2017.

Furthermore, Deminor, a firm that is actively engaged in shareholder activism by representing minority shareholders and enforcing their claims accordingly, refers to a couple of Luxembourg companies on its website. Their names are redacted for obvious disclosure reasons, which makes it almost impossible to identify the companies concerned, but it is quite likely that they already have or will target Luxembourg-listed companies.

On a side note, Luxembourg hosts a number of funds that invest in companies worldwide and are active as shareholders in these entities. As an example, Active Ownership is a Luxembourg-based fund that managed to replace certain members in the supervisory board of STADA and, in 2019, became the most important shareholder in Agfa.

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

Luxembourg and EU company law reforms introduced new or strengthened shareholder rights around the turn of the 21st century. Luxembourg promotes more transparency, accountability and increased shareholder rights, especially in listed companies. In this context, the transposition of the Shareholder Rights Directive (Directive (EU) 2017/828) into Luxembourg law by the Act of 1 August 2019 must be mentioned. The Companies Act also granted additional rights to minority shareholders further to the changes made to the Companies Act in 2016.

It is hard to predict whether these changes will lead in practice to more public campaigns led by activist shareholders. It is certain that boards will, however, have to take into account the potential involvement and action from their shareholders, including minority shareholders.

In Luxembourg, no particular industry is more or less prone to shareholder activism. Activist campaigns against 'national champions' tend to face more backlash from the general public and politicians.

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

Deminor, a firm that is actively engaged in shareholder activism by representing minority shareholders and enforcing their claims accordingly, refers to a couple of Luxembourg companies on its website. Their names are redacted for disclosure reasons, which makes it almost impossible to identify the companies concerned, but it is quite likely that they already have or will target Luxembourg-listed companies.

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

Activist campaigns would typically be focused on a company sale or break-up, bumpitrage or return of capital. Long-term institutional investors tend to focus more on environmental, social and governance topics and executive compensation or say on pay.

Factors that tend to attract activists' attention include announced or potential M&A events, low leverage or strong cash positions, as well as perceived corporate governance issues, underperformance and inflated executive pay.

SHAREHOLDER ACTIVIST STRATEGIES

Strategies

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

Depending on the type of activist, its goals and the company's takeover defences, activists may use a number of different tactics to pursue their objectives, such as:

- privately engaging through informal discussions or 'dear board' letters (the starting point of most activist campaigns and the preferred tool of most institutional investors);
- publicly criticising a company's strategy, governance or performance or calling for a sale, break-up, return of capital or increased offer price (bumpitrage);
- short-selling stock and starting a public campaign to drive down stock prices;
- stakebuilding to build up pressure on the boards and signal seriousness;
- partnering with a hostile bidder;
- participating in and voting at general meetings;
- orchestrating a 'vote no' campaign;
- making a shareholders' proposal or requesting an extraordinary general meeting be convened; and
- initiating litigation.

Processes and guidelines

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

Shareholders representing individually or collectively at least 5 per cent of a Luxembourg company's capital request for listed entities falling within the scope of the Shareholder Act or 10 per cent for other entities, as the case may be, have the right to amend a notice to the shareholder meeting (under the Shareholder Act) and add additional items to the agenda. The company may refuse to put an item on the agenda as a voting item (rather than a discussion item), if it concerns a matter that falls outside the power of the general meeting. In addition, shareholders representing 10 per cent of a company's share capital may force the board to postpone a general meeting of shareholders for a period of up to four weeks.

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

Even if director nomination is typically made via the company's nomination committee, any shareholder holding at least 5 per cent for listed entities falling within the scope of the Shareholder Act or 10 per cent for the other entities, as the case may be, has the right to amend a notice (under the Shareholder Act) to the shareholders' meeting and add the nomination of a director for election.

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

Shareholders representing individually or collectively at least 10 per cent of a Luxembourg company's capital (or a lower percentage as prescribed in the company's articles) may request of the board that a general meeting be convened. The request must set out in detail the matters to be discussed. If the board has not taken the steps necessary to hold a general meeting within one month (if the company's shares are not listed on a regulated market within the European Economic Area) of the request, the requesting shareholders may be authorised by the district court in preliminary relief proceedings to convene a general meeting, provided that they have a reasonable interest in holding the meeting.

No written resolutions can be taken.

Litigation

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

Shareholders can seek nullification of corporate resolutions (arguing, for instance, that the resolution is contrary to the company's interest) or bring wrongful act claims against companies or its directors (arguing that a particular conduct of the company or its directors constituted a tort against the claimant).

Read this article on Lexology

Derivative actions are not common under Luxembourg law. The law does not provide for class actions.

During the annual general meeting, the shareholders can question the board on all aspects of the company's management, accounting and so forth throughout the year, and may withhold the granting of discharge.

The right of shareholders to ask questions during the meeting and to receive answers to their questions is legally enshrined.

Under the Shareholder Act, in addition to the right to ask questions orally during a meeting, shareholders may have the right to pose written questions about the items on the agenda before the meeting is held. If provided for in a company's articles of association, questions may be asked as soon as the convening notice for the general meeting is published. The company's articles of association will furthermore provide the cut-off time by which the company should have received the written questions.

Apart from several specific circumstances (eg, in the case of confidential information), the company must answer any questions addressed to it. Should several questions relate to the same topic, the company may publish a detailed questions and answers document on its website, in which case the chair should draw the shareholders' attention to the publication.

The Companies Act also allows shareholders to submit questions to management outside a meeting. Any shareholder representing at least 10 per cent of the company's share capital or voting rights, or both, can ask the board of directors or management body questions about the management and operations of the company or one of its affiliates, without the need for extraordinary circumstances. If the company's board or management body fails to answer these questions within one month, the shareholders may petition, as in summary proceedings, the president of the district court responsible for commercial matters to appoint one or more independent experts to draw up a report on the issues to which the questions relate.

Certain matters must also be reported to the shareholders, such as any director's conflict of interest relating to voting on a resolution.

Although the concept of discovery does not exist under Luxembourg law, a party with a legitimate interest may submit a motion to the court demanding the production of specified documents pertaining to a legal relationship to which the requesting party or its legal predecessor is a party.

SHAREHOLDERS' DUTIES

Fiduciary duties

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

Under Luxembourg law, shareholders may, in principle, give priority to their own interests.

Read this article on Lexology

Compensation

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

There is no Luxembourg law that prohibits a director of a Luxembourg company from accepting compensation from a shareholder who nominated or appointed him or her. Irrespective of whether a director is nominated, appointed or compensated by a specific shareholder, Luxembourg corporate law requires all directors to be guided by the corporate interests of the company and its business in performing their duties and to consider with due care the interests of all stakeholders. If any such compensation creates, in respect of a particular board matter, a direct or indirect personal interest for the director that conflicts with the interests of the company and its business, the director may not participate in the deliberations and decision-making of the board on such matter.

Mandatory bids

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

The Luxembourg mandatory offer rules only apply to Luxembourg public companies whose shares or depositary receipts for shares are listed on a regulated market within the European Economic Area. Pursuant to the Luxembourg Financial Supervisory Authority and subject to limited exemptions, a mandatory offer requirement is triggered if a person, or a group of persons acting in concert, obtains the ability to exercise at least 33.3 per cent of all outstanding voting rights in a company (predominant control).

Concert parties refers to natural or legal persons who cooperate with the offeror or the offeree company on the basis of an agreement, either express or tacit, and either oral or written, aimed either at acquiring control of the offeree company or at frustrating the successful outcome of a bid.

Disclosure rules

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

Pursuant to the Transparency Act, any person who acquires or disposes of shares or voting rights of a Luxembourg company whose shares are listed on a regulated market within the European Economic Area, must forthwith (generally, the next trading day) notify the issuer of the proportion of voting rights of the issuer held by the shareholder as a result of the acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 5, 10, 15, 20, 25, 33.3, 50 and 66.6 per cent. It is not necessary to include the shareholders' intentions.

At a few listed Luxembourg companies, the articles of association impose additional notification obligations on shareholders.

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

Depositary receipts for shares are taken into account for purposes of calculating the percentage of capital interest and voting rights.

For the purposes of calculating the percentage of capital interest and voting rights held by a person, shares and voting rights held by the person's controlled entity, by a third party for the person's account or by a third party with whom the person has concluded an agreement to pursue a sustained joint voting policy, are taken into account.

Insider trading

16 Do insider trading rules apply to activist activity?

Yes, the insider rules apply with respect to Luxembourg companies whose shares or other financial instruments are listed on a regulated market within the European Economic Area. No person may:

- engage or attempt to engage in insider dealing;
- recommend that another person engage, or induce another person to engage, in insider dealing;
- unlawfully disclose inside information; or
- engage, or attempt to engage, in market manipulation.

COMPANY RESPONSE STRATEGIES

Fiduciary duties

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

Luxembourg corporate law requires all directors to be guided by the corporate interests of the company and its business in performing their duties. If the company has a business, the interests of the company generally are particularly defined by the interest of promoting the sustainable success of the company's business (ie, a focus on long-term value creation). Boards must weigh all relevant aspects and circumstances and must consider with due care the interests of all stakeholders, including shareholders, employees, creditors and business partners. Boards have a lot of discretion on how to weigh the various stakeholders' interests against each other, although the duty of care may require boards to prevent unnecessary or disproportionate harm to the interests of specific stakeholders. The board is responsible for determining and implementing the strategy of the company.

Responding to an unsolicited approach or activist proposal seeking to change the company's strategy (including by means of efforts to change the board composition) forms part of the company's strategy and, as such, falls within the domain of the board. There is no shift of fiduciary duties: the directors must continue to act in the best interests of the company

and its business with a view to long-term value creation, taking into account the interests of all stakeholders. Boards should ensure that they have all relevant information to make an informed decision, and the proposal should be carefully reviewed, without bias, and assessed against all available alternatives. Shareholders do not have to be consulted prior to the company's response; the board is (retrospectively) accountable to the shareholders.

Preparation

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

Although the absolute number of activist campaigns in Luxembourg is limited, no company is immune to activism, and preparedness is key. While recommended advance preparations depend on the specifics of the company, some useful preparations are:

- continuously monitoring market activity, financial performance (particularly relative to peers) and the company's industry and competitors;
- setting up a small defence team of key directors and officers plus legal counsel, an investment banker and a public relations firm that meets periodically;
- 'thinking like an activist', routinely assessing the company's strengths and weaknesses and its takeover defences and exploring available strategic alternatives (consider red teaming);
- building relationships and credibility with shareholders and other stakeholders before activists emerge and maintaining regular contact with major shareholders, the marketplace generally and key stakeholders; and
- communicating clearly and consistently on environmental, social and governance or corporate social responsibility matters, the company's long-term strategy, its implementation and the progress in achieving it.

Defences

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

Some listed Luxembourg companies have adopted one or more structural takeover defences, often in their articles of association. Examples include:

- priority shares with certain control rights; and
- listing of depositary receipts for shares rather than the shares itself.

In addition, Luxembourg companies may use a variety of other tactics, such as:

- engaging with shareholders and other stakeholders (eg, convince major shareholders with compelling long-term plans, mobilise employees and customers);
- exploring strategic transactions that make the company a less desirable target;
- issuing new shares (under existing authorisations) or selling treasury shares to a friendly third party (white knight); and

- issuing bonds with a mandatory redemption at a higher value in case of a change of control.

Proxy votes

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

It depends on the listing venue. Luxembourg companies with a US listing often (choose to) receive regular updates on the vote tally, especially in contested situations, consistent with market practice in the United States. Historically, this has been less so at Luxembourg companies with an EU listing.

Settlements

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

Private settlements with activists are not common in Luxembourg but do occur from time to time.

SHAREHOLDER COMMUNICATION AND ENGAGEMENT

Shareholder engagement

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

Organised shareholder engagement outside of general meetings and earnings calls – through investor days, road shows, presentations at conferences or bilateral contacts – has increased in recent years but tends to vary considerably from company to company. Larger issuers, in particular, tend to organise structured shareholder engagement. Engagement efforts tend to be elevated when the company is faced with a crisis or shareholder discontent (eg, an unsolicited approach or activist campaign, a negative recommendation from proxy advisory firms or poor voting results on say on pay or discharge of directors).

23 Are directors commonly involved in shareholder engagement efforts?

Depending on the company and the topic and shareholder concerned, shareholder engagement efforts may be led by a company's investor relations department or one or more managing or executive directors – in particular, the CEO or CFO. Non-executive or supervisory directors are less frequently involved in shareholder engagement, though non-executive or supervisory directors may lead conversations with investors regarding the performance or remuneration of managing or executive directors.

Disclosure

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

Certain listed Luxembourg companies have published a policy on bilateral contacts. Companies are not required to disclose shareholder engagement efforts. It is recommended that presentations to institutional or other investors and press conferences be announced in advance, that all shareholders be allowed to follow these meetings and presentations in real time and that the presentations be posted on the company's website after the meeting.

Selective disclosures by a Luxembourg company whose shares are listed on a regulated market within the European Economic Area, must comply with the requirements under the Transparency Act. In addition, Luxembourg companies must ensure equal treatment of all shareholders who are in the same position.

Communication with shareholders

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

For listed companies, according to the Luxembourg Stock Exchange's 10 Principles of Corporate Governance, companies should 'establish a policy of active communication with the shareholders' and allow shareholder dialogue with the board and the executive management. In addition, one of the main objectives of the amended Shareholder Act 2019 is to give listed companies the right to identify their shareholders and, in the end, improve the communication between the companies and their shareholders. Intermediaries, even those in third countries, are required to provide the company with information on shareholders' identities to communicate with them directly with a view to facilitating the exercise of shareholder rights and shareholder engagement with the company.

The explanatory notes to the agenda for a general meeting set out the company's position with respect to the agenda items. The meeting materials are posted on the company's website. Other public communications often take the form of press releases. Listed Luxembourg companies may decide to engage proxy solicitation firms or investor relations specialists to actively reach out to shareholders (in particular, Luxembourg companies with a US listing do so in line with US market practice).

Notified major shareholdings (more than 5 per cent) can be found in the online registers. The statutory provisions on identification of shareholders must be amended to bring them in line with the amended Shareholder Act.

Access to the share register

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

The Act of 13 January 2019 established a Luxembourg register of beneficial owners (the RBE Act). The RBE Act applies to entities registered with the Luxembourg Trade and Companies Register, including civil and commercial companies, branches of foreign companies, Luxembourg common investment funds, and other types of investment funds, such as the undertakings for the collective investment in transferable securities, risk capital investment companies, reserved alternative investment funds and specialised investment funds. There is, nevertheless, an exception for companies whose securities are admitted to trading on a qualifying regulated market (qualifying listed entities). The register was until recently accessible to everyone. On 22 November 2022, the European Court of Justice ruled that the 'public access' feature of the RBE is invalid in the light of the Charter of Fundamental Rights of the European Union and that it constitutes a serious interference with the fundamental rights to private life and the protection of personal data. As a result of this decision, the Luxembourg RBE register was inaccessible for a short period, but is now accessible again to a certain number of professionals as defined in the law of 2004 in the fight against white washing such as lawyers, notaries and representatives of the local press with a legitimate interest.

If a shareholder so requests, the (management) board must provide the shareholder, free of charge, with an extract of the information in the company's share register concerning the shares registered in the shareholder's name. Luxembourg companies are not required to provide access to or a copy of the full shareholders' register.

If an identification has occurred and shareholders holding 5 per cent of the issued share capital have been identified, the company must disseminate to its shareholders (and publish on its website) any information prepared by the requesting shareholders that relates to an agenda item for the general meeting. The company may refuse the request if the information:

- is received less than five days prior to the meeting;
- sends, or may send, an incorrect or misleading signal regarding the company; or
- is of such a nature that the company cannot reasonably be required to disseminate it (criticism of the company's policy or affairs is, in itself, not valid grounds for refusal).

UPDATE AND TRENDS

Recent activist campaigns

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

In line with the developments in EU law, there is in general a trend in Luxembourg law for more transparency, accountability and increased shareholder rights, especially in listed

companies. However, there is also the decision of 22 November 2022 of the European Court of Justice on the unlimited access to the RBE register in Luxembourg, which it considered invalid given contrary to the right to private life and protection of certain data. Luxembourg now replaced this unlimited access by an access limited to certain professionals and local press with a legitimate interest. Time will tell whether the changes in Luxembourg law, in particular the amended Shareholder Act, will lead to more public campaigns led by activist shareholders. It is certain that boards will, however, have to be aware of potential involvement and action from their shareholders, including minority shareholders. Directors of listed and larger companies (to be defined) should keep in mind that in the near future the ESG considerations will become part of the directors' duty of care as per the EU proposal for corporate sustainability due diligence directive (ESG Directive) and companies should start preparing for a change.

* *The author would like to thank Katia Volodine for her assistance with this chapter.*

NautaDutilh

Margaretha Wilkenhuysen greet.wilkenhuysen@nautadutilh.com
Katia Volodine katia.volodine@nautadutilh.com

2 Rue Jean Bertholet, Luxembourg 1233, Luxembourg
Tel: +35 2 261 22 91
www.nautadutilh.com

Netherlands

Stefan Wissing, Frans Overkleeft, Paul van der Bijl and Willem Bijveld

NautaDutilh

RETURN TO CONTENTS

Summary

GENERAL

Primary sources

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

The primary source of corporate law is Book 2 of the Dutch Civil Code (DCC). Its provisions are applicable to all companies organised under Dutch law, regardless of their listing venue, and are generally enforced through the civil court system or in proceedings before a specialist court (the Enterprise Chamber of the Amsterdam Court of Appeals).

The primary sources of securities laws are the Dutch Financial Supervision Act (DFSA) and directly applicable EU regulations, such as the Market Abuse Regulation (MAR) and the Short Selling Regulation. The DFSA provisions relating to takeovers of listed companies and disclosure obligations for listed companies and major shareholders apply to all Dutch companies whose shares or depositary receipts for shares are listed on a regulated market within the European Economic Area (EEA). The MAR and the Short Selling Regulation apply to (Dutch companies whose) shares or other financial instruments are listed on a regulated market within the EEA. The Dutch Authority for the Financial Markets is the competent authority for supervising compliance with the DFSA and, to the extent these regulations allocate competence to the competent authority in the Netherlands, the MAR and the Short Selling Regulation.

A breach of certain statutory provisions of the DCC, the DFSA and the MAR qualifies as a criminal offence, though prosecution (beyond imposing administrative penalties by regulatory authorities) is rare.

The revised EU Shareholders Rights Directive, as implemented in Dutch law, sets out rules on – inter alia – say on pay, identification of shareholders, transmission of information and transparency of institutional investors, asset managers and proxy advisers.

The above statutory requirements are supplemented by the Dutch Corporate Governance Code (DCGC), which contains principles and best practice provisions regulating relations between the board and shareholders. The updated DCGC took effect on 1 January 2023. The DCGC applies to listed Dutch companies, even if the shares are only listed on a stock exchange outside the EEA. While the DCGC applies on a 'comply or explain' basis, certain principles and best practices may be considered part of the statutory requirement for boards and shareholders to act as regards each other in keeping with the principles of reasonableness and fairness and may as such be binding.

The Dutch Stewardship Code, developed by pension funds, insurers and asset managers participating in Eumedion, sets out guiding principles for institutional investors with a view to constructive engagement with listed companies on strategy, risk, performance and environmental, social and governance (ESG) aspects, transparency regarding voting policies and their implementation and voting in a well-informed manner with a view to long-term value creation.

Proxy advisory firms, such as ISS and Glass Lewis, have issued proxy voting guidelines that also cover Dutch listed companies. These voting guidelines are regularly updated to reflect (what proxy advisory firms perceive as) evolving best practices and market practice for listed Dutch companies.

Shareholder activism

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

Activist campaigns can play out publicly or privately. Private campaigns can have a significant impact on companies as the considerable pressure put on boards may cause them to change the company's strategy to appease the activist and prevent a public campaign.

Activist campaigns in 2021–2022 included Harbor Spring and Hawk Ridge calling for a strategic review by Intertrust prior to Intertrust announcing a takeover bid by CSC, Elliott calling for the separation of bol.com by Ahold Delhaize, and Cat Rock and Oceanwood calling for the sale of Grubhub by Just Eat Takeaway.

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

Owing to Dutch and EU company law reforms introducing new or strengthened shareholder rights around the turn of the 21st century, shareholder activism in the Netherlands rose sharply. After 2007, corrective measures to curb shareholder activism were implemented in the Dutch Civil Code (increased threshold for shareholders to put items on the agenda and, more recently, the enactment of a cooling-off period in the case of a hostile bid or activism), the DFSA (lower threshold for notification by major shareholders), the Dutch Corporate Governance Code (response time), case law (strategy falls within the domain of the board) and by listed companies themselves (renewed appreciation for takeover defences available under Dutch law).

In the Netherlands, no particular industries are more or less prone to shareholder activism. Activist campaigns against 'national champions' tend to face more backlash from the general public and politicians.

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

Historically, activist campaigns have predominantly originated from well-known international activist funds with a global or European investment focus such as Centaurus, Elliott, Hermes, JANA Partners, Knight Vinke, Paulson and TCI. In recent years, fuelled by calls from politicians to take a more active role, Dutch pension funds and other long-term institutional investors have become more vocal.

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

High-profile activist campaigns at Dutch companies by activist hedge funds are typically focused on a company sale or break-up, increased offer price (bumpitrage) or return of capital. Long-term institutional investors tend to focus more on ESG topics and executive compensation or say-on-pay.

Factors that tend to attract activists' attention include announced or potential M&A events, low leverage or strong cash positions, as well as perceived corporate governance issues, underperformance and inflated executive pay.

A recent trend that is growing in importance is climate-related activism, where boards of listed companies are urged to prepare and report on, discuss with shareholders or present for approval by shareholders their strategy on mitigating climate change.

SHAREHOLDER ACTIVIST STRATEGIES

Strategies

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

Depending on the type of activist, its goals and the company's takeover defences, activists may use a number of different tactics to pursue their objectives, such as:

- privately engaging through informal discussions or 'dear board' letters (the starting point of most activist campaigns and the preferred tool of most institutional investors);
- publicly criticising a company's strategy, governance or performance or calling for a sale, break-up, return of capital or bumpitrage;
- short-selling stock and starting a public campaign to drive down stock prices;
- stakebuilding to build up pressure on the boards and signal seriousness;
- partnering with a hostile bidder;
- participating in and voting at general meetings;
- orchestrating a 'vote no' or a 'withhold the vote' campaign;
- making a shareholders' proposal or requesting an extraordinary general meeting be convened; or
- initiating litigation.

Processes and guidelines

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

Items requested by shareholders that individually or collectively represent at least 3 per cent of a Dutch company's capital must be included in the convening notice or announced by the company in the same manner if the company has received the substantiated request or a draft resolution no later than on the 60th day before the day of the general meeting. The

company's articles may provide for a lower minimum percentage (eg, 1 per cent, the former statutory threshold) or a shorter period.

The company may refuse to put an item on the agenda as a voting item (rather than a discussion item) if it concerns a matter that falls outside the power of the general meeting. Exceptionally, a company may refuse to put an item on the agenda if it contravenes the principles of reasonableness and fairness. Depending on the topic of the shareholder proposal, the company may also invoke a cooling-off period.

The Dutch Corporate Governance Code (DCGC) provides that a shareholder should only exercise its right to put items on the agenda after consultation with the (management) board.

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

Some listed Dutch companies are subject to the large company regime, in which case the following applies by default. The members of the management board are appointed by the supervisory board (instead of the general meeting) and members of the supervisory board are appointed by the general meeting upon a nomination by the supervisory board. If the nomination is not overruled by the general meeting, the person is appointed; if the nomination is overruled, the supervisory board shall make a new nomination.

The articles of association of many listed Dutch companies that are not subject to the large company regime provide that the general meeting can only appoint directors upon a binding nomination by the (supervisory) board or that the (supervisory) board may elect to make a binding nomination. The binding nomination can typically be overruled either by absolute majority of the votes cast representing at least one-third of the issued share capital (maximum under the DCGC) or by two-thirds of the votes cast representing more than half of the issued share capital (statutory maximum).

If the appointment of a director is not subject to a binding nomination, a nomination can be made by shareholders in accordance with the procedure for submitting a shareholders' proposal or convening a general meeting.

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

Shareholders representing individually or collectively at least 10 per cent of a Dutch company's capital (or a lower percentage as prescribed in the company's articles) may request the board(s) to convene a general meeting. The request must set out in detail the matters to be discussed. If the board(s) have not taken the steps necessary to hold a general meeting within eight weeks (or six weeks, if the company's shares are not listed on a regulated market within the European Economic Area) of the request, the requesting shareholder may be authorised by the district court in preliminary relief proceedings to convene a general meeting provided that they have a reasonable interest in holding such meeting. As part of the reasonable interest test, the court will weigh the interests of the requesting shareholders against the interests of the company.

If shareholders seek to convene a general meeting that may result in a change in the company's strategy, the (management) board may invoke a response time under the DCGC by stipulating a reasonable period of up to 180 days to deliberate, consult stakeholders and explore alternatives (according to case law, this response time must be respected by shareholders absent an overriding interest). Depending on the topic for such general meeting, the company may alternatively invoke a cooling-off period.

While shareholders of a Dutch public company may pass resolutions outside a meeting if the company's articles of association so allow, such written resolutions can only be passed by a unanimous vote of all shareholders with voting rights.

Litigation

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

Shareholder litigation regarding listed Dutch companies mostly takes place in inquiry proceedings before the Enterprise Chamber. Inquiry proceedings allow shareholders (above a statutory share ownership threshold) of a Dutch company to request the Enterprise Chamber to appoint experts to conduct an investigation into the policy and affairs of the company and to impose certain measures of a definitive or preliminary nature. Depending on the capital structure of the company (ie, low nominal value of the shares), the threshold for an activist to have standing in inquiry proceedings can be very high. The Enterprise Chamber may order an inquiry if the applicant demonstrates that there are well-founded reasons to doubt the soundness and propriety of the company's policy and affairs (eg, deadlock situations, unacceptable conflicts of interest, disturbed relationships and unjustified use of takeover defences). Based on the reported findings of the court-appointed investigators, the applicant may file a petition for a declaratory judgment that mismanagement occurred. At any point during the inquiry proceedings, the Enterprise Chamber may be requested to impose (far-reaching) interim measures by way of injunctive relief (eg, enjoining the execution of board resolutions, appointing one or more independent directors to the board, suspending voting rights of a shareholder or delaying a shareholder vote).

In addition to inquiry proceedings, shareholders can seek nullification of corporate resolutions (arguing for instance that the resolution is contrary to the principles of reasonableness and fairness to be observed) or bring wrongful act claims against a company or its directors (arguing that a particular conduct of the company or its directors constituted a tort against the claimant).

Derivative actions do not exist under Dutch law. The Dutch Civil Code does provide for a collective action, initiated by a foundation or association whose objective is to protect the rights of a group of persons having similar interests. Previously, such action could only result in a declaratory judgment; to obtain damages, individual claimants had to file follow-on suits based on the declaratory judgment to obtain damages or petition the Amsterdam Court of Appeal to declare a settlement binding upon all injured parties (with an individual opt-out choice). As of 2020, and provided that the action relates to events that occurred on

or after 15 November 2016, the restrictions on seeking monetary damages on a collective basis have been removed. At the same time, additional requirements have been imposed on collective action organisations regarding their governance, funding and representation, and there must be a sufficiently strong connection between the collective claim and the jurisdiction of the Netherlands to be admitted. Under the new regime, the court judgment will be binding on all injured parties domiciled in the Netherlands who have not opted out and on all non-Dutch residents who have opted in. The action can also result in a court-approved settlement with binding effect on the aforementioned injured parties, except those who opt out of the settlement.

At general meetings of Dutch companies, boards are required to provide the shareholders with all the information requested by them, unless doing so would be contrary to an overriding interest of the company. Although the concept of discovery does not exist under Dutch law, a party with a legitimate interest may submit a motion to the court demanding the production of specified documents pertaining to a legal relationship to which the requesting party or its legal predecessor is a party.

SHAREHOLDERS' DUTIES

Fiduciary duties

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

Under Dutch law, shareholders may – in principle – give priority to their own interests. However, they must act towards each other and the board(s) in keeping with the principles of reasonableness and fairness. Courts apply an 'all facts and circumstances' test to determine whether an act was in keeping with such principles. The Dutch Corporate Governance Code (DCGC) adds that this includes a willingness to engage with the company and fellow shareholders, and that the greater the interest of the shareholder in a company, the greater is his or her responsibility to the company, fellow shareholders and other stakeholders.

Compensation

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

There is no Dutch law that prohibits a director of a Dutch company from accepting compensation from a shareholder who nominated or appointed them. Irrespective of whether a director is nominated, appointed or compensated by a specific shareholder, Dutch corporate law requires all directors to be guided by the corporate interests of the company and its business in performing their duties and to consider with due care the interests of all stakeholders. To the extent that any such compensation creates, in respect of a particular board matter, a direct or indirect personal interest for the director that conflicts with the interests of the company and its business, the director may not participate in the deliberations and decision-making of the board on that matter.

The DCGC considers a director non-independent if they are a representative of a 10 per cent shareholder. Being a shareholder representative generally involves receiving compensation from the shareholder. Therefore, compensation received by a director from a 10 per cent

shareholder is indicative of being a shareholder representative and is a relevant factor in determining that director's independence.

Mandatory bids

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

The Dutch mandatory offer rules only apply to Dutch public companies whose shares or depositary receipts for shares are listed on a regulated market within the European Economic Area (EEA). Pursuant to the Dutch Financial Supervision Act (DFSA) and subject to limited exemptions, a mandatory offer requirement is triggered if a person, or a group of persons acting in concert, obtains the ability to exercise at least 30 per cent of all outstanding voting rights in a company (predominant control).

Concert parties are natural persons, entities or companies collaborating under an agreement with the purpose to acquire predominant control in a company or, if the target company is one of the collaborators, to thwart an announced public offer for such target. Persons, entities and companies are in any event deemed to act in concert with entities that are part of the same group and their subsidiaries or other controlled entities. Enforcement of the obligation to make a mandatory bid rests with the Enterprise Chamber, which – as an independent judicial authority – is not bound by the European Securities and Markets Authority's white list on acting in concert.

Disclosure rules

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

Pursuant to the DFSA, any person who acquires or disposes of shares or voting rights of a Dutch company the shares of which are listed on a regulated market within the EEA, must forthwith (generally, the next trading day) notify the Dutch Authority for the Financial Markets (AFM) if the percentage of capital interest or voting rights reaches, exceeds or falls below any of the following thresholds: 3, 5, 10, 15, 20, 25, 30, 40, 50, 60, 75 and 95 per cent. Notifications are published in the AFM's online registers. The DFSA does not require shareholders to disclose their intentions.

At a few listed Dutch companies, the articles of association impose additional notification obligations on shareholders.

The updated Dutch Corporate Governance Code provides that if a shareholder enters into a dialogue with the company outside the context of a general meeting, the shareholder shall disclose their full share position (long and short and through derivatives) at the company's request.

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

Depositary receipts for shares, convertible bonds, options for acquiring shares, cash settled instruments of which the value is at least in part dependent on the value of shares (eg, contracts for difference and total return swaps) and any other contracts creating a similar economic position are taken into account for purposes of calculating the percentage of capital interest and voting rights.

For purposes of calculating the percentage of capital interest and voting rights held by a person, shares and voting rights held by such person's controlled entity, by a third party for such person's account or by a third party with whom such person has concluded an agreement to pursue a sustained joint voting policy, are taken into account.

Any person who acquires or disposes of financial instruments as a result of which such person's gross short position reaches, exceeds or falls below the thresholds of 3, 5, 10, 15, 20, 25, 30, 40, 50, 60, 75 and 95 per cent, must forthwith notify the AFM. Notifications are published in the AFM's online registers. In addition, the EU Short Selling Regulation requires any person holding a net short position to privately notify the relevant competent authority the next trading day if the position reaches or falls below 0.2 per cent, and each 0.1 per cent above that, of the issued share capital of a Dutch listed company. Notifications for a net short position of 0.5 per cent or above are made public.

Insider trading

16 Do insider trading rules apply to activist activity?

Yes, the Market Abuse Regulation (MAR) applies with respect to Dutch companies whose shares or other financial instruments are listed on a regulated market within the EEA. Pursuant to the MAR, no person may:

- engage or attempt to engage in insider dealing;
- recommend that another person engage, or induce another person to engage, in insider dealing;
- unlawfully disclose inside information; or
- engage, or attempt to engage, in market manipulation.

COMPANY RESPONSE STRATEGIES

Fiduciary duties

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

Dutch corporate law requires all directors to be guided by the corporate interests of the company and its business in performing their duties. If the company has a business, the interests of the company generally are defined in particular by the interest of promoting

the sustainable success of the company's business (cf, the updated Dutch Corporate Governance Code (DCGC), which emphasises sustainable long-term value creation). Under Dutch law, there is no duty to maximise shareholder value at all costs. Instead, boards must weigh all relevant aspects and circumstances and shall consider with due care the interests of all stakeholders, including shareholders, employees, creditors and business partners. Boards have a large discretion on how to weigh the various stakeholders' interests against each other, although the duty of care may require boards to prevent unnecessary or disproportionate harm to the interests of specific stakeholders. The (management) board is responsible for determining and implementing the strategy of the company (in a two-tier board structure: under the supervision of a supervisory board).

Responding to an unsolicited approach or activist proposal seeking to change the company's strategy (including by means of efforts to change the board composition) forms part of the company's strategy and, as such, falls within the domain of the board. There is no shift of fiduciary duties: the directors must continue to act in the best interests of the company and its business with a view to (sustainable) long-term value creation, taking into account the interests of all stakeholders. Boards should ensure that they have all relevant information to make an informed decision, and the proposal should be carefully reviewed, without bias, and assessed against all available alternatives. Shareholders do not have to be consulted prior to the company's response; boards are (retrospectively) accountable to the shareholders.

Dutch case law confirms the absence of a general obligation for boards to engage with a bidder or activist to discuss the proposal. While boards may 'just say no', they should do so only after careful consideration of a serious proposal on its merits, and boards should consider whether some form of interaction with the bidder or activist is needed to make sure the directors have all relevant information to make an informed decision.

Preparation

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

Although the absolute number of activist campaigns in the Netherlands is limited, (high-profile) activist campaigns in recent years have made shareholder activism and engagement a discussion topic in the boardroom of many listed Dutch companies. No company is immune to activism, and preparedness is key. While recommended advance preparations depend on the specifics of the company, a few useful preparations are:

- continuously monitoring market activity, financial performance (particularly relative to peers) and the company's industry and competitors;
- setting up a small defence team of key directors or officers plus legal counsel, investment bankers and public relations firm that meets periodically;
- 'thinking like an activist', routinely assessing the company's strengths and weaknesses and its takeover defences and exploring available strategic alternatives (consider red teaming);
- building relationships and credibility with shareholders and other stakeholders before activists emerge and maintaining regular contact with major shareholders, the marketplace generally and key stakeholders; and

- communicating clearly and consistently on environmental, social and governance and corporate social responsibility matters, the company's long-term strategy, its implementation and the progress in achieving it.

Defences

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

Most listed Dutch companies have adopted one or more structural takeover defences, often in their articles of association. Examples include:

- binding nomination rights and supermajority requirements for appointment and involuntary dismissals of directors;
- staggered boards;
- evergreen call option for preference shares to an independent Dutch foundation whose purpose is to safeguard the interests of the company and its stakeholders and resist any influences that might adversely affect or threaten the company's strategy, independence or continuity in a manner contrary to such interests, pursuant to which the foundation can effectively acquire up to 50 per cent of the votes;
- loyalty voting shares providing for additional voting rights for 'loyal' shareholders;
- priority shares with certain control rights; or
- listing of depositary receipts for shares rather than the shares itself.

In addition, Dutch companies may use a variety of other tactics such as:

- engaging with the activist, which may result in some form of agreement;
- engaging with shareholders and other stakeholders (eg, convince major shareholders with compelling long-term plans or mobilise employees, customers or politicians);
- invoking a response time under the DCGC, pursuant to which the (management) board may stipulate a reasonable period of up to 180 days if shareholders seek to convene an extraordinary general meeting or put items on the agenda that may result in a change in the company's strategy (eg, dismissal of directors) and during which the board should deliberate, consult stakeholders and explore alternatives (according to case law, this response time must be respected by shareholders absent an overriding interest);
- invoking a statutory cooling-off period of up to 250 days;
- invoking the put-up-or-shut-up rule under the Dutch public offer rules;
- exploring strategic transactions that make the company a less desirable target;
- issuing new shares (under existing authorisations) or selling treasury shares to a friendly third party (white knight); or
- issuing bonds with a mandatory redemption at a higher value in the event of a change of control (macaroni defence).

Proxy votes

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

It depends on the listing venue. Dutch companies with a US listing often (choose to) receive regular updates on the vote tally, especially in contested situations, consistent with market practice in the United States. Historically, this has not been the standard practice at Dutch companies with an EU listing. In recent years, the practice in the Netherlands has shifted more towards the US practice of companies receiving updates on the vote tally prior to the general meeting.

Settlements

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

Although private settlements with activists are not common in the Netherlands, they do occur from time to time. A company may seek to enter into a pure standstill agreement to reach a truce with an activist shareholder in return for, for instance, a commitment to consult the activist (and other major shareholders) on new director nominations. In case of activists with a significant shareholding, a settlement may take the form of a relationship agreement wherein the company and the shareholder agree on topics such as strategy and governance and wherein the company may give one or more (supervisory) board seats to the activist.

SHAREHOLDER COMMUNICATION AND ENGAGEMENT

Shareholder engagement

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

Organised shareholder engagement outside of general meetings and earnings calls, through investor days, road shows, presentations at conferences or bilateral contacts, has increased in recent years but tends to vary considerably from company to company. Especially larger issuers tend to organise structural shareholder engagement. Engagement efforts tend to be elevated when the company is faced with a crisis or shareholder discontent (eg, an unsolicited approach or activist campaign, a negative recommendation from proxy advisory firms or poor voting results on say on pay or discharge of directors).

In line with the recommendation of the Dutch Corporate Governance Code (DCGC), most listed Dutch companies have formulated an outline policy on bilateral contacts with shareholders and posted such policy on their website. Mostly, such policies leave large discretion to the company to decide whether to enter into, continue or terminate any dialogue and to determine the company participants for such meetings.

23 Are directors commonly involved in shareholder engagement efforts?

Depending on the company and the topic and shareholder concerned, shareholder engagement efforts may be led by a company's investor relations department or one or more managing or executive directors, in particular, the CEO or CFO. Non-executive or supervisory directors are less frequently involved in shareholder engagement, though non-executive or supervisory directors may lead conversations with investors regarding the performance or remuneration of managing or executive directors.

Disclosure

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

Most listed Dutch companies have published a policy on bilateral contacts. Companies are not required to disclose shareholder engagement efforts. The DCGC does recommend that presentations to institutional or other investors and press conferences be announced in advance, that all shareholders be allowed to follow these meetings and presentations in real time and that the presentations be posted on the company's website after the meeting.

Selective disclosures by a Dutch company whose shares are listed on a regulated market within the European Economic Area must comply with the requirements under the Market Abuse Regulation. In addition, Dutch companies must ensure equal treatment of all shareholders who are in the same position.

Communication with shareholders

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

The explanatory notes to the agenda for a general meeting set out the company's position with respect to the agenda items. The meeting materials are posted on the company's website. Other public communications often take the form of press releases. Listed Dutch companies may decide to engage proxy solicitation firms or investor relations specialists to actively reach out to shareholders (particularly Dutch companies with a US listing do so in line with US market practice).

Notified major shareholdings (greater than 3 per cent) can be found in the online Dutch Authority for the Financial Markets registers. In addition, a listed Dutch company whose shares trade in book-entry form through Euroclear Nederland can – at its own initiative or upon a timely request by shareholders representing at least 10 per cent of the company's capital – run a process in the lead-up to a general meeting to identify its shareholders holding 0.5 per cent or more of the company's capital. The company may approach Euroclear Nederland and relevant intermediaries to provide certain information on the identity of the company's shareholders. The company must keep such information confidential. The

company may use such information to disseminate information to its shareholders, provided it also posts that information on its website. The statutory provisions on identification of shareholders have been expanded with effect from 3 September 2020 as part of the Dutch implementation of the revised Shareholders Rights Directive (SRD II).

Access to the share register

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

If a shareholder so requests, the (management) board must provide the shareholder, free of charge, with an extract of the information in the company's share register concerning the shares registered in the shareholder's name. Dutch companies are not required to provide access to or a copy of the full shareholder register.

If an identification of shareholders (other than under the new SRD II procedure) has occurred and shareholders holding 1 per cent of the issued share capital or shares with a value of at least €250,000 so request, the company must disseminate to its shareholders (and publish on its website) any information prepared by the requesting shareholders relating to an agenda item for the general meeting. The company may refuse the request if the information:

- is received less than seven business days prior to the meeting;
- sends, or may send, an incorrect or misleading signal regarding the company; or
- is of such a nature that the company cannot reasonably be required to disseminate it (criticism of the company's policy or affairs is in itself no valid ground for refusal).

UPDATE AND TRENDS

Recent activist campaigns

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

In recent years, high-profile unsolicited approaches and increasing pressure from activists have prompted a public debate in the Netherlands on the dangers of short-termism and the effectiveness of defence measures available to listed Dutch companies.

In 2021, the Dutch Senate passed legislation that introduces a statutory cooling-off period of up to 250 days that the board may invoke in the event of an unsolicited takeover bid or when faced with activists proposing to dismiss, suspend or appoint board members, if the bid or proposal materially conflicts with the interests of the company and its business (as reasonably determined by the board). During the cooling-off period, the general meeting cannot validly dismiss, suspend or appoint board members or amend the company's articles of association on these topics, unless proposed by the board itself.

Read this article on Lexology

Shareholders representing 3 per cent or more of the company's capital must be consulted by the board during the cooling-off period. Moreover, shareholders representing at least 3 per cent of the company's capital (or such lower percentage as provided for in the company's articles for the right to put items on the agenda of a general meeting) may request the Enterprise Chamber for early termination of the cooling-off period. The Enterprise Chamber grants the request if:

- the board, in view of the circumstances at hand when the cooling-off period was invoked, could not reasonably have come to the conclusion that the bid or proposal constituted a material conflict with the interests of the company and its business;
- the board can no longer reasonably hold that the continuation of the cooling-off period can contribute to careful decision-making; or
- during the cooling-off period, one or more measures are active that have a nature, purpose and purport that corresponds to the cooling-off period, and these measures have not been terminated or suspended within a reasonable period after a written request to that effect from the shareholders.

The cooling-off period also ends early if the hostile bid is declared unconditional.

The cooling-off period is aimed at taking some of the (short-term) pressure off target boards to allow for a careful decision-making process in which – in accordance with the Dutch stakeholder model – the interests of all stakeholders are considered and weighed with a view to long-term value creation.

The legislation applies to all Dutch companies whose shares or depositary receipts for shares are listed on a regulated market or multilateral trading facility in the European Economic Area (EEA) or any similar stock exchange outside the EEA (eg, Nasdaq and the New York Stock Exchange).

Stefan Wissing	stefan.wissing@nautadutilh.com
Frans Overkleeft	frans.overkleeft@nautadutilh.com
Paul van der Bijl	paul.vanderbijl@nautadutilh.com
Willem Bijveld	willem.bijveld@nautadutilh.com

Beethovenstraat 400, Amsterdam 1082 PR, the Netherlands
Tel: +31 20 717 1000
www.nautadutilh.com

New Zealand

David Raudkivi

Russell McVeagh

RETURN TO CONTENTS

Summary

GENERAL

Primary sources

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

Most entities in New Zealand that may be subject to shareholder activism and engagement are companies established under the Companies Act 1993. Companies that are listed on the New Zealand Stock Exchange (NZX) are subject to the NZX Listing Rules. The Takeovers Code also applies to all companies listed on the NZX and to companies that have a broad shareholding (see below).

The other principal legislation is the Financial Markets Conduct Act 2013 and the Financial Markets Conduct Regulations 2014, which regulate misleading and deceptive conduct in relation to dealings in securities, enforce a substantial product disclosure regime and impose restrictions on the making of unsolicited offers to acquire securities.

The Companies Act and the Financial Markets Conduct Act were passed by Parliament and the regulations under each of these are made and amended by the Governor-General on the recommendation of the Minister of Commerce and Consumer Affairs, granted under the authority of the relevant primary legislation.

The NZX Listing Rules are made and enforced by NZX Limited, as operator of the New Zealand Stock Exchange, with oversight from the Financial Markets Authority.

The Companies Act and the constitution of each relevant company are of principal relevance for any activism and shareholder engagement as they provide for the rights and requirements of shareholders in convening a shareholder meeting, the right to propose resolutions and explanatory statements and form the basis for the substantial body of corporate governance law.

The Takeovers Code is a regulation made by Order in Council on the recommendation of the Minister of Commerce and Consumer Affairs under the Takeovers Act 1993, and prescribes a code for the conduct of takeovers of 'code companies'. A code company includes any company incorporated in New Zealand and listed on the NZX or that has 50 or more shareholders and 50 or more share parcels, even if not listed. The Takeovers Code is enforced by the Takeovers Panel.

Shareholder activism

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

Like most jurisdictions, the prevalence of observable shareholder activism in New Zealand has grown during the past few years.

Most shareholder activism occurs on a private basis, at least initially, and only a percentage develop into a public campaign where there is a noticeable outcome. It is therefore difficult

to establish specific data or statistics. The nature of the types of activist engagement traverses the typical spectrum seen in most other jurisdictions, ranging from de facto or proxy takeovers and director-election contests, to 'vote no' campaigns and advocacy in relation to board and management remuneration.

For the most part, company boards take activist engagement very seriously and respond to activists in good faith to understand their concerns. This can result in alignment and adoption of some or all of the strategic changes to the company that have been proposed by the activist or a change in the board of directors without any public activist presence. Alternatively, where activism develops into a public campaign, results can vary with corporate changes agreed or board resignations after the publicity develops but before a vote ever takes place. Very few campaigns go to a vote and, for those that do, the results can be close.

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

Generally, regulators do not take a position on activism. The relevant regulators, particularly the Financial Markets Authority and the Takeovers Panel, frequently receive complaints from stakeholders during a campaign and generally do not get involved unless it is clear that the conduct in question breaches specific provisions of the Takeovers Code or relevant legislation. In this regard, shareholders have been censured for timely failure to disclose substantial product holder positions or for misleading conduct.

Shareholder activists in New Zealand are not restricted to any particular industry. However, there is a strong concentration of listed companies on the NZX that have controlling shareholders through being majority owned by the New Zealand government (for example, three of the major energy companies and Air New Zealand) or having a strategic controlling shareholder. Naturally, these companies are less prone to activism.

Like other jurisdictions, targets are typically identified by poor operational or share price performance, high cash balances, untapped or mismanaged opportunities, governance issues (including matters of social importance), and perceived consolidation or buy-out opportunities.

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

Significant activists tend to be long-term shareholders, including institutional investors and KiwiSaver (superannuation) funds. However, due to the relative ease of proposing shareholder resolutions, activists can also include disgruntled minority shareholders. Occasionally, industry participants also engage in activism on a strategic basis, but this is generally not as successful or as well received as a takeover transaction. Shareholding percentages need not be particularly significant to have an impact.

Institutional shareholding in New Zealand has become more concentrated in recent years due to the continued growth of New Zealand superannuation contributions to KiwiSaver funds. For the most part, these tend to be passive investors and are more likely to abstain

than be seen to support an activist in any proxy campaign. However, this naturally enhances the votes held by the activists when only the shares that vote are taken into account. Unlike some jurisdictions, there is no requirement for KiwiSaver funds, among others, to periodically disclose how they have voted.

While we see alliances form between shareholders where there is mutual support in a campaign, it is not uncommon to see these fall apart through a sale of shares by a party during the course of the campaign or a shareholder reaching a satisfactory accommodation with the target on their issues.

Investors who consider engaging in an activist strategy are also likely to be mindful of any possible effect on their reputations and how activism could affect their further participation in initial public offerings or other corporate opportunities.

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

The main areas on which shareholder activism focuses are:

- poor governance, including scrutiny on related party transactions, the sudden announcement of significant financial write-downs, and deficiencies in transparency from management in reporting to shareholders;
- change-of-board campaigns or director-appointment campaigns;
- vote-no campaigns to shareholder resolutions; and
- shareholder and hedge fund activism in connection with a value strategy manifested through a shareholder proposal. These can range from players looking to elevate the share price quickly for profit, or those looking to effect a genuine long-term value-added strategy for the company.

Say on pay

There are no express provisions for shareholder say on management pay in New Zealand. However, director pay is a direct focus for the New Zealand Shareholders' Association, which regularly takes published positions on director remuneration resolutions and votes discretionary proxies from its members. In particular, the Shareholders' Association generally takes the position that the requested director fee increase must be demonstrated to be reasonable and, where remuneration benchmarking reports are used to justify fee increases, the full report should be made available to shareholders. Fee pools, and the fees paid to directors, should be comparable with the company's peers and the peer group companies should be of a similar scale and the directors should take into account the overall performance of the company prior to asking shareholders to approve a fee increase. In this regard, it may be more appropriate to reduce the number of directors rather than seek an increase. In this context, it has been apparent that smaller, more regular, increases are more likely to be palatable than a single large increase.

SHAREHOLDER ACTIVIST STRATEGIES

Strategies

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

Generally, activist strategies begin with private discussions directly with the subject company to negotiate changes in line with the activist's value strategy. These may then develop into public campaigns, media campaigns and greater pressure from a broader shareholder base.

Shareholder resolutions and proxy contests are generally a last resort.

There is no set playbook and examples differ depending on the company's specific situation, its shareholder agendas and share register.

Processes and guidelines

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

Clause 9(1) of the First Schedule of the Companies Act provides that any shareholder can put up a resolution at a shareholders' meeting by giving written notice to the board, notifying the proposal or text of the proposed resolution.

Provided that the shareholder offers the notice well in advance, the company is required to bear the subsequent cost of including the information in the notice of meeting. The shareholder is also permitted to include an explanatory statement of not more than 1,000 words on the resolution, together with his or her name and address.

There are limited rules that operate to exclude only a few types of resolutions. The board may only refuse to include a shareholder-proposed resolution in the notice of meeting if the directors consider the resolution to be defamatory (within the meaning of the Defamation Act 1992). The board may only refuse to include an accompanying statement if it is defamatory, frivolous or vexatious.

Instead, the rules focus mainly on timing and who bears the cost of putting the proposal. Specifically, where the notice is received at least 20 working days before the last day for giving notice of the meeting, the board must give notice of the proposal and text of the resolution at the company's expense. If the notice is received between five and 20 days before the last date, the shareholder is required to bear the cost. If the notice is received less than five days before the last date, putting that proposal to shareholders is at the board's discretion.

Shareholder resolutions can have the effect of appointing and removing directors or changing the company's constitution. Section 109(2) of the Companies Act provides that notwithstanding anything in the Act or constitution, a meeting of shareholders may pass a resolution relating to the management of a company. However, section 109(3) goes on to provide that unless the constitution provides that the resolution is binding, it is not binding on the board. Therefore, an ordinary resolution that relates to the future direction of the company will generally be advisory only. It would, nonetheless, be a brave board that ignores

such a steer from shareholders when the same voting thresholds would ordinarily apply to effect a change in the directors who sit on the subject board.

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

The New Zealand Stock Exchange (NZX) Listing Rules specifically require the board of the company to call for nominations from shareholders and impose director rotation requirements. To properly inform shareholders, the company will invariably include any requested biography and other reasonable explanatory statement provided by the candidate for election, at the company's cost.

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

Under section 121 of the Companies Act, a shareholder or group of shareholders commanding at least 5 per cent of the company's voting rights have the ability to require the board to call a special meeting of shareholders. While the board or the court can only convene a meeting if it is in the interests of the company, shareholders are not limited in this way and are free to do so if this simple percentage threshold requirement is met.

Neither the Companies Act nor the NZX Listing Rules specify any specific timeframe within which the board is required to convene a meeting upon receiving valid notice from shareholders.

Case law has also been limited on the duties of the board to convene a meeting. However, proceedings requiring the board to convene a meeting under section 121(b) of the Companies Act can be brought seeking injunctive relief, which requires the courts to take into account the balance of convenience and the overall justice of the matter. Accordingly, courts commonly accept the principle that a meeting must be called within a 'reasonable time'. What is reasonable must be assessed against the particular circumstances presented before the court.

Under section 109 of the Companies Act, the chairperson at a meeting of shareholders must allow a reasonable opportunity for shareholders to question, discuss or comment on the management of the company as part of the general business at a meeting.

Shareholders may also act by written resolution. However, this is extremely rare in a public company context. Generally, a resolution in writing signed by not less than 75 per cent of the shareholders entitled to vote on that resolution who together hold not less than 75 per cent of the votes is as valid as if it had been passed at a meeting of those shareholders.

Litigation

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

The Companies Act provides a number of statutory remedies for minority (and, in some cases, majority) shareholders. These include rights to:

- apply for relief on the grounds that the company's affairs or acts are 'oppressive, unfairly discriminatory, or unfairly prejudicial';
- apply for the company's liquidation on the grounds that 'it is just and equitable' to do so;
- apply for an injunction restraining the company or a director from breaching the company's constitution or provisions of the Act;
- apply for a compliance order requiring a director or the company to take any steps required to comply with the company's constitution or the Act;
- bring an action against a director or the company for breach of a duty owed to the shareholder personally; or
- bring a statutory derivative action with the leave of the court.

While derivative actions are not particularly common, section 165 of the Companies Act gives the court the ability to grant leave to a shareholder or director of a company to bring proceedings in the name and on behalf of the company or intervene in proceedings to which the company is a party for the purpose of continuing, defending or discontinuing proceedings on behalf of the company. In essence, the section facilitates the enforcement of directors' duties owed to the company where the company has failed to take the necessary enforcement steps.

While the section does not expressly limit the remedy to minority shareholders, the prevailing view is that a shareholder with a controlling interest should not generally be permitted to use the derivative procedure. There are a number of requirements the court must consider before granting leave to allow derivative actions, including:

- being satisfied that the company does not intend to bring, diligently continue or defend, or discontinue the proceedings – in this regard, the party proposing to bring derivative proceedings must inform the court as to the extent of its effort to convince the company to take action against the directors; and
- being satisfied that it is in the interests of the company that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders as a whole. This may be appropriate in instances of deadlock, cessation of trading and wrongdoer control, where the court considers that it would be in the best interests of the company to sidestep its internal processes for making decisions.

The court must also consider the following four mandatory factors under section 165(2):

- the likelihood of the proceedings succeeding;
- the costs of the proceedings in relation to the relief likely to be obtained;

Read this article on Lexology

- any action already taken by the company or related company to obtain relief; and
- the interests of the company in the proceedings being commenced, continued, defended or discontinued.

Under section 178 of the Companies Act, a shareholder may request that a company disclose 'information' held by the company to the shareholder. The company must either provide the information or refuse to provide the information and specify the reasons for the refusal. A company is entitled to a reasonable time period to provide the information and may impose a reasonable charge for the service. Without limiting the reasons for which a company may refuse to provide information, a company may refuse to provide information if:

- the disclosure of the information would, or would be likely to, prejudice the commercial position of the company;
- the disclosure of the information would, or would be likely to, prejudice the commercial position of any other person, whether or not that person supplied the information to the company; or
- the request for the information is frivolous or vexatious.

A shareholder who is dissatisfied with a refusal by a company to supply information may appeal that decision to the court. The courts have held that a request for information, when it is possible that such information may be used as part of a due diligence exercise for a takeover offer, may be declined.

In *Ayyildiz v Casablanca Sylvia Park Ltd* [2018] NZHC 2782, the High Court held that:

> *the purpose of s 178 is to ensure that those in control of a company, the directors and management, are accountable to shareholders. Accountability is enhanced by allowing shareholders access to company information. Under s 178, there is a wide range of reasons for refusing disclosure of information to shareholders. Some of them are noted in subsection (4) but they are not the only ones. If a company does not co-operate or if it refuses to provide information, the shareholder can come to court to seek orders under s 178(7). On such an application, the court considers whether there are outweighing reasons to justify a refusal of information to a shareholder.*

SHAREHOLDERS' DUTIES

Fiduciary duties

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

Shareholders do not generally owe any fiduciary duties to the company, regardless of the size of their shareholding. Directors who represent a shareholder activist on the board of the target company owe the same duty to act in good faith and in the best interests of the company as all other directors.

Compensation

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

Board members of listed companies are typically remunerated by the relevant company in accordance with an overall level of compensation that has been approved by the company's shareholders under the New Zealand Stock Exchange (NZX) Listing Rules. Any increase in the number of directors typically results in an automatic corresponding increase in the fee pool to allow equivalent compensation to be paid to the additional director.

However, a director nominee of a shareholder may be separately remunerated by the shareholder under the terms of his or her employment contract or terms of appointment but the director should ensure that they make appropriate disclosure of their interests in the company's interests register as required under the Companies Act.

Mandatory bids

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

Under the Takeovers Code, the acquisition by a person (together with that person's associates) of more than 20 per cent of the voting rights in a listed company must be undertaken in accordance with the Code (ie, pursuant to a takeover offer in accordance with the prescribed process set out in the Code or with the approval of an ordinary resolution of the target company's shareholders).

The process for a takeover offer requires a notice of intention to make an offer. The offeror may then send a takeover offer during the period 14 to 30 days after their notice of intention to make the offer has been given. However, there is no 'put up or shut up' rule, so the offeror may let its offer lapse and follow up with a further notice of intention to make a takeover offer without being subject to any stand-down period.

The Takeovers Code applies to aggregate holdings of 'associates' (as that term is defined in the Code) but there are generally no restrictions on shareholders agreeing to act in concert provided that neither shareholder acting in association acquires shares while their combined shareholdings exceed the 20 per cent threshold and the shareholders comply with the substantial product holder disclosure regime to disclose their relevant interest.

Disclosure rules

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

Yes. Part 5 of the Financial Markets Conduct Act requires persons who have a 'relevant interest' in 5 per cent or more of a class of quoted voting securities of a listed issuer to make immediate disclosure by means of filing a 'substantial product holder notice' with the NZX and the relevant issuer.

A person must disclose that interest in the prescribed form as soon as the person knows, or ought reasonably to know, that they have become a substantial product holder.

There is then a requirement to disclose any change in the nature of the substantial holding, any movement of 1 per cent or more in the relevant interest held, and upon ceasing to be a substantial product holder.

The rules do not require the holder of the relevant interest to disclose their intentions.

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

The Financial Markets Conduct Act specifically provides that if a person has a relevant interest in a derivative over quoted voting security, they are treated as having a relevant interest in the underlying voting security, which must be disclosed if special thresholds or circumstances are met.

The Act specifically also defines a 'relevant interest' to capture interests held by another person if, among other things: (1) the other person or its directors are accustomed or under an obligation (whether legally enforceable or not) to act in accordance with the first person's directions, instructions or wishes in relation to the voting security; (2) the first person controls 20 per cent or more of the other person; or (3) both persons have an agreement to act in concert in relation to the voting security.

A short position itself may not necessarily need to be disclosed but the fact of any borrowing of quoted voting securities or subsequent disposal of those securities may need to be disclosed if any interest at a point in time exceeds 5 per cent of the voting securities on issue.

Insider trading

16 Do insider trading rules apply to activist activity?

The Financial Markets Conduct Act includes specific insider trading restrictions. An 'information insider' is prohibited from trading quoted financial products of a listed issuer. An 'information insider' is a person who has material information relating to the listed issuer that is not generally available to the market and knows, or ought reasonably to know, that the information is material information that is not generally available to the market.

It is possible that, through engagement and the provision of information, an activist could become an information insider and it would be appropriate for the activist and target company to enter into a confidentiality and standstill agreement if material non-public information is to be disclosed.

COMPANY RESPONSE STRATEGIES

Fiduciary duties

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

Directors are subject to a general duty to act in good faith and in the best interests of the company. This applies in the same way in relation to responding to an activist proposal. Generally, this leads to constructive engagement with the activist and consideration of the full or partial adoption of any accretive strategies. The board will also need to consider the provision of information carefully, given continuous disclosure obligations.

Preparation

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

There are no structural defences to shareholder activism that we would typically recommend. Defensive tactics, such as poison pills or rights plans, would generally run afoul of the prohibition on defensive tactics in the Takeovers Code and would likely be inconsistent with the duties of directors to exercise their powers for a proper purpose and in the best interests of the company. Generally, New Zealand's corporate law regime is seen as shareholder-friendly and gives a number of rights to shareholders to support the engagement.

Companies should generally have a policy in place that outlines procedures to be followed in relation to an activist approach or a takeover proposal, including consideration of continuous disclosure obligations, contact details for trusted advisers and protocols for engagement – including requirements for a script, and record keeping and confidentiality expectations.

We do not see shareholder activism causing any greater concern in the boardrooms of New Zealand companies than it does in any other jurisdictions.

Defences

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

In addition to good management practices, to avoid being the target of shareholder activism, companies should look to maintain a strong investor relations programme. This includes providing regular market updates and clear communication of the company's business strategy. Investors appreciate opportunities to ask questions on conference calls at the time results are announced. Companies also generally benefit from a good understanding of the interests of significant shareholders on the register and their perspectives (if they are willing to share them).

Monitoring movement in the share register is also important. Particular issues can arise where a particular shareholder is overweight in the company's shares and needs to generate exit options.

Proxy votes

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

The company's share registrar normally provides proxy updates daily or upon request to a company in advance of a shareholder meeting. They are typically not disclosed other than the chairman stating at the meeting the number of proxies held and how they are directed to be cast on the resolution. Care needs to be taken with this information in advance of the meeting as it could be considered inside information in relevant circumstances – although institutional investors tend to deliver proxies very shortly before the deadline by which proxies must be received (usually 48 hours before the meeting) so the information may only become meaningful and reliable at that point in time and can still be changed, including by attendance in person.

Settlements

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

Private settlements or accommodations of activist agendas are, we understand, much more common than fully fledged public campaigns resulting in shareholder meetings and votes. It is reasonably common to see outcomes with changes in one or more board seats, directors not standing for re-election, and companies agreeing a compromise position to adopt one or more of the strategies or outcomes advocated for by the activist.

Other than for changes in the directors and management, such outcomes may or may not be publicly announced – and the target company will need to have careful consideration of its continuous disclosure obligations in this regard.

SHAREHOLDER COMMUNICATION AND ENGAGEMENT

Shareholder engagement

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

Engagement with shareholders is principally undertaken through continuous disclosure, which is a critical focus of the New Zealand Stock Exchange (NZX) as market supervisor. Many listed issuers have also focused on improving their shareholder engagement in recent years through their investor relations functions and endeavours to provide shareholders with a greater understanding of the business at annual meetings and in shareholder communications. It is not unusual for companies to provide shareholders with access to products or

facilitate visits. It is also typical for issuers to hold conference calls to facilitate Q&A at the time of announcing annual and half-year results.

23 Are directors commonly involved in shareholder engagement efforts?

Normally, the company's senior management lead any response but, depending on the nature of the proposals – for example, if they concern board or management appointments or changes – independent directors, and in some cases the chair, may also become involved in the engagement.

Disclosure

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

All listed issuers are subject to a continuous disclosure regime under the NZX Listing Rules, which require the immediate disclosure of any material non-public information unless an exception to disclosure applies. It is generally permissible to hold back information that is confidential and concerns an incomplete proposal or negotiation if the objective standard is met that a reasonable person would not expect disclosure. Accordingly, it is possible for most shareholder engagement efforts to play out in private.

It is only when the matter becomes public, such as through a media campaign or open letter, that the company may be compelled to make disclosure through the market announcement platform.

Most issuers would consider a requisition of a shareholders' meeting and the requirement to put a shareholder resolution as a matter that triggers a continuous disclosure obligation and make disclosure to the market.

For these reasons, a company should also require an activist to sign a confidentiality agreement before sharing material information. However, that activist may not want to receive such information so as to avoid becoming an 'information insider' and thereby be restricted from trading in the target company's shares while it is in that position.

There is no prescribed form of disclosure, provided that the information disclosed is sufficient to properly inform the market of all material matters. In the case of a demand to call a meeting, this will often include disclosing the form of requisition itself or the text of the resolution proposed.

Communication with shareholders

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

Under the NZX Listing Rules, a company is required to disclose all communications it provides to its shareholders through the market announcement platform. However, this does not apply to investor relations materials, personalised letters or dividend and transfer statements. Such requirements do not apply to communications emanating from third parties and nor do third parties have the right to post such information on the target company's NZX announcement page. Generally, there are no restrictions on shareholder communications, as long as they are not misleading or deceptive.

Proxy solicitation firms are active in New Zealand and can be seen to operate in relation to some takeovers and other major corporate events for significant companies. In a takeover situation, if the proxy solicitation firm represents an offeror or target company, the Takeovers Panel expects to receive a copy of any script or other communication material, which may also lead to requests from the offeror or target to obtain a copy.

Most shareholders opt to receive electronic communications by email through agreement in writing with the issuer, so it is typical for shareholder engagement to proceed in that manner for shareholders who have agreed to that mode of communication.

Care needs to be taken in relation to proxy solicitation not to become the holder or controller of more than 20 per cent of the voting rights of the target company in breach of the Takeovers Code. In this regard, there is an exemption for proxies appointed after the notice of meeting has been despatched, provided that the proxy does not pay consideration to receive the proxy.

Access to the share register

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

Significant shareholding positions above 5 per cent in listed issuers are disclosed through the substantial product-holder disclosure regime, which is easily accessed through NZX's website. A listed issuer is also required to summarise these holdings in its annual reports.

Under the Financial Markets Conduct Act, issuers of securities that have been offered to the public are generally required to keep a securities register, make that register available for public inspection upon notice and provide copies of the register to any person on request and on payment of any prescribed fee. When a copy of the register is requested, the reasons for the request and intended purpose must be disclosed and the issuer may provide a copy of that statement to the Financial Markets Authority. The Financial Markets Authority may determine that the issuer is not required to comply with the request to provide the copy of the register.

Read this article on Lexology

UPDATE AND TRENDS

Recent activist campaigns

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

Shareholder activism and engagement has been through a more settled period over the past 12 months. Climate change and ESG-related matters continue to be a focus but there have been very few public campaigns. Proxy advisers, particularly Institutional Shareholder Services (ISS), also published important policies on board diversity and climate accountability that are likely to gain influence.

The New Zealand Shareholders' Association continues to influence through advising on its voting recommendations to members on resolutions relating to takeovers and other material matters, and regularly puts questions to listed companies at annual and special shareholders meetings, including in relation to compliance with the NZX Corporate Governance Code.

Notable public matters included the following:

- A2 Milk continues to face a class action lawsuit in Australia from litigation funded investors who claim A2 breached its continuous disclosure obligations by not having a reasonable basis for its revenue and underlying profit guidance. The lawsuit covers investors who purchased A2 shares between August 2020 and May 2021, over which time A2 downgraded its earnings four times and saw its share price fall by more than 70 per cent. A separate New Zealand class action was filed, but has been suspended pending an outcome in Australia.
- The New Zealand Shareholders' Association, whose members own 0.4 per cent of Fletcher Building, raised concerns that a Gib plaster board shortage in the context of a boom in building following covid-19 stimulus, was creating long term reputational damage to Fletcher Building, with reputational risk quickly turning into political risk for the company. This was followed by an open letter from the NZSA and Simplicity KiwiSaver, which called for the immediate resignation of the Fletcher Building chair, for the remaining board members to put themselves up for re-election, and for some independent reviews of conduct, culture and risk. No resolutions were ultimately put to shareholders and changes resulted at the AGM held three months after the publicity.
- Market Forces, a small activist shareholder holding shares in Australia's three top banks (two of which are dual listed in New Zealand) called for resolutions at the annual general meetings seeking the banks to avoid financing new or expanded fossil fuel projects. The resolutions were not well supported and did not pass (see the discussion on ISS' International Climate Accountability Policy below and implications for board elections).
- The founder and controlling shareholder in listed company DGL made misogynistic comments in respect of a founder figurehead at another listed company. This led to a shareholder and broader public backlash, culminating in an apology and the board of the company announced a review of DGL's culture. The board described the comments as offensive and unacceptable. DGL's share price took a hammering and reduced close to 50 per cent. The company ultimately delisted from NZX to remain solely listed on ASX.

Read this article on Lexology

Proxy advisers have also made their mark in New Zealand with notable policy developments.

Board diversity

ISS's 2022 publication on its board policy to recommend 'generally voting against the chair of the nomination committee or chairman of the board (or other relevant directors on a case-by-case basis) if there are no women on the board' now applies to New Zealand companies. For companies that have not yet met this, ISS has stated that mitigating factors include:

- a commitment to appoint at least one female director as disclosed in the company's meeting documents or in an announcement to the NZX;
- the presence of a female director on the board during the preceding year; or
- other relevant factors.

A new ISS New Zealand Policy has also been introduced for board diversity as a whole. ISS will examine board diversity, including gender, skills, ethnicity and age as part of board refreshment and succession planning, in order to provide its clients with sufficient information from which to base informed engagement and voting decisions. Proxy research reports on each company will include whether:

- there is a disclosed diversity policy;
- there are disclosed and measurable objectives in promoting gender diversity, among others;
- the company reports on progress against those measurable objectives;
- the company reports on the respective proportions of men and women on the board, in senior executive positions and across the whole organisation (including how the company has defined 'senior executive' and various management positions, for these purposes); and
- the company uses Recommendation 2.5 of the NZX Corporate Governance Code 2020 to create the company's diversity policy.

Climate accountability

The ISS international climate accountability policy is to recommend generally voting against or withholding from an incumbent chair of the responsible committee for climate oversight if the company fails to follow the minimum steps laid out by ISS. For 2023, 'appropriate GHG emissions reduction targets' are now defined as:

- Net Zero by 2050 or sooner GHG reduction targets that include scope 1, 2 and relevant scope 3 emissions;
- medium-term GHG reduction targets; and
- a decarbonisation strategy, with a defined set of quantitative and qualitative actions to reach the Net Zero Targets.

This introduces specific minimum requirements for overall disclosure. The policy also states that expectations about what constitutes 'minimum steps needed to be aligned with a Net Zero by 2050 trajectory' will increase over time.

Read this article on Lexology

It is noted this policy only applies to companies that are 'significant GHG emitters'. For 2023, companies defined as significant GHG emitters will be those on the current Climate Action 100+ Focus Group list.

Russell McVeagh

David Raudkivi david.raudkivi@russellmcveagh.com

Level 30 Vero Centre, 48 Shortland Street, Auckland 1140, New Zealand
Tel: +64 9 367 8000
www.russellmcveagh.com

South Korea

Joo-young Kim and Jeong Seo
Hannuri Law Firm

RETURN TO CONTENTS

Summary

GENERAL

Primary sources

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

South Korea's main laws regarding shareholder activism include:

- the Commercial Act;
- the Financial Investment Services and Capital Markets Act (the Capital Markets Act); and
- the Act on Corporate Governance of Financial Companies.

The Commercial Act and the Act on Corporate Governance of Financial Companies state a shareholder's right to:

- request copies of company documents for inspection (eg, articles of incorporation and the shareholders' register (article 396 of the Commercial Act), and shareholder and board meeting minutes (articles 396 and 391-3 of the Commercial Act);
- propose agendas for the shareholders' meeting (articles 363-2(2) and 542-6(2) of the Commercial Act);
- call a temporary shareholders' meeting (articles 366(1) and 542-6(1) of the Commercial Act and article 33 of the Act on Corporate Governance of Financial Companies);
- inspect and copy accounting books (articles 466(1) and 542-6(4) of the Commercial Act and article 33 of the Act on Corporate Governance of Financial Companies);
- file a derivative lawsuit (articles 403(1) and 542-6(6) of the Commercial Act and article 33 of the Act on Corporate Governance of Financial Companies);
- request the court to remove managing directors (articles 385(2) and 542-6(3) of the Commercial Act and article 33 of the Act on Corporate Governance of Financial Companies);
- request the court to appoint inspectors (articles 367(2), 467(1) and 542-6(1) of the Commercial Act and article 33 of the Act on Corporate Governance of Financial Companies);
- request cumulative voting (articles 382-2(1) and 547-7(2) of the Commercial Act and article 33 of the Enforcement Decree of the Commercial Act); and
- file an injunction suit to stop director misconduct (articles 402(1) and 542-6(1) of the Commercial Act and article 33 of the Act on Corporate Governance of Financial Companies).

The Capital Markets Act provides shareholders with the right to solicit other shareholders to exercise voting rights by proxy (articles 152 to 158).

Shareholder activism

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

Shareholder activism in South Korea commenced in the late 1990s with the minority shareholder movements driven by non-governmental organisations (NGOs), such as the People's

Solidarity for Participatory Democracy (PSPD). The PSPD filed a suit to revoke shareholder resolution against Cheil Bank in 1997, and a shareholder derivative lawsuit against Samsung Electronics in 1998. In 1998, the PSPD raised numerous minority shareholder campaigns (the five largest *chaebols* (large industrial conglomerates) minority shareholder movements), which included shareholder movements against Samsung Electronics and SK Telecom, as well as '10 shares for the people', aiming to reform *chaebols*.

Shareholder activism in South Korea includes the following examples:

- In 1997, with the inflow of foreign capital, foreign activist investment fund campaigns began.
- In 1999, a global hedge fund, Tiger Fund, acquired 6.66 per cent of SK Telecom's shares and demanded that the stock be split and the withdrawal of paid-in capital increase.
- In 2003, UK firm Sovereign Asset Management acquired 14.99 per cent of SK Telecom's shares and demanded the resignation of Chair Choi Tae Won and urged the overall improvement of corporate governance.
- In 2004, the United Kingdom's Hermes fund acquired 5 per cent of Samsung C&T's shares and demanded the retirement of preferred stocks.
- In 2005, Carl Icahn (a US investor) and hedge fund Steel Partners together acquired 6.59 per cent of the Korea Tobacco & Ginseng's (KT&G) shares and demanded the sale of properties and removal of directors.

In *KT&G v Carl Icahn*, Icahn appointed one outside director, sold part of an affiliated company's stocks and increased treasury stocks. In 2015, US activist fund Elliott Management opposed the merger of Samsung C&T and Cheil Industries and filed a preliminary lawsuit (*Samsung C&T v Elliott*).

Since the late 2010s, domestic activist funds and institutional investors have been creating cases of shareholder activism in the Korean market. According to Insightia, a global voting rights research firm, cases of management attacks by activist funds in Korea have been on a steady rise with eight in 2019, rising to 10 in 2020 and 27 in 2021. In 2022, 47 Korean companies became targets of activist campaigns via shareholder proposals or by other means.

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

Numerous foreign activist hedge funds have triggered management disputes and shortly thereafter have sold the stocks to benefit from the increased stock price. Companies, therefore, often view shareholder activism as a means of a hostile M&A or invasion of management. In the past, institutional investors were not hugely interested in improving companies' corporate governance structure; however, since 2016, with the introduction of the Stewardship Code, shareholder activism has increased. The minority shareholders' movement has been thriving since 1997 and has improved retail shareholders' positive perception of shareholder activism. Nevertheless, cases are not numerous enough to capture the considerable differences in the performance of shareholder activism among industries.

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

There are four main types of shareholder activism in South Korea:

- NGOs – in 1997, after the financial crisis, shareholder activism was brought out in the form of minority shareholder movements, and NGOs led the campaigns and demanded companies to improve management transparency;
- foreign activist hedge funds (eg, the Tiger fund, Sovereign Asset Management, Hermes, Carl Icahn and Elliott);
- emerging domestic activist funds (eg, the KCGI, Align Partners Asset Management and Truston Asset Management); and
- institutional investors – such investors were previously disinterested in improving company management or governance structure, but since the introduction of the Stewardship Code, institutional investor shareholder activism has been spreading.

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

Shareholder activism in South Korea spread significantly in 1997 following the financial crisis, mainly due to lack of transparency and competency in companies. Since the late 2010s, the trend is to correct *chaebol* family-oriented corporate governance. Unfortunately, there are cases where *chaebol* chairs degrade company value intentionally so that the family can easily become the company successor. These issues call for activist funds to improve corporate governance and increase corporate value.

SHAREHOLDER ACTIVIST STRATEGIES

Strategies

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

The most commonly used tools are agenda proposals and proxy fighting. A proxy fight is conducted by most activist shareholders because it draws public attention effectively. Shareholders also exercise their rights stated in the Commercial Act, including the right to:

- inspect and copy accounting books;
- request the court to appoint inspectors to obtain information;
- call a temporary shareholders' meeting;
- propose agendas for the shareholders' meeting to adopt certain policies;
- request cumulative voting;
- file injunction suits to stop director misconduct;
- file a derivative lawsuit;
- request the court to remove managing directors; and
- request the return of profits by shareholders who illegally profited from the company.

Processes and guidelines

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

Shareholders who hold no less than 3 per cent of the total number of issued shares may issue a proposal to directors in writing or through an electronic document stating that certain matters be raised as agenda items for a shareholders' meeting at least six weeks before the date of the meeting. This is also possible for persons who have continued to hold stocks equivalent to no less than 10:1,000 (5:1,000 for listed companies with assets more than 100 billion won) of the total number of issued shares of a listed company for more than six months. When requested by a shareholder, the company must publicly open the specifics of the agenda in the convocation letter. As long as the proposed agenda does not violate the law or articles of incorporation, the company must include such proposals as agendas for the general shareholders' meeting.

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

Shareholders can nominate directors for election to the board. However, there are no legal grounds for shareholders to use the company's proxy or shareholder circular infrastructure at the company's expense. Companies generally do not bear the costs arising from shareholders exercising their rights to elect and nominate directors.

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

The Commercial Act provides minority shareholders with the right to request convocation of a shareholders' meeting. According to articles 366(1) and 542-6(1) of the Act, shareholders who hold no less than 3 per cent of the total number of issued shares may request convocation of an extraordinary general meeting of shareholders. For publicly listed companies, any person who has continued to hold stocks equivalent to no fewer than 15:1,000 of the total number of issued shares of the company for more than six months may exercise the above shareholders' right.

Minority shareholders may submit to the board of directors a document or electronic document stating the subject matter of and the reasons for the convocation. If the board concludes that they are justifiable, it will decide to hold a shareholders' meeting, but when they are deemed unjustifiable, the board may disregard a shareholder's request.

If the board does not take prompt measures in response to a shareholder's request, the shareholder may convene the meeting with the court's permission.

A shareholder may delegate their right to vote at the general shareholders' meeting to the proxy solicitor by writing a document proving the proxy's power of representation at the general shareholders' meeting.

Litigation

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

To impose liability on directors, shareholders with the requisite amount of shares may file a preliminary suit to injunct directors for misconduct and file a lawsuit to remove a director where there are reasonable grounds.

Shareholders, including shareholders of a parent company, may file a lawsuit against directors for damages on behalf of the company. However, class actions are possible only on certain claims stated in the Securities-Related Class Action Act. Shareholders may not file a class action on behalf of other shareholders.

Shareholders with the requisite amount of shares may request:

- a copy of the shareholders' register for inspection;
- board meeting minutes;
- accounting books;
- the appointment of an inspector to survey the company's business and financial status; and
- the appointment of an inspector for the general shareholders' meeting.

SHAREHOLDERS' DUTIES

Fiduciary duties

11 Do shareholder activists owe fiduciary duties to the company?

There are no explicit laws regulating shareholder activists' fiduciary duties.

Compensation

12 May directors accept compensation from shareholders who appoint them?

Yes. There are no statutes that prohibit directors from gaining compensation from the shareholders that appoint them. However, it is difficult to find cases where directors are compensated in this way. Although it is not illegal, it may carry the risk of directors breaching their fiduciary duties if they decide in favour of certain shareholders at the expense of the company.

Mandatory bids

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

Joint holders are those who have agreed to:

- jointly acquire or dispose of stocks;
- trade stocks among each other after jointly or solely acquiring those stocks; or
- jointly exercise voting rights.

When the joint holders' accumulated stock is no less than 5 per cent of the total shares, they must report the status of the stocks that they hold (article 141(2) of the Enforcement Decree of the Capital Markets Act).

Disclosure rules

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

According to article 147 of the Capital Markets Act, if a person holds no less than 5 per cent of the total share of a listed company, if there is no less than 1 per cent change in the holding share or if there is a change in the purpose of holding or changing an essential term and condition of the contract related to the stocks, that person must report to the Financial Services Commission within five days on the status of the holding shares, the purpose of the holding (referring to whether they intend to exercise influence on the issuer's business administration) and details of the change of shares held.

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

Yes. In the following cases, the party is obliged to disclose its holding status to the Financial Services Commission (article 142 of the Enforcement Decree of the Capital Markets Act):

- where a person holds a right to claim delivery of stocks pursuant to a provision of an act, as a result of a transaction or under any other contract;
- where a person holds a voting right (including the power to instruct the exercise of the voting right) of stocks pursuant to a provision of an act or under a money trust contract, collateral agreement or any other contract;
- where a person holds a right to acquire or dispose of the relevant stocks pursuant to a provision of an act or under a money trust contract, collateral agreement, discretionary investment contract or any other contract;
- where a person holds a right to complete a trade by unilateral reservation for trading stocks and acquires the status of purchaser by exercising that right;
- where a person holds a contractual right of derivatives contract for an underlying asset of stocks and acquires the status of the purchaser by exercising that contractual right; and
- where a person holds a stock option and acquires the status of the purchaser by exercising that stock option.

Insider trading

16 Do insider trading rules apply to activist activity?

Yes. Activists may be regulated under the law related to using material non-public information regarding the acquisition or disposal of stocks in bulk, as well as tender offers (article 174 of the Capital Markets Act).

COMPANY RESPONSE STRATEGIES

Fiduciary duties

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

Where a proposal has been made in time by a shareholder with the requisite amount of shares, as long as that proposal is in line with the statutes and articles of incorporation, the board will accept the proposal as an agenda item at the shareholders' general meeting. If the board fails to do this, it violates the law, and the directors' liability may not, therefore, be limited or exempt by the business judgement rule.

Preparation

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

It is advisable to listen carefully to shareholder activists' opinions and positively consider meaningful advice in the board or shareholders' meetings. If the opinions are found to be unreasonable, it is recommended that the shareholders and the media be informed that the demands are unjustifiable and that they will be denied. As the number of shareholder activism cases increases, attention and concern within companies and their boards will rise.

Defences

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

The main targets of shareholder activism are companies with:

- no eminent major shareholder or low control of the major shareholder;
- devaluated shares and low dividend payouts; or
- poor corporate governance structure.

To avoid being a target of an activists' fund, major shareholders may:

- increase holdings of shares;

Read this article on Lexology

- increase dividend payouts;
- reinforce procedural and material contents of management judgements; and
- develop communication with shareholders and proxy advisers.

When activists make demands against a company, the company should positively review the demands as long as they are justifiable and aligned with the shareholders' interests. However, the company should also observe whether the shareholders have complied with their obligations to disclose shares and fulfil legal requisites to solicit proxies, or indeed whether they have violated the law by damaging the reputation of the company or the management. When the information requested by the activists is material non-public information or subject to regulations regarding fair disclosure, the companies should not share the information. In addition, investor-friendly policies are necessary (eg, strengthening communication through official shareholder communication channels and establishing a management conduct code).

Proxy votes

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

No. All voting is conducted on the day of the shareholders' meeting, and the company is not permitted to receive daily or periodic reports regarding proxy votes.

Settlements

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

There are few cases where activists' demands have been accepted. However, there have been some instances where a company has compromised with shareholders on appointing outside directors, improving corporate governance and increasing dividend payouts, among other things.

SHAREHOLDER COMMUNICATION AND ENGAGEMENT

Shareholder engagement

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

There have been a few cases of shareholder engagement where both the shareholders and the company were involved. For instance, Korea Tobacco & Ginseng established a shareholder council, recommended outside directors, suggested shareholders' meeting agendas and collected opinions regarding those agendas.

23 Are directors commonly involved in shareholder engagement efforts?

No. Cases where directors are involved in shareholder engagement efforts remain rare. Although shareholders do not directly participate in company organisations, some companies have had committees within the board gather shareholders' opinions to improve shareholder value. For instance, Samsung Electronics and Samsung C&T established a governance committee under the board and appointed a shareholders' rights protection commissioner to handle communication between the board and shareholders. The commissioner reported meaningful feedback and opinions from the shareholders to the board.

Disclosure

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

If shareholder engagement effort-related matters occur through committees within the board, those matters must be disclosed. According to the annual, biannual and quarterly business report disclosure forms provided by the Financial Supervisory Service, under the item 'board and other company organisations', companies must disclose the name, director's name, chair's name, purpose and activities concerning the committees.

Sometimes shareholders directly contact the board. However, directors are not obliged to respond unless it is otherwise stated in the law as the minority shareholders' right. Direct communications are, therefore, rare.

South Korea has adopted a fair disclosure policy through the Securities Market Disclosure Rule. According to article 15 of the Rule, when information subject to fair disclosure (eg, information regarding companies' future business or management plans) is provided selectively to company-related persons subject to fair disclosure, it must be reported to the Korea Exchange. The company is not obliged to disclose communication with shareholders unless it constitutes information subject to fair disclosure.

Communication with shareholders

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

To solicit proxy for more than 10 shareholders of a listed company, a proxy form and reference documents should be submitted to the Financial Services Commission and the Korea Exchange. A proxy solicitor may provide the proxy form and reference documents to the voting rights holder by:

- delivery in person;
- mail or facsimile;
- email;

- dispatching them together with a notice to convene a general meeting of shareholders; or
- publishing them on a website.

Meanwhile, there are no systems enabling a company to identify or facilitate direct communication with its shareholders.

Access to the share register

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

According to article 396(2) of the Commercial Act, any shareholder, even a shareholder with only one share, may request, at any time during the company's business hours, to inspect or copy the shareholders' register. The company is obliged to provide the shareholders' register or beneficial shareholders' register at the shareholder's request. However, the company may deny the request when issued with improper purpose.

UPDATE AND TRENDS

Recent activist campaigns

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

Since 2018, the Korea Corporate Governance Improvement Fund (KCGI), a domestic activist fund, and its joint holders have acquired over 40 per cent of shares in Hanjin Kal Corp (the holding company of Hanjin Group). The KCGI has:

- demanded improvements to corporate governance;
- demanded that shareholder proposals be pushed through;
- requested the inspection of the shareholders' register, board meeting minutes and accounting books; and
- filed a derivative suit.

Shareholder activism by the KCGI reached its apex in the Hanjin Kal Corp's annual shareholders' meeting in March 2020. However, the KCGI and fellow shareholders failed to amend Hanjin Kal's articles of association and appoint directors at the shareholders' meeting.

Since 2022, the activities of Align Partners Asset Management(Align Partners), a domestic activist fund have attracted great attention. In SM Entertainment's annual shareholders' meeting in March 2022 an audit candidate proposed by Align Partners, was appointed. Align Partners has carried out various shareholder engagements such as requesting inspection of the minutes of the board of directors and accounting books. In February 2023, SM Entertainment and Align Partners came to an agreement on 12 clauses through which the entertainment company's management structure will be revised.

Joo-young Kim jykim@hnrlaw.co.kr
Jeong Seo jseo@hnrlaw.co.kr

Suite 431, 27, Seochojungang-Ro 24-Gil Seocho-Gu, Seoul, South Korea
Tel: +82 2 564 9889
www.hnrlaw.co.kr

Switzerland

Mariel Hoch

Bär & Karrer

RETURN TO CONTENTS

Summary

GENERAL

Primary sources

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 laws and regulations relating to shareholder activism are the Code of Obligations (CO) governing the rights and obligations of companies' boards of directors and shareholders in general and containing specific rules on the compensation of management and the board of directors as well as the Financial Market Infrastructure Act (FMIA), enacted on 1 January 2016, containing additional rules for listed companies and their shareholders. The provisions of the FMIA are set out in more detail in two ordinances, the Financial Market Infrastructure Ordinance (FMIO) and the Financial Market Infrastructure Ordinance by the Financial Market Supervisory Authority (FMIO-FINMA). The Takeover Ordinance (TOO) sets out detailed rules on public takeover offers, including boards' and qualified shareholders' obligations.

Companies listed on the SIX Swiss Exchange are also bound by, inter alia, the Listing Rules (LR-SIX), the Directive on Ad hoc Publicity (DAH) and the Directive on Information relating to Corporate Governance (DCG).

The CO and the FMIA are enacted by Parliament and the FMIO by the Federal Council, the FMIO-FINMA by the Financial Market Supervisory Authority FINMA (FINMA), the TOO by the Takeover Board, and the LR-SIX and the DAH by SIX Exchange Regulation.

Compliance with the CO is primarily enforced by the civil courts. FINMA enforces the FMIA as well as its ordinances, and the Takeover Board enforces the TOO and the takeover-related provisions of FMIO-FINMA. Compliance with the LR-SIX, the DAH and the DCG is enforced by the SIX Exchange Regulation.

Shareholder activism

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

Compared with other jurisdictions, in particular the United States, the number of activist campaigns involving Swiss companies is still moderate. However, Switzerland is a key European target for activist shareholders. Since 2015, there have been 42 campaigns against companies of all sizes. Out of these 42, there were three situations in which the activist was able to gain board seats. In 2021, only four campaigns took place compared to nine in 2020 and 14 in 2019. The year 2022 was marked by an increase in activist activity and a further increase is expected in 2023.

The chances of success depend on the content of the campaigns and cannot easily be measured among others because targets may announce changes in operations or strategic adjustments as their own (pre-existing) plans, which happen to coincide with the requests of the activist shareholder. Proxy fights at shareholders' meetings are rarely successful, but occasionally activists win them (eg, Veraison and Cobas at Aryzta's 2020 EGM, which led to

the replacement of a number of board members including the chairman). The chances of success are typically higher if proxy advisers, such as the Institutional Shareholder Services and Glass Lewis, issue voting recommendations in support of the activist's requests.

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

The corporate community is generally critical of shareholder activism because of its rather short-term orientation. The legislator and regulators have not expressed a position on shareholder activism but tend to lower the hurdles of shareholder minority rights. Retail shareholders and the general public will form an opinion on a case-by-case basis. Institutional shareholders will analyse the requests of the activists and decide whether to support them. Only in rare instances will they vote with the activist.

It seems that basic materials, technology and services are regularly targeted industries; the financial industry, industrial goods and the healthcare sector have also attracted interest from activists. Owing to a variety of reasons that have attracted activist shareholders in the basic materials industry, it should not be concluded that this industry is particularly prone to activist campaigns. There are also no regulatory reasons that facilitate shareholder activism in certain industries over others.

In recent years, Switzerland has seen shareholder activists engage in campaigns, including:

- Petrus Advisers, who have a stake of less than 3 per cent in the Geneva-based banking software company Temenos, in October 2022 published a letter in which they sharply criticised the company's management and called for a correction of the company's strategy, followed by a letter in November 2022 calling for the dismissal of the CEO and the resignation of the chairman of the board; only a few months thereafter, the CEO resigned and the chairman of the board will step down in June this year;
- Ethos, who holds a stake in Credit Suisse, in 2022 in cooperation with other shareholders submitted two requests for agenda items (one climate-related topic aiming for an amendment of the articles of association and the other requested a special audit) which, however, received no support from the board of directors and were voted against with a large majority at the annual shareholders' meeting;
- the activist investor Bluebell holds a stake in the Swiss luxury group Richemont. So far, Bluebell has not been very successful with its activist campaigns with regard to Richemont in 2022, mainly due to the founding family member Johann Rupert, who holds 50 per cent of the voting rights in the company and Richemont's support by proxy advisers;
- Veraison and Cobas collectively held 17.8 per cent in Aryzta and successfully changed the majority of the board of directors in 2020 and pushed for the sale of the Americas business;
- the investor group White Tale Holdings acquired a stake in Clariant and then, in July 2017, increased the stake to more than 20 per cent and successfully prevented the merger between Clariant and Huntsman and eventually exited its investment by selling its stake to the Saudi chemical firm SABIC International Holdings BV;

- RBR Capital Advisors, with its manager Rudolf Bohli, acquired a stake of 0.2 to 0.3 per cent in Credit Suisse and requested that Credit Suisse be split into three businesses, an investment bank, an asset manager and a wealth management group;
- Active Ownership Capital's successful support of Freenet in its opposition of Sunrise's planned takeover of UPC in 2019; and
- Cevian's complex campaign at Panalpina requesting board changes and, in parallel, attacking the exemption from the voting rights restriction of 42.6 per cent shareholder Ernst Göhner Foundation.

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

Swiss public companies have been mainly targeted by international hedge funds, but Swiss hedge funds have also engaged in a number of situations.

Although it is hardly possible to make a general statement regarding the short- or long-term orientation of the inhomogeneous group of activists present on the Swiss market, it is probably fair to say that they are naturally rather mid- to long-term oriented. Typically, activist shareholders aim at giving all supporting shareholders a voice at the board table.

They may raise different issues that ultimately ensure companies are managed in their owners' interests (whether short- or long-term interests). However, there has been an increasing level of more contentious activist interests in recent years. These activists are focused on ensuring that any value being invested for the long-term benefit of the company is immediately released for the investing public (eg, by cutting investments with long-term returns, closing or spinning off separable divisions or increasing payout ratios). There is no clear pattern as to whether traditional large shareholders support activists in their endeavours. This partly depends on whether the activists benefit from the recommendations of leading proxy advisers.

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

Shareholder activism in Switzerland primarily focuses on governance issues (particularly board representation and executive compensation) as well as on strategic and operational matters (particularly dividends and divestitures). Activist shareholders usually seek a (stronger) representation on the board of directors. It is estimated that in Switzerland activists use board representation as a tactic more than anywhere else in Europe. In particular, the implementation of specific rules on the compensation of management and the board of directors in the CO has led to increased attention placed at executive compensation-related governance issues: activist shareholders have a binding vote on the executive compensation of the Swiss company's executive management – one of the most powerful tools to direct the management's conduct. It is extremely rare that shareholders reject the compensation submitted to them by the board of directors.

By way of contrast, social activism is rarely tabled in any activist campaign in Switzerland. However, there are indications that environmental, social and governance matters such as

board gender diversity, environmental matters or the disclosure of political spending and lobbying will play a role in governance activism in the future.

SHAREHOLDER ACTIVIST STRATEGIES

Strategies

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

Shareholder activism normally starts with building up a relatively small stake of shares, avoiding triggering the disclosure obligations pursuant to the Financial Market Infrastructure Act (FMIA) (especially the first threshold of 3 per cent). Prior to increasing its stake, a common activist will make private contact with the company's executive management or board representatives to present and discuss its ideas and specific demands. These private negotiations are also the reason why it is believed that roughly half of all activist campaigns never become public. However, attention should be paid to the duty of equal treatment of all shareholders and the duty of ad hoc publicity.

If the private negotiations fail, an activist may launch a public campaign to divulge the key requests towards the company and, by doing so, obtain the support of other shareholders (since shareholders do not have a right to access the share register, the only way of reaching out to other shareholders holding less than 3 per cent is through the media). As psychology plays an important part in the fight for control, gaining the support of the public opinion is a crucial element in winning the battle. The share price is likely to increase following the publication of the key elements of the campaign as it is likely to attract new investors. In the run-up to the shareholders' meeting, the composition of the shareholder base of the target company may change towards increased support of the activist's campaign. Based on public support and depending on the support from professional proxy advisers, the activist shareholder may be in a position to find an attractive compromise with the board.

Fruitless settlement attempts may lead to proxy fights at and outside the shareholders' meeting (including the enforcement of the information rights, freezing entries in the commercial register and challenging allegedly non-compliant shareholders' resolutions) or even result in litigation (eg, liability claims) and criminal charges.

Ahead of the shareholders' meeting, the activist shareholder may decide to form a group with one or more other key shareholders. According to the FMIA, any person who reaches, exceeds or falls below 3, 5, 10, 15, 20, 25, 33.3, 50 or 66.6 per cent of the voting rights of the target company must notify the target company and the stock exchange (the SIX Disclosure Office for SIX-listed companies). The activist may use the disclosure as a signal of determination to the company and financial markets. It typically also triggers an additional round of media reports.

Although irrelevant to win a proxy fight but helpful to the communication strategy, the activist shareholder often uses the shareholders' meeting to speak publicly and reiterate its requests for improved performance.

Processes and guidelines

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

All shareholders have the right to attend shareholders' meetings, to vote and to request information and inspect documents (to the extent company interests requiring confidentiality do not prevail). The right to information is regularly used by activist shareholders to increase pressure prior to shareholders' meetings. The board is obliged to respond to such questions during the shareholders' meeting. All shareholders have the right to propose motions and counter-motions (eg, regarding board elections) at shareholders' meetings and may request a special audit or a special expert committee to investigate certain facts and behaviours of the board or management.

Furthermore, any shareholder (or group of shareholders) representing 0.5 per cent of voting rights or capital (or in non-listed companies, 5 per cent of voting rights or capital; the articles of association may contain a lower threshold) is entitled to demand that certain agenda items be tabled at the next shareholders' meeting.

Any shareholder (or group of shareholders) representing 5 per cent of the voting rights or capital (or in non-listed companies, 10 per cent of the voting rights or capital in non-listed; again, a lower threshold may be contained in the articles of association) may request that an extraordinary shareholders' meeting be convened.

If a shareholder demands that an agenda item be tabled for the next shareholders' meeting, the respective deadline for the submission is contained in the articles of association and ranges typically between 40 and 55 days prior to the meeting. The company is obliged to include the item and the shareholders' motion relating thereto in the invitation to the shareholders' meeting. The board will add its own motion to the item.

Shareholders representing at least 33.3 per cent of the voting rights may block special resolutions (capital transactions, mergers, spin-offs, etc), shareholders holding at least 50 per cent of the voting rights may force ordinary resolutions (eg, appointment of a director) and shareholders representing at least 66.6 per cent of the voting rights may force special resolutions (eg, amendments to the articles of association, or, since 1 January 2023, the delisting of the company's shares (before, the delisting was a board competence). As these thresholds typically relate to the total votes represented at the shareholders' meeting and given that shareholder representation typically ranges between 45 and 65 per cent, the shareholdings required to pass the aforementioned thresholds are much lower.

Under the Code of Obligations (CO) a number of corporate decisions – such as the amendment of the articles of association; capital increases; the approval of the annual accounts and resolutions on the allocation of the disposable profit and; the election of board members, the chair and the members of the compensation committee as well as board and management compensation – fall into the mandatory competence of the shareholders' meeting. The CO further foresees that elections (or re-elections respectively) of board members must take place annually, and elections must take place individually. Therefore, activist shareholders that aim to deselect members of the board of directors are not required to request an extra agenda item for this purpose, but may simply vote against the re-election tabled by the company.

Except for the request for an extraordinary shareholders' meeting or a special audit and the appointment of an auditor at the request of a shareholder, it is not possible to request that additional agenda items be tabled during the shareholders' meeting. However, any shareholder may make motions relating to any agenda item during the shareholders' meeting. This is particularly relevant with respect to any election items as additional persons may be proposed for election. Against the background that a significant number of shareholders cast their votes via the independent proxy without giving specific instructions as to ad hoc motions (or by instructing the independent proxy to follow the board's recommendation in such case), ad hoc motions generally have a low likelihood of succeeding.

Other than with respect to the number of votes or percentage of the capital, Swiss law does not distinguish processes depending on the type of shareholder submitting a proposal.

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

Any shareholder is entitled to nominate a director for election to the board, usually as a motion within the agenda item 'election of the members of the board of directors'. In this context, if the motion is filed with the company in a timely fashion, the board is obliged to publish the shareholder's motion in the company's invitation to the shareholders' meeting at the company's expense. However, shareholders may not directly access the share register and divulge their requests via a special proxy access tool.

Activists typically use the media or a dedicated web page for their campaigns once their intentions are publicly disclosed.

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

Any shareholder – individually or acting in concert – representing 5 per cent of the voting rights or capital (or in non-listed companies, 10 percent of the voting rights or capital) has the right to call an extraordinary shareholders' meeting. Certain companies have introduced lower thresholds in their articles of association. The required threshold may also be reached by several shareholders acting in concert. The request to call an extraordinary shareholders' meeting must be submitted in writing to the company's board and must contain the requested agenda items, including the activist's motions thereto.

Further, the revised CO foresees that companies may not only hold physical, but also virtual (ie, with no physical venue solely by electronic means, provided that the articles of association permit this form and the board of directors designates an independent voting representative) and hybrid (ie, with a physical venue and the possibility of virtual participation) shareholders' meetings.

Litigation

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

Shareholders may, in principle, not file lawsuits on behalf of the corporation or on behalf of all shareholders. However, they may file liability actions against directors and members of the executive management where the payment of damages is directed to the company. In addition, any shareholder may challenge shareholders' resolutions made in violation of the laws or the articles of association with effect for the entire company. Also, certain post-M&A appraisal actions under the Merger Act have erga omnes effect (ie, all shareholders in the same position as the claimant receive the same compensation). The cost of the proceedings must generally be borne by the company (ie, the defendant).

In general, class actions are not specifically addressed in the Swiss civil procedure according to applicable law. The existing class action rights are limited to the violations of personality rights, but should be expanded in future to also enable the enforcement of claims for compensation. Today, the Swiss civil procedure nevertheless allows for a joinder of plaintiffs or defendants: several parties may join their lawsuits if the same court has jurisdiction, and all claims are based on the same set of facts and questions of law. This approach reduces costs and avoids conflicting judgments but increases complexity. Another corporate litigation tactic is to launch a single litigation test case to have a precedent for multiple actions involving the same set of facts and questions of law.

Shareholders are not able to directly prevent the company from accepting a private settlement with an activist shareholder. They may only challenge the board's settlement resolution on the grounds that the decision was void or bring liability actions against the directors should the board have breached their directors' duties and should they have caused damage to the company by doing so.

At the shareholders' meeting, every shareholder is entitled to request information from the board of directors on the affairs of the company and information from the external auditors on the methods and results of their audit (and in non-listed companies, beyond the shareholders' meeting, shareholders who together represent at least 10 per cent of the voting rights or capital may in addition request the board of directors in writing to provide information on company matters). The right to information is regularly used by activist shareholders to increase pressure prior to shareholders' meetings. The information must be provided to the extent company interests requiring confidentiality do not prevail.

In addition, any shareholder – individually or acting in concert – representing at least 5 per cent of the voting rights or capital has the right to inspect documents (again to the extent company interests requiring confidentiality do not prevail). The board is obliged to permit inspection within four months from receiving the request and shareholders may take notes.

Finally, any shareholder – individually or acting in concert – representing at least 5 per cent of the voting rights or capital (or in non-listed companies, at least 10 per cent of the voting

rights or capital) has the right to request a special audit if the shareholders' meeting has rejected a respective motion.

SHAREHOLDERS' DUTIES

Fiduciary duties

11 Do shareholder activists owe fiduciary duties to the company?

Shareholders, including shareholder activists holding a significant or majority stake, do not owe any fiduciary duties or duty of loyalty to the company. They may, in particular, cast their votes in their own (short-term) interest irrespective of whether those interests are contrary to the company's long-term interests.

Compensation

12 May directors accept compensation from shareholders who appoint them?

There is no Swiss law or regulation preventing shareholders from paying direct compensation (ie, remuneration in addition to the compensation bindingly resolved by the shareholders' meeting) to their directors. However, the shareholders may not derive any special rights from this contribution as the directors are always obliged to act in the best interest of the company (duty of loyalty to the company) and generally to treat all shareholders equally. The board member will need to disclose and handle resulting conflicts of interest according to the company's regulations, and the company may have to disclose the compensation in the annual report and pay social security contributions on all those amounts.

Mandatory bids

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

Shareholders acting alone or in concert with other shareholders with the intention to control the relevant company are obliged to launch a mandatory bid if they exceed the threshold of 33.3 per cent of the voting rights of a listed company. The articles of association of a company may raise the relevant threshold up to 49 per cent of the voting rights (opting up) or may put aside the duty to launch a takeover offer completely (opting out). Shareholders are deemed to act in concert with respect to the mandatory bid obligation if they coordinate their behaviour, by contract or other organised procedure or by law, and this cooperation relates to the acquisition or sale of shareholdings or the exercising of voting rights.

Disclosure rules

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

Any shareholder or group of shareholders acting in concert must disclose if it attains, falls below or exceeds the threshold percentages of 3, 5, 10, 15, 20, 25, 33.3, 50 or 66.6 of the

voting rights of the company (irrespective of whether the voting rights may be exercised or not). This applies to direct or indirect holdings of shares as well as to the holding of financial instruments with those shares as underlying ones. Shareholders are considered to be acting in concert if they are coordinating their conduct by contract or by any other organised method with a view to the acquisition or sale of shares or the exercise of voting rights.

The disclosure entails the number and type of securities, the percentage of voting rights, the facts and circumstances that triggered the duty to disclose, the date the threshold was triggered, the full name and place of residence of the natural persons or the company name and registered seat of legal entities as well as a responsible contact person. The shareholder's intentions must not be disclosed.

The disclosure must be made towards the company and the stock exchange within four trading days following the triggering event. The company must publish the required information within another two trading days. The maximum fine that may be imposed on non-reporting parties amounts to 10 million Swiss francs in the case of intentional conduct and 100,000 Swiss francs in the case of negligence. The Federal Department of Finance (FDF) is the competent authority to issue those fines. In most instances, the FDF commences its procedures following a criminal complaint made by the Financial Market Supervisory Authority.

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

The disclosure requirements apply to all derivate instruments (eg, conversion rights and option rights), and long as well as short positions need to be disclosed. In addition, if shareholders are acting in concert, their shareholdings or holdings of derivate instruments are aggregated, and they need to make the disclosure as a group. For the purposes of the notification of significant shareholdings, parties are deemed to act in concert if they coordinate their behaviour, by contract or other organised procedure or by law, and this cooperation relates to the acquisition or sale of shareholdings or exercising of voting rights.

Insider trading

16 | Do insider trading rules apply to activist activity?

Insider trading rules apply to activist activity; that is, if the intentions of the activist shareholder are deemed as inside information, the activist shareholder may not communicate the information to anyone, including other shareholders, before making it public unless the communication to other shareholders is required to comply with legal obligations or in view of entering into an agreement. An activist wanting to purchase shares in a company does not constitute insider trading. As the campaign typically includes more than just the purchase of target shares (eg, a change in board composition and a request of corporate actions), activist shareholders need to carefully structure their campaign and the building up of their stake to avoid risks of insider trading.

COMPANY RESPONSE STRATEGIES

Fiduciary duties

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

Directors must apply the same standard of care to an activist proposal as to any other proposal or matter. They have to act and resolve in the best interest of the company and must treat all shareholders equally under equal circumstances. Also, board members (formally or informally) representing a shareholder on the board of directors must appropriately deal with their conflicts of interests when facing their shareholder's activist campaign.

Preparation

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

As shareholder activism has gained traction in Switzerland, larger listed companies are investing more time and resources in activist engagement to deal with activists' concerns appropriately. Accordingly, the preparation and implementation of preventive as well as defending measures against activists' attacks have become part of a corporation's routine. This increased attention may be regarded as an impact resulting from shareholder activism.

Preventive measures minimise the risk of a campaign. In particular, the board may identify and reduce existing exposures of the company to activist shareholders. As a first step, the board will examine the company's exposure and analyse issues that are likely to be addressed by an activist investor. Key features of an exposed company are, inter alia:

- undervaluation (which can be addressed by value-adding sale possibilities of separable divisions or non-core assets);
- board instability (especially decreasing support by the shareholder base);
- large cash reserves combined with a comparably low dividend payout ratio; and
- M&A transactions involving the company.

Additionally, the executive management should continuously monitor and assess the company's shareholder base to identify potential shareholder activists. At this stage, the board may also consider appointing a (standby) task force comprising specialists in public relations, finance and law. However, even if the board manages to implement effective preventive measures, a complete elimination of the risk of becoming a target of activists is – in light of the various activists' interests – not possible.

Once an activist investor emerges and expresses its concerns to the company's board, which usually occurs in a private setting at first, the board should be in a position to revert to a set of prepared tools. First, a board is well advised to listen open-mindedly and attempt to engage politely in a constructive dialogue with the activist investor, addressing and considering the activist's legitimate concerns. Following a close examination of the issues raised,

the dialogue should continue, and a dismissive or confrontational stance should be avoided. Consistency in the board's engagement is important to preserve credibility.

Where no satisfactory solutions can be reached during the private conversations, the board may revert to its defence tools, which include:

- responding clearly and comprehensively to the activist (ignoring the issues addressed is usually not an option);
- using committed and consistent board communication (direct and public engagement with the shareholders, especially by issuing a white paper illustrating the company's position); and
- engaging in dedicated dialogue with the company's major shareholders and significant proxy advisory firms (to secure their support).

The company may be able to identify an investor who would go public in support of the board. An approach that has proven effective in past activist campaigns is to slightly relent towards the position of the activist with a moderate alternative proposal to steal the activist's thunder.

As a long-term defence measure, some target boards consider gaining a friendly long-term anchor shareholder who is supportive of the current board's strategy.

Defences

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

The potential target company may implement a set of defensive measures, particularly defensive provisions in the articles of association concerning, inter alia, transfer restrictions, voting rights restrictions (3 and 5 per cent are the most common thresholds), super voting shares (ie, shares with a nominal value reduced by up to 10 times by keeping the one-share, one-vote principle, normally assigned to an anchor shareholder) and super majorities relating to specific resolutions or to a quorum at the shareholders' meeting. Such structural defences may be an efficient tool to hinder short-term interested shareholders. In addition, Swiss regulation already provides for certain effective impediments an activist must overcome, including, especially, the disclosure requirements and the mandatory tender obligation (at 33.3 per cent) pursuant to the Financial Market Infrastructure Act as well as the lack of access to the company's share register. It is a difficult balancing act for the activist to engage in conversations with other shareholders and to avoid triggering disclosure obligations or even a mandatory bid obligation owing to an acting in concert. Target boards will sometimes use this legal risk to destabilise the activist shareholder and shareholders showing sympathy with his or her actions.

A structural feature that makes a corporation more likely to be the target of shareholder activism is, in particular, the implementation of an opting-out clause (or an opting-up clause, respectively) regarding mandatory bid obligations. The release of an investor building up a majority stake from the duty to launch a public tender offer means an elimination of a main legal impediment that activists face in Switzerland.

Although not picked up by the revised Code of Obligations, criticism with respect to the instruments of super voting rights and opting-out has been voiced in a recent battle for control over Swiss listed company Sika.

Proxy votes

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

Under the CO, the independent proxy must treat the instructions of the individual shareholders confidential until the shareholders' meeting. He or she may provide the company with general information on the instructions received not earlier than three working days before the shareholders' meeting and must explain at the shareholders' meeting what information he or she has provided to the company.

In addition, the dialogue with proxy advisers (ISS, Glass Lewis and Ethos) gives the company a rough indication of how some of the votes might be cast at the shareholders' meeting. A regular dialogue with proxy advisers is advisable to ensure proxy advisers understand the company's reasoning, in particular, if it deviates from proxy advisers' policy guidelines.

Settlements

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

The entering into settlements with activists is rare in Switzerland. One example was the settlement of the board of directors of gategroup Holding AG with RBR Capital Advisors during a proxy fight where the parties agreed on the composition of the board of directors.

SHAREHOLDER COMMUNICATION AND ENGAGEMENT

Shareholder engagement

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

Public companies are increasingly reaching out to shareholders in a systematic manner to gain a deeper understanding of shareholder thinking and priorities. Larger companies will retain specialised firms to assist them with such engagement.

On the shareholder side, the joining of forces by shareholders with regard to an activist campaign is rather uncommon. In two recent cases, RBR Capital Advisors and the London-based hedge fund Cologny Advisors formed a shareholder group that controlled more than 10 per cent of the Swiss public company gategroup Holding AG, and Veraison and Cobas formed a group in the 2020 Aryzta campaign and jointly held 17.8 per cent in Swiss public company Aryzta.

Organised shareholders customarily conclude a shareholder agreement at first to outline their joint concerns and plan of action. Such agreements typically entail voting commitments regarding shareholders' meetings, how to handle disclosure notification issues pursuant to the Financial Market Infrastructure Act (disclosure only needs to be made by one member of the group), provisions to avoid triggering the mandatory bid obligation, a communication policy and confidentiality obligations. Such jointly organised engagement allows shareholders to publicly announce their group with a joint approach, which can increase the pressure on the company. Even without a formal shareholder agreement, the acting in concert of several shareholders is likely to trigger disclosure obligations. Swiss law does not provide for any formal requirements in how activist shareholders must approach the company. Depending on their campaign strategy and their general policies, they will either engage with the company in confidential conversations or take the public route (which is typically preceded by confidential discussions). The levels of success of these approaches depend on the specific characteristics of the target, including the industry it belongs to.

23 Are directors commonly involved in shareholder engagement efforts?

Chairpersons occasionally engage with shareholders when it comes to board matters such as corporate governance (eg, on a governance roadshow).

Regarding the engagement with activist shareholders, board members are regularly involved. Once the initial private conversations between the activists and the target company turn out to be fruitful, it is common to contractually fix the framework conditions in the further approach (eg, relating to a supported board representation). It is common for activists to approach not only the chair of the company's board but also those board members they already know or to whom they have been introduced through their networks.

Disclosure

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

Corporate law requires the board of directors to treat all shareholders equally under equal circumstances. Hence, valid reasons are required to allow for a selective information policy. Against the background that shareholders have no fiduciary duties towards the company, the board will rarely have valid reasons to selectively disclose confidential information to an activist shareholder within a proxy fight ahead of a shareholders' meeting.

The board is not obliged to disclose its engagement with activist shareholders for as long as no agreement is entered into. If, for example, an activist shareholder requests that an agenda item be tabled at the next shareholders' meeting or that an extraordinary shareholders' meeting be convened, the board must make an ad hoc publication. For SIX listed companies, any such announcement must be distributed to SIX Exchange Regulation, at least two widely used electronic information systems, two Swiss daily newspapers of national importance, the website of the company and any interested party requesting to be included in the electronic distribution list.

Communication with shareholders

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

As activist shareholders do not have access to the share register of the company, they may publish their intentions on their website or in the media (eg, with open letters to shareholders or by approaching significant shareholders).

Generally, companies are free to approach their shareholders (eg, by way of letters to shareholders, public statements or individual approaches). As soon as the activist approach is publicly known, the media play an important role in shaping shareholder opinion in the run up to a shareholders' meeting. The board usually engages with the key shareholders to gain their support, which may require that the board compromises on certain issues. This shareholder engagement by the board must occur within the limits of the law, in particular, the transparency rules and rules on equal treatment.

The board will also engage with proxy advisers to gain their support (possibly in the form of a special situations report) and, if successful, to make the proxy advisers' recommendation public to underline the viability of the board's position with its shareholders.

Access to the share register

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

The shareholders' register of a Swiss company is not publicly available, and the shareholders may therefore not receive a list of the registered shareholders from the company. In addition, Swiss companies are not obliged to distribute information prepared by a requesting shareholder to the other shareholders.

However, any shareholder holding at least 3 per cent in a listed company has to disclose, inter alia, the number of shares represented and the legal and beneficial owner. This information is available on the website of the respective stock exchange (eg, that of the SIX Swiss Exchange). To foreign investors, it may come as a surprise that they are, as shareholders, not entitled to address their concerns with other shareholders by directly or indirectly using the company's share register or by including them in the company's proxy materials.

UPDATE AND TRENDS

Recent activist campaigns

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

Activist engagement has become an established element of the Swiss capital market and is unlikely to disappear in the foreseeable future. After a few years of increased shareholder activism, many Swiss companies are aware of the related challenges and prepare for them, for example, by having their advisers lined up. Not all activist approaches are publicly known, and not all published campaigns culminate in a proxy fight.

Some activists try to differentiate themselves from their competitors by stressing that they have a less short-term approach or that they wish to engage privately with the board of directors rather than in public campaigns. Swiss media are often divided in their assessment of the activists' requests, and so is public opinion.

A new expected trend in shareholder activism are campaigns on environmental, social and governance topics where environmental and social matters will become more present next to governance topics that have been part of the activist playbook for a long time.

BÄR & KARRER

Mariel Hoch mariel.hoch@baerkarrer.ch

Brandschenkestrasse 90, Zurich 8002, Switzerland
Tel: +41 58 261 5000
www.baerkarrer.ch

United States

Adam O Emmerich, Trevor S Norwitz, Steven A Cohen, Sabastian V Niles and Raeesa I Munshi

Wachtell, Lipton, Rosen & Katz

RETURN TO CONTENTS

Summary

GENERAL

Primary sources

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

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

State law

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

Federal law

Federal laws that are most directly related to shareholder activism and engagement are laws governing securities trading, including the Securities Act of 1933 (the Securities Act), the Securities Exchange Act of 1934 (the Exchange Act), the Public Company Accounting Reform and Investor Protection Act of 2002 (the Sarbanes-Oxley Act) and the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd–Frank Act), and the regulations that have been promulgated by the federal agencies under each of these Acts. The enforcement of these laws and regulations are the purview of the Securities and Exchange Commission (SEC). For example, shareholder activists are required to comply with beneficial ownership reporting requirements under section 13 of the Exchange Act, which generally require a person or group that has acquired direct or indirect beneficial ownership of more than 5 per cent of an outstanding class of equity securities to file a report with the SEC within 10 calendar days of crossing the 5 per cent threshold and promptly after material changes in the group's position or intentions. In February 2022, the SEC

proposed amendments to the reporting requirements under section 13 that would shorten the filing deadline to five days, set an amendment deadline of one business day (rather than 'promptly') after a material change, address the use of derivatives and tighten up on action in concert. Companies must also navigate the disclosure requirements of the Exchange Act in reporting on corporate governance matters in their periodic disclosures and their annual meeting proxy statement disclosures.

Federal laws relating to the protection of competition can also impact activism. In particular, the Hart-Scott–Rodino Antitrust Improvements Act of 1976, as amended, and the rules and regulations promulgated thereunder (the HSR Act), generally requires persons proposing to acquire voting securities (and certain other interests) of a company valued over specified thresholds to file a notification and report form with the Federal Trade Commission and Antitrust Division of the Justice Department and observe a 30-day waiting period prior to consummating the acquisition. Because the lowest threshold is currently US$111.4 million, this filing may be the first time a company learns that an activist is accumulating a position in its stock (although activists are often able to avoid filing under the HSR Act while building their position by buying through separate funds).

Informal standard setters

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

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

Shareholder activism

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

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

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

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

According to Lazard's 2022 Review of Shareholder Activism, which analyses campaigns at companies with market capitalisations greater than US$500 million, in 2022 there were 235 activist campaigns, leading to 108 board seats claimed by activists. These figures are down just 6 per cent from 2018's record of 249 activist campaigns. Activist funds have amassed very substantial 'war chests' of available capital and both they and activist shareholders (including ESG activists) are expected to continue to be a major force going forward.

Many public companies receive one or more shareholder proposals under Rule 14a-8 every one or two years relating to governance or other ESG issues. In the 2022 proxy season, over 860 shareholder proposals were filed. Most of these are precatory proposals, not seeking to directly implement a change but requesting the board to take a specified action. The success of these depends very much on the particular topic (for example, a request to eliminate a staggered board would almost invariably receive a very high level of support, whereas a request for a company to study gender pay disparities will depend on whether investors perceive there is a problem and how the company has responded). Because the proxy advisory firms have policies to recommend against directors standing for re-election if they do not implement the will of the shareholders as expressed in a shareholder resolution, companies are increasingly responsive to shareholder proposals that receive broad shareholder support.

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

The merits of shareholder activism remain a hotly debated subject in the United States. In general, corporate America and its supporters view much shareholder activist activity as short-term oriented, often abusive, and detrimental to the ability of companies to plan and execute long-term strategies. The institutional shareholder community, supported by many in the sell-side analyst community, the press and academia, consider shareholder activism as a valuable mechanism for holding boards of directors to account. Institutional

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

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

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

Activism in the United States is broadly spread across industries, although naturally some individual activists gravitate towards certain industries once they feel they have established a good understanding of the industry. In 2022, the technology and industrials industries were the most frequently targeted sectors by shareholder activists. Certainly, no industry is immune from shareholder activism. Companies in highly regulated industries, such as banks and insurance companies, were once seen as less likely targets for an activist campaign, but the targeting of AIG (by Carl Icahn) and the Bank of New York Mellon (by Nelson Peltz) and the engagement between ValueAct and Citigroup make it clear that even companies in highly regulated industries can be subject to fund activism.

Read this article on Lexology

As for 14a-8 activism, certain industries are more susceptible than others, given the ESG focus of some campaigns. For example, the New York City Comptroller and the New York City Pension Funds' initial Boardroom Accountability Project, a campaign for proxy access, specifically targeted carbon-intensive energy companies, among others, as a way to improve governance at companies that were seen to be 'most vulnerable to long-term business risks related to climate change'. The recent two-front proxy contest waged by Exxon simultaneously against an economic activist and an ESG activist shows that even the largest companies in carbon-intensive industries can be vulnerable to activism. In early 2021, Exxon announced that activist Jeff Ubben, founder of ESG and sustainability-focused activism fund Inclusive Capital Partners, had been granted a seat on the company's board of directors. Ubben, who had previously founded ValueAct Capital Partners and the ValueAct Spring Fund, also focused on ESG and sustainability-linked investments. Later that year, tiny startup hedge fund, Engine No. 1, which owned only 0.02 per cent of Exxon's shares, won a proxy fight to instal three directors on Exxon's board with its carbon footprint reduction platform.

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

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

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

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

Shareholder activists have focused on a wide variety of capital structure changes, such as increasing leverage, stock splits, dividends and repurchases, and strategic changes, such as a company sale or break-up or other operational or governance changes, including changes to management and boards of directors. In 2022, strategic changes and M&A transactions featured prominently in the various campaigns, with M&A-related campaigns representing 41 per cent of all 2022 campaigns. Although calls for company sales remain prevalent, activists have begun to make more sophisticated demands, such as the break

up of conglomerates (eg, United Technologies Corporation) and reorganisation of complex corporate structures (eg, Procter & Gamble). In addition, activists are increasingly challenging announced M&A transactions from either the buyer side (such as Bristol-Myers's acquisition of Celgene) or the seller side (such as Dell's buyout of its VMware tracking stock).

Often, shareholder activist campaigns will couple a call for capital structure changes and strategic changes with criticism of, and suggested changes to, corporate governance (eg, eliminating structural defences, board refreshment, management changes, criticism of executive compensation and other governance changes). A significant percentage of activist campaigns every year include demands for board seats at the target company. In the United States, activists won a total of 108 board seats in 2022.

ESG issues are also areas of focus, especially for institutional investors. BlackRock, in its CEO's 2018 annual letter, noted that 'every company must not only deliver financial performance, but also show how it makes a positive contribution to society.' In 2022, despite an onslaught of public and political anti-ESG rhetoric, BlackRock reiterated that, 'in today's globally interconnected world, a company must create value for and be valued by its full range of stakeholders in order to deliver long-term value for its shareholders.' In the 2022 proxy season, social and environmental proposals made up approximately 53 per cent of all proposals submitted, up from 44 per cent in 2021. There has been heightened activism around climate change, particularly in the context of the late-2015 Paris Climate Accord and the previous US administration's deregulatory stance, including calls for more expansive environmental and sustainability disclosure, with growing focus on sustainability measurement and accountability. There has also been a continued focus on lobbying and political spending disclosure. Board diversity has also been in the spotlight, receiving expressions of support from notable institutional investors, such as State Street and Vanguard. After recent tragedies in the United States, selected institutional investors are pushing companies for stronger positions on gun control. Conventional activist funds have also embraced this development by launching separate funds with social and environmental goals or including ESG factors in their overall investment process.

SHAREHOLDER ACTIVIST STRATEGIES

Strategies

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

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

- deal activism include pushing for a merger, sale or divestiture transaction by the target company or, after the announcement of such a transaction, exercising shareholder rights to appraisal in hopes of getting a higher price, encouraging a topping bid by a third party, trying to influence the combined company or the integration process or, increasingly, trying to scuttle the deal or force a price bump;

- operational activism include advocating for cost-cutting measures, strategy change, portfolio review or management turnover, in each case, often in combination with a proposal to replace the CEO or members of the board of directors, or both;
- financial engineering or balance sheet activism include demanding that a target company undergo a capital structure change in the form of buying back shares, declaring a special dividend or overhauling the company's tax planning;
- environmental, social and governance activism include advocating for environmental, social and governance change, including eroding a company's takeover defences to facilitate economic activism goals; and
- 'short' activism include accumulating a short position and combining it with negative public campaigns, white paper publications, among others.

These more conventional tactics are often coupled with more innovative approaches, such as economic arrangements among funds, partnering with a hostile third-party bidder, calling special meetings for referendums and combining traditional proxy fights with vote no campaigns. Some activists have looked to the courts in their campaigns by making wide-ranging pre-suit books-and-records demands and using litigation to extend director nomination deadlines or to challenge the target company's decision in proxy fights. Activists have also been known to employ new methods to engage retail shareholders, including using social media and redoubling engagement efforts with institutional shareholders and proxy advisers.

Processes and guidelines

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

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

Under the Securities Exchange Act of 1934 (the Exchange Act), Rule 14a-8, a shareholder may submit a proposal to be included in the company's proxy statement alongside management's proposals (avoiding the expense of developing independent proxy materials and conducting an independent proxy solicitation). Rule 14a-8, as revised in 2022, sets forth eligibility and procedural requirements, including that:

- the proposing shareholder has held US$2,000 of the company's securities for at least three years, US$15,000 for at least two years, or US$25,000 for at least one year;
- the proposal be no longer than 500 words; and

- the proposal be received at least 120 calendar days prior to the anniversary of the date of release of the company's proxy statement for the previous year's annual meeting.

If the shareholder has complied with the procedural requirements of Rule 14a-8, then the company may only exclude the proposal if it falls within one of the 13 substantive bases for exclusion under Rule 14a-8, which include, for example, 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, addresses substantially the same subject matter as a proposal previously included in the company's proxy materials or relates to a specific amount of cash or stock dividends. In July 2022, the SEC proposed new amendments to Rule 14a-8 that would, if adopted, revise and clarify (and, effectively, narrow) the substantial implementation, duplication and resubmission bases for exclusion of shareholder proposals. A company will often seek 'no-action relief' from the Securities and Exchange Commission (SEC) staff to exclude a shareholder proposal from the company's proxy materials on one of the bases of exclusion listed above. If no-action relief is not granted, a company could, but rarely does, seek a declaratory judgment from a court that the shareholder proposal may be excluded from the company's proxy statement.

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

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

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

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

Proxy access was thrust back onto the agenda in large part through Rule 14a-8 proposals by individual shareholders, as well as large institutional investors, such as the New York

City Pension Funds. In reaction to the popularity of these proxy access proposals, most large public companies have since adopted proxy access by-laws with standards similar to proposed Rule 14a-11. Over 80 per cent of the companies in the S&P 500 have adopted a proxy access by-law, with most allowing nominations for 20 per cent of the board seats by a shareholder or group of shareholders (up to 20 shareholders) that have held 3 per cent or more of the company's shares for three years or more. Because the percentage and holding period to be met represented a significant hurdle, there were not many instances of shareholders utilising proxy access by-laws to nominate directors. These nominations may become more popular in the future but in light of the requirement adopted in 2022 to use a universal proxy card, proxy access may be less relevant.

Although companies are not required to give shareholders access to the company's proxy statement to nominate dissident candidates, new rules require the use of a universal proxy card in contested elections. The universal proxy rules, which took effect in September 2022, require the use of proxy cards listing the names of all director candidates in a contested election, regardless of whether the candidates were nominated by the board or shareholders. A dissident must, however, still develop its own proxy solicitation materials and conduct its own proxy solicitation. The universal proxy rules set forth minimum solicitation and notice requirements, including the requirement that dissidents solicit holders of a minimum of 67 per cent of the voting power of shares entitled to vote in the election. As a result of the universal proxy rules, shareholders will be able to 'mix and match' their votes for dissidents and board nominees.

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

Whether a shareholder may call a special meeting depends on the corporate laws of its state of incorporation and its organisational documents. With respect to Delaware corporations, under section 211(d) of the Delaware General Corporate Law (DGCL), a company's certificate of incorporation or by-laws may authorise shareholders to call a special shareholder meeting. The certificate of incorporation or by-laws would then set forth the procedural requirements for calling a special meeting, including the minimum holding requirements for a shareholder to call a special meeting. Just under 70 per cent of companies in the S&P 500 provide for this right in their organisational documents, while approximately 30 per cent do not. For those companies that do allow shareholders to call special meetings, the required ownership threshold varies considerably, from as low as 10 per cent to as high as 50 per cent, although 25 per cent is sometimes cited as the most common threshold.

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

Whether shareholders may act by written consent without a meeting also depends on state corporate law and the particular company's organisational documents. With respect to Delaware corporations, under section 228 of the DGCL, shareholders may act by written

consent in lieu of a shareholders' meeting, unless the company's charter provides otherwise. A majority of S&P 500 companies do not allow their shareholders to act by written consent without a meeting. While ISS and Glass Lewis state that they consider the right to act by written consent an important shareholder right, most large institutions appreciate that, as long as shareholders have the right to call a special meeting if necessary, action by written consent is unnecessary, as well as being potentially destabilising and undemocratic (in that it disenfranchises minority shareholders).

Litigation

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

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

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

While shareholder derivative suits are brought for the benefit of the corporation, shareholder direct and class actions address unique, direct harms to the particular shareholder plaintiffs. In the M&A context, it has become common for shareholders to initiate class actions against target companies and their boards of directors, alleging that the target company's board violated its fiduciary duties by conducting a flawed sale process that did not maximise value for the companies' shareholders. In such instances, a critical factor in determining the outcome of the litigation will be which standard of review is applicable to the board's conduct; in other words, the deferential 'business judgement rule' or a heightened standard

of review that some jurisdictions have adopted (such as Revlon, Unocal or 'entire fairness'). Many public companies have adopted 'exculpation' provisions in their governance documents, which provide that directors cannot be personally liable for damages arising out of breaches of the duty of care. Recent amendments to the Delaware corporate laws allow similar exculpation for corporate officers as well. However, a director or officer generally cannot be exculpated (or indemnified) for breaches of the duty of loyalty, including the obligation to act in good faith.

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

SHAREHOLDERS' DUTIES

Fiduciary duties

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

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

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

Compensation

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

It is not illegal for directors to receive compensation from shareholders who appoint them. This often happens, for example, when employees of an activist hedge fund are themselves nominated and elected as directors. However, it would be important to analyse whether acceptance of compensation from a nominating shareholder might be contrary to the directors' fiduciary duties. Under federal securities laws, the compensation would also likely have to be disclosed. In addition, the corporation itself may have limitations in its by-laws

or charter with respect to directors accepting direct compensation from shareholders who nominate them. It is common practice for companies to require a director candidate to sign an agreement that includes a representation by the nominee that they are not and will not become party to any undisclosed agreement with any person other than the company with respect to compensation in connection with their service as a director of the company.

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

Mandatory bids

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

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

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

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

Disclosure rules

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

Accumulations of large blocks of equity securities trigger reporting obligations under section 13 of the Exchange Act, which requires any person or group that acquires beneficial ownership of more than 5 per cent of a class of a public company's registered voting

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

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

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

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

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

Read this article on Lexology

The Hart-Scott–Rodino Antitrust Improvements Act of 1976 (the HSR Act) may also impose a filing obligation with the Federal Trade Commission (FTC) and the Antitrust Division of the Justice Department (DOJ) on certain investors. For 2022, an investor's proposed acquisition of a company's voting securities (and certain other interests) is generally reportable if the transaction value exceeds US$111.4 million (this dollar amount is adjusted annually). If the investor proposes to cross this threshold (or one of the other specified higher thresholds), the investor must first file a notification and report form with the FTC and the DOJ and observe a 30-day waiting period prior to consummating the acquisition. These filings are not made public by the FTC or the DOJ, but either party may independently choose to make the fact of the filing public. There are certain structures that can be used (for example, involving put-call options or the use of multiple funds as acquisition vehicles), and certain exemptions that may be available, that may permissibly allow an investor to accumulate voting securities (and certain other interests) well in excess of the HSR Act threshold without the need to first secure clearance under the HSR Act. Counsel should be consulted early regarding the use of such methods as the rules are highly technical.

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

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

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

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

Insider trading

16 Do insider trading rules apply to activist activity?

The SEC's insider trading rules prohibit a person from buying or selling a security, in breach of a fiduciary duty or other duty of confidence, while in possession of material non-public information about that security. The rules also prohibit the 'tipping' by insiders of such

material non-public information and the trading by the recipient of such information. Insiders typically include a company's directors, officers, employees, counsel, significant shareholders and any other person that has a duty not to trade on material non-public information. Additionally, most, if not all, companies have adopted insider trading policies that apply to directors, officers, employees, controlling shareholders and their respective affiliates to minimise the likelihood of insider trading.

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

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

COMPANY RESPONSE STRATEGIES

Fiduciary duties

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

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

In Delaware, in certain instances, a board's action in response to an activist proposal may be subject to an enhanced level of judicial scrutiny. If the board adopts defensive measures after a takeover or similar proposal is launched or threatened, the decision may be reviewed under the heightened *Unocal* standard, under which the directors must show both that there are reasonable grounds for believing there to be a danger to corporate policy and effectiveness and that the defensive measure was reasonably proportional in relation to the threat. Generally, the board has wide latitude to take defensive measures within a range

of reasonableness, so long as those measures are not coercive or preclusive. Actions that impede the shareholder franchise (for example, if an activist is seeking to replace a majority of the directors and the board increases the board size to deny the activist a majority) are liable to be overturned by the courts (under the *Blasius* line of cases).

Preparation

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

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

- Everything should go through the CEO (or, if applicable, chair of the board): all executives and directors should refer activist and takeover approaches, overtures and conversations to the CEO. It is essential that the company speak with one voice. The CEO should keep the board of directors informed and solicit director input for decisions and reactions. Activists may try to contact directors directly, in which case, directors should keep in mind that all conversations are 'on the record' and any comments may be used by the activist in their proxy and press materials.
- Maintaining board unity is essential: a unified, supportive board is essential to producing the best outcome, whether the goal is resisting an activist agenda or negotiating the best possible settlement. It is critical to avoid having an activist drive a wedge between management and the board. Honest and open debate should be encouraged but kept within the boardroom. Activists can be extremely effective in dividing boards by targeting selected board members with a combination of threats and promises, and boards need to be very wary of such tactics.
- Except in 'clear conflict' situations, special committees with additional financial and legal advisers are not advisable: special committees usually hinder board unity, overemphasise the role of advisers, deprive directors of the most valuable source of information and do not enhance directors' legal protection in non-conflict situations. Clear conflict means the involvement of interested directors or senior management on the other side of the transaction.
- Act and speak as though everything you do and say will be made public: appreciate that the public dialogue is often asymmetrical; while activists can, often without consequence, make personal attacks and use aggressive language, the company cannot respond in this manner. Any sign of discouragement, self-criticism of performance or execution or sign of dissension in the boardroom will be used against the company.
- The board has time and flexibility in responding and plenty of legal latitude: with respect to activism, the board has no special duty to implement an activist's proposals. The board's general fiduciary duties apply to decisions made in contemplation of or in reaction to shareholder activism. When considering an activist's proposals and criticisms, it is the board's responsibility to make decisions in the best interests of the company and stockholders.
- Remain focused on the business: activists and takeover approaches can be distracting and time-consuming for a board and management, but continued strong performance of the business, though not an absolute defence, is one of the best defences.

Defences

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

Structural defences

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

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

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

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

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

Other defences

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

Proxy votes

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

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

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

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

Settlements

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

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

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

SHAREHOLDER COMMUNICATION AND ENGAGEMENT

Shareholder engagement

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

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

23 Are directors commonly involved in shareholder engagement efforts?

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

Disclosure

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

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

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

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

Communication with shareholders

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

The federal proxy rules are the primary rules relating to communications to solicit support from shareholders. Any statement that is designed to result in the giving or withholding of a proxy must be filed under the proxy rules, comply with certain legending and informational requirements, and must not be misleading. In addition, companies that choose to hold private discussions with certain shareholders must be mindful of Regulation FD. Companies solicit formal votes from shareholders at both annual and special meetings,

each of which are subject to federal proxy rules and certain notice requirements under state law or the company's by-laws, or both. Shareholders may cast absentee ballots or designate a proxy to vote either at the proxy's discretion or with specific and binding guidance.

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

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

Access to the share register

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

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

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

UPDATE AND TRENDS

Recent activist campaigns

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

In 2022, activist activity rebounded from a relatively muted level of engagement during the height of the covid-19 pandemic, with a 36 per cent year-over-year increase in new campaigns initiated and a 21 per cent increase year-over-year in the number of board seats secured. Technology was the most frequently targeted sector, as activists seized on opportunities created by macroeconomic headwinds, trading multiple compression and a bearish earnings outlook. Activist hedge funds have significantly more than US$100 billion of assets under management and remain an asset class that attracts investment from major traditional institutional investors. Although a number of institutional investors are beginning to question whether hedge fund activism should be supported or resisted, and will act independently of activists, the relationships between activists and more traditional investors in recent years have encouraged increasingly frequent and aggressive activist attacks. Several mutual funds and other institutional investors have, on occasion, also deployed the same kinds of tactics and campaigns as the dedicated activist funds.

At the same time, the new Securities and Exchange Commission rule requiring a universal proxy card in director election proxy fights became effective in 2022. The universal proxy card will facilitate proxy contests by reducing the cost and effort required for activists to nominate and solicit proxies for the election of board members. It could also lead to a greater focus in proxy fights on the track records and skill sets of individual directors, rather than the performance of the company or board as a whole, because a universal proxy card will enable shareholders to pick and choose individual directors from the company's and the activist's competing slates.

Another development that has become increasingly prevalent (and polarising) is activism campaigns oriented around environmental, social and governance (ESG), which may be brought at the same time as traditional economic activism campaigns, requiring the target company to battle on two fronts. At Exxon Mobil, an ESG activist fund (supported by some large institutional investors) launched a proxy fight for seats on Exxon's board of directors, calling for Exxon to set carbon emission reduction targets and shift to a 'sustainable, transparent, and profitable long-term plan focused on accelerating rather than deferring the energy transition'. At the same time, a large, occasionally activist, hedge fund called on Exxon to cut spending to improve performance and maintain its dividend, as well as improve its environmental reputation. Even though the activists collectively owned a tiny fraction of the oil and gas behemoth, the dual-front tactic presented a significant challenge, won the support of some of Exxon's biggest institutional investors and eventually culminated in Exxon's loss of three board seats to activist-appointed nominees. The past year also saw the emergence of a new *anti*-ESG movement (among a small number of money managers and a vocal group of politicians, mostly in conservative states) that is opposed to consideration of ESG factors, in a push to revert to the notion that the primary purpose of a corporation is to maximise shareholder profits. Anti-ESG shareholder activism is on the rise and will be an important trend to watch as the 2023 proxy season gets underway. It is likely that the

number of anti-ESG proposals will increase relative to the number of such measures put to a vote in 2022 and that anti-ESG proponents will become more vocal and numerous, in part strengthened by a growing political backlash against ESG.

Wachtell, Lipton, Rosen & Katz

Adam O Emmerich	aoemmerich@wlrk.com
Trevor S Norwitz	tsnorwitz@wlrk.com
Steven A Cohen	sacohen@wlrk.com
Sabastian V Niles	svniles@wlrk.com
Raeesa I Munshi	rimunshi@wlrk.com

51 West 52nd Street, New York, NY 10019, United States
Tel: +1 212 403 1000
www.wlrk.com

MORE TOPICS AVAILABLE ONLINE AT LEXOLOGY.COM/GTDT

Including

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Business & Human Rights
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Digital Business
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
Drone Regulation
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
Healthcare M&A
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
Luxury & Fashion
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Partnerships
Patents
Pensions & Retirement Plans
Pharma & Medical Device Regulation
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements