Schulte Roth&Zabel

SH\REHOLDER ANNUAL ACTIVISM CONFERENCE

TUESDAY, OCTOBER 16, 2012

- 1. About the Speakers
- 2. About Schulte Roth & Zabel
- 3. Activist Investor Strategies
- 4. Shareholder Activism in Canada
- 5. Shareholder Activism in the Banking Sector
- 6. mergermarket Shareholder Activism Insight Study
- 7. Overcoming Advance Notification Bylaws and Poison Pills
- 8. Keynote Presentation



1. About the Speakers

TUESDAY, OCTOBER 16, 2012





David E. RosewaterPartner

Schulte Roth & Zabel LLP

+1 212.756.2208 | david.rosewater@srz.com

David E. Rosewater is a partner in the New York office of Schulte Roth & Zabel where he focuses his practice on mergers and acquisitions, private equity/leveraged buyouts, distressed investments and acquisitions, and shareholder activism. Mr. Rosewater has represented numerous corporate and private equity buyers and sellers, including in connection with the acquisitions of Caritas Christi Health Care System, which was named the "North America Private Equity Deal of the Year" by Global M&A Network as well as the 2010 "Deal of the Year" in the health care category by *Investment Dealers' Digest* magazine; Austrian bank BAWAG; integrated logistics systems services provider Syncreon; tabletop icon Lenox Group; GMAC; certain Newell Rubbermaid divisions and the factoring businesses of GE Capital and HSBC Business Credit. He has represented companies and shareholders in connection with a number of major campaigns, including those involving The New York Times Co., CNET Networks, CSX Corp., Red Robin Gourmet Burgers Inc. and Mentor Graphics Inc.

Mr. Rosewater co-authored the U.S. chapter of *The International Comparative Guide to: Corporate Governance 2012* (Global Legal Group), SRZ's *PE Buyer/Public Target M&A Deal Study: 2012 Mid-Year Update* and "Keeping Up With Distressed Debt Strategies" from *Buyouts*. He also contributes to *Shareholder Activism Insight*, an annual report created in association with mergermarket, and frequently presents at industry events, recently speaking on "Activist Hedge Funds: Examining their Strategy and Objectives" at DealFlow Media's Activist Investor Conference.

Mr. Rosewater received his B.A., with distinction and high honors, from the University of Michigan and his J.D., *cum laude*, from New York University School of Law.



Joseph P. Vitale
Partner
Schulte Roth & Zabel LLP
+1 212.756.2485 | joseph.vitale@srz.com

Joseph P. Vitale is a partner in the New York office of Schulte Roth & Zabel, where he advises parties, including private investment funds, seeking to acquire or invest in banks or other licensed financial or money service providers. Mr. Vitale also represents financial institutions and money service businesses with respect to chartering; regulatory compliance; financial transactions; mergers, acquisitions and reorganizations; responses to formal and informal regulatory actions; litigations and claims; and legislative and regulatory developments. He practices before the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Federal Housing Finance Agency, and the banking agencies of all 50 states, the District of Columbia and Puerto Rico. *Chambers USA* recognizes Mr. Vitale as one of the nation's leading lawyers for both banking compliance and financial institutions M&A work, noting that clients give him "strong reviews for his broad regulatory practice," in particular his "substantive technical knowledge and good advocacy skills."

Highlights of Mr. Vitale's practice include his representation of the majority owners of a Fortune 500 mortgage and consumer finance conglomerate in connection with the institution's conversion into the nation's 14th largest bank holding company, a complex transaction that included a related \$2 billion private recapitalization and the acquisition of \$5 billion in public funds through the TARP; and his representation of both the seller (a private investment firm) and the buyer (one of the 15 largest banks in the U.S.) in the \$6.2 billion sale of a national consumer finance company, including obtaining more than 100 government approvals necessary to close the transaction. Other practice highlights include advising the nation's largest Internet retailer on the creation of its online money transmission and payments business and counseling a national Internet money transmission and payments business on the creation of its user agreements and related terms, conditions and disclosures. Mr. Vitale is admitted to federal and state courts for the District of Columbia and the State of New York as well as the U.S. Court of Federal Claims, where, among other matters, he co-litigated a breach-of-contract claim on behalf of a former thrift institution which, after an eight-week trial, resulted in a \$96 million judgment against the U.S. government.

Mr. Vitale received his J.D. from Georgetown University Law Center in 1997 and his A.B. from the College of the Holy Cross in 1994.



Marc Weingarten
Partner
Schulte Roth & Zabel LLP
+1 212.756.2280 | marc.weingarten@srz.com

Marc Weingarten, a partner in the New York office of Schulte Roth & Zabel, is chair of the Business Transactions Group and a member of the Investment Management Group. His practice focuses on mergers and acquisitions, leveraged buyouts, corporate governance, securities law and investment partnerships. The American Lawyer selected Mr. Weingarten as a "Dealmaker of the Year" for his representation of Cerberus Capital Management in its acquisition of a controlling interest in GMAC from General Motors. He also represented Cerberus in the acquisition of Chrysler from Daimler; its acquisition, by tender offer, of a controlling interest in Aozora Bank in Japan; and in numerous other transactions. He has represented private equity funds Castle Harlan and Veritas in numerous acquisitions and dispositions., In addition to representing public and private companies in M&A transactions, he regularly counsels companies and investors on corporate governance and control issues. One of the leading lawyers representing activist investors, he has advised on many of the most significant activist campaigns in recent years, including The Children's Investment Fund's proxy contest with CSX Corp., JANA Partners LLC and SAC Capital in their campaign involving Time Warner Inc., the Trian Group in its successful proxy contest with H.J. Heinz Co., JANA Partners in its campaigns involving Kerr-McGee Corp., Marathon Petroleum and The McGraw-Hill Companies, Elliott Associates in its campaign with BMC Software, and Pershing Square in its investments in McDonald's Corp. and Target Corp.

Mr. Weingarten is a member of the American Bar Association, the New York State Bar Association and the New York City Bar Association, having served on its Committee on Mergers, Acquisitions and Corporate Control Contests for multiple terms, and on its Committee on Corporation Law. He has been cited for his preeminence in both corporate law and investment fund practice in Chambers USA, The Legal 500 United States, Lawdragon, Who's Who and New York Super Lawyers.

Mr. Weingarten received his J.D. from Georgetown University Law Center, where he was an editor of the *Georgetown Law Journal*, and his B.S. in finance from the University of Pennsylvania's Wharton School.



Kristen P. Poole
Attorney
Schulte Roth & Zabel LLP
+1 212.756.2709 | kristen.poole@srz.com

Kristen P. Poole is an associate in the New York office of Schulte Roth & Zabel, where she advises firm clients on mergers and acquisitions, private equity transactions, PIPEs and shareholder activism matters. Some of her recent representations include advising the alternative investment specialist Prisma Capital Partners on its acquisition by global investment firm KKR & Co.; Charming Shoppes Inc., the parent company of three nationwide women's apparel retailers — Lane Bryant, Catherines Plus Sizes and Fashion Bug — on its \$890 million cash acquisition by Ascena Retail Group Inc. and Morton's Restaurant Group Inc. on its sale to affiliates of Tilman J. Fertitta. She has also advised Moelis & Company and Berenson & Company in their capacity as financial adviser on public-company merger transactions.

Ms. Poole earned her J.D. from the University of Virginia School of Law, where she was the articles editor of the *Virginia Journal of International Law*, and her B.S., *magna cum laude*, from Virginia Polytechnic Institute and State University.



Daniel H. Burch
Chief Executive Officer
MacKenzie Partners, Inc.
+1 516.492.2721 | dburch@mackenziepartners.com

Daniel H. Burch is the Chief Executive Officer and co-founder of MacKenzie Partners, Inc., a proxy solicitation and investor relations consulting firm specializing in mergers and acquisitions, corporate governance and proxy contests with offices in New York, London, Los Angeles and Palo Alto.

MacKenzie offers a full range of shareholder and debt holder-related services, including proxy and consent solicitations, tender and exchange offers, information agent services, proxy contests, rights offerings, restructurings, other complex corporate transactions, stock and bond holder identification, beneficial owner analysis, market surveillance, corporate governance consulting and associated financial, investor and media relations activities.

In his nearly 35-year career in the proxy/M&A field, Mr. Burch has been involved with some of largest and most visible tender offers and proxy contests. Some of the notable transactions he and the firm have been involved with are: Forest Laboratories/Icahn; Target/Pershing Square; Terra Industries/CF Industries; Air Products/Air Gas; Avis/Dollar Thrifty/Hertz; Casey's General Stores/Alimentation Couche-Tard; BHP/Potash; NRG/Exelon; Roche/Genentech; Yahoo!/Microsoft/Icahn; Ceridian/Pershing Square; Ryerson/Harbinger; Engelhard/BASF; Midwest Air/AirTran/TPG Northwest Airlines; Guidant/Boston Scientific/Johnson & Johnson; EOP/Blackstone/Vornado; Topps/Crescendo/Tornante and Madison Dearborn; Unocal/Chevron; MCI/Verizon; Oracle/PeopleSoft; Sanofi-Synthelabo/Aventis; Roy E. Disney/The Walt Disney Company; The Hewlett Foundation/Hewlett-Packard and Compaq merger; Total Fina and Elf Aquitaine and Mannesmann/Vodafone.



Chris Cernich Executive Director, M&A and Proxy Contest Research ISS

+1 301.556.0625 | chris.cernich@ISSGovernance.com

Chris Cernich is the Executive Director, M&A and Proxy Contest Research for Institutional Shareholder Services (ISS), a leading proxy advisory service. His previous executive experience includes eight years in corporate finance and strategy positions with the Ford Motor Company, most recently as controller for the \$9.5 billion used-vehicle sales division.

Mr. Cernich is also the chief author of two studies sponsored by the IRRC Institute. "The Effectiveness of Hybrid Boards" (2009) examined the impact of shareholder activism on financial performance. "Compensation Peer Groups at Companies with High Pay" (2010) explored systemic bias in compensation benchmarking processes at S&P 500 companies.

Mr. Cernich holds an M.B.A. in Finance and Strategy and a Ph.D. in American Literature, both from the University of Michigan.



Wesley J. Hall Chief Executive Officer Kingsdale Shareholder Services Inc. +1 416.867.2342 | whall@kingsdaleshareholder.com

Wesley J. Hall has over 15 years experience in corporate governance and shareholder communications. Mr. Hall started Kingsdale Shareholder Services in 2003 and Kingsdale Communications in 2009 to provide clients with best-in-class services for communicating with shareholders and managing investor-relations communications. Prior to forming Kingsdale, he was vice president, national sales, for Georgeson Shareholder Communications Canada, and a senior manager for a major Canadian transfer agent. He also held the position of assistant corporate secretary at CanWest Global Communications Corp.

Mr. Hall is a founding board member of the Canadian Society of Corporate Secretaries (CSCS) and was CSCS' longest serving president. He remains committed to his involvement in and support of CSCS, and other corporate governance and investor relations organizations. He is currently chairman of the board of TSX Venture Exchange-listed Difference Capital Funding and a director of Longford Energy and Prophecy Platinum. He is a former director of the Exempt Market Dealers Association of Canada.

Assisted by an expert group of professionals, Mr. Hall leads the Kingsdale team and guides his clients through takeover bids, proxy fights and routine shareholder meetings. He is an industry expert in proxy solicitation, depositary, corporate governance and other shareholder related initiatives. Mr. Hall has been sought out to lead some of the highest profile deals and proxy contests in North America. They include Pershing Square Capital Management's campaign to replace the board of Canadian Pacific Railway, Petro Canada's \$19 billion merger with Suncor Energy, Xstrata PLC's \$19 billion bid for Falconbridge, Companhia Vale do Rio Doce's \$19 billion bid for Inco, and Barrick Gold's \$9 billion acquisition of Placer Dome, among many others.

Mr. Hall's other accomplishments include being a recipient of the Ernst & Young Entrepreneur of the Year 2009 award for Ontario. In 2011, he successfully completed the directors education program offered by the Institute of Corporate Directors (ICD) in partnership with the Rotman School of Management, University of Toronto. He received the Institute-certified designation, ICD.D.

Rich Lashley Principal PL Capital LLC

Rich Lashley is a co-founder and principal of PL Capital LLC and its affiliates. PL Capital was founded in 1995 as an investment management boutique specializing in the banking industry. PL Capital's specialty is community banks and thrifts operating throughout the U.S., and shareholder activism in that sector. He serves, and has served, on a number of bank and thrift boards of directors and is considered an "audit committee financial expert" for purposes of Sarbanes-Oxley. PL Capital has run numerous proxy contests for board seats, "just say no" proxy campaigns and shareholder proposals on numerous corporate governance items. He currently serves on the board of directors of BCSB Bancorp, Inc. and Baltimore County Savings Bank, a \$600 million in assets community bank in Maryland.

Prior to co-founding PL Capital, Mr. Lashley was a CPA who worked in a variety of professional capacities at KPMG Peat Marwick from 1984 to 1996. As a Director in KPMG's Financial Services Corporate Finance Practice from 1993 to 1996, he delivered merger and acquisition and related financial advisory services to banks, thrifts and other financial services companies nationwide.

From 1984 to 1993, Mr. Lashley delivered professional accounting and auditing services to banks, thrifts and financial services companies in the NY/NJ metro area. In that role he learned the banking business from the ground up, and was able to work with numerous large and small banks and thrifts on a variety of issues.

Importantly, the late 1980s and early 1990s were the last time that the banking sector endured an economic and regulatory environment similar to the latest financial crisis. Mr. Lashley was a first-hand participant and observer of that period's banking crisis and the solutions to that crisis. During that time period he served in a number of significant banking industry and accounting standard setting roles, including Assistant to the Director of KPMG's U.S. Financial Services Practice, and Assistant to the Chairman of the AICPA Savings Institution's Committee based in Washington, D.C. As part of his responsibilities in KPMG's U.S. Financial Services practice, he provided technical accounting guidance on bank and thrift industry accounting issues to KPMG professionals throughout the U.S. In his role as Assistant to the Chairman of the AICPA Savings Institution's Committee, he assisted the Committee in working with the SEC, banking industry regulators (OTS, FDIC, RTC, OCC, FRB), the accounting firms, FASB and other standard setters on cutting edge accounting and regulatory matters. Many of the same accounting issues that are ripe today were originally issued at that time in response to the banking crisis of that period. He was also KPMG's Liaison to the Resolution Trust Corporation (RTC). In that role, he participated and observed in the RTC's "resolution" of thousands of failed banks and thrifts throughout the U.S. and coordinated KPMG's role as a major contractor to the RTC.

Mr. Lashley is a CPA (status inactive) and has an M.B.A. in Accounting from Rutgers University (1984) and a B.S. in Business Administration from SUNY Oswego (1980).



Barry Rosenstein Managing Partner JANA Partners LLC

Barry Rosenstein is the founder and Managing Partner of JANA Partners LLC, an event driven hedge fund located in New York with over \$3 billion in investments and commitments. JANA Partners applies a private equity style research approach to the public markets, focusing on companies with a compelling valuation and catalysts to realize value. In addition to fundamental investing, JANA has a proven track record in implementing activism. JANA has been a successful activist in companies including McGraw Hill, El Paso, Charles River, CNET, Kerr-McGee Corp., Artesyn Technologies, Houston Exploration Company, InterCept and SourceCorp. Most recently, JANA successfully called for Marathon Petroleum Corporation to separate its midstream assets and pursue a substantial share repurchase and for the sale of Dutch mail and express company TNT NV, which was ultimately sold to UPS.

Prior to establishing JANA, Mr. Rosenstein was the founder and Managing Partner of Sagaponack Partners, a private equity fund. Mr. Rosenstein was instrumental in the initial funding of Copart, Inc., which is currently the world's largest auto salvage company. Mr. Rosenstein began his career as an investment banker specializing in mergers and acquisitions with Merrill Lynch in New York and was also a principal in charge of corporate takeover for Asher Edelman's Plaza Securities Corporation. Mr. Rosenstein graduated from Lehigh University (1981) Phi Beta Kappa and earned an M.B.A. from the University of Pennsylvania's Wharton School of Business (1984).

Mr. Rosenstein is a trustee of Brown University and the 92nd Street Y in New York City and a board member of Make the Road New York.



Alexander A. Singh General Counsel and Secretary West Face Capital Inc.

Alexander A. Singh joined West Face in April 2010. As General Counsel and Secretary of West Face and several of its affiliates, Mr. Singh is actively involved in West Face's transactions, fund formation, compliance and regulatory matters and operations. He is a member of the Investment, Valuation, Investor Relations, Compliance and Operations Committees at West Face.

Prior to joining West Face, Mr. Singh practiced corporate and securities law at Borden Ladner Gervais LLP in Toronto, with a focus on lending, private M&A, structured finance and securitizations and bankruptcy/insolvency. He was seconded to The Bank of Nova Scotia's General Counsel's Office in 2006 and joined Borden Ladner Gervais LLP in 2005.

Mr. Singh was called to the Bar of Ontario, has a J.D. from the Schulich School of Law at Dalhousie University and a B.Comm. degree from McGill University.

Mr. Singh previously worked in brand strategy, marketing and advertising with divisions of MacLaren McCann and Ogilvy & Mather.

West Face Capital: West Face is a Toronto-based investment management firm with assets under management of over \$3 billion. West Face specializes in event-oriented investments where its ability to navigate complex investment processes is the most significant determinant of returns. West Face and its affiliates have a mature, experienced team of 15 investment professionals with strong networks and relationships as one of Canada's dominant alternative managers. Investment professionals have expertise in private equity, quantitative and fundamental analysis.

West Face currently manages: a group of Long Term Opportunities Funds with a hedge fund structure; a group of structured finance focused Credit Opportunities Funds with a hybrid hedge-PE structure; and will soon be launching a group of Credit Opportunities Funds II with a PE structure focused on primary and secondary credit activities across the credit spectrum.



Walied Soliman

Partner

Norton Rose Canada LLP
+1 416.216.4820 | walied.soliman@nortonrose.com

Walied Soliman focuses on public and private financings, corporate governance and regulatory compliance matters, as well as on the establishment of structured products for Canadian financial institutions. He works on both public and private financings for senior and junior Canadian issuers, including financial institutions and companies in the energy and mining sectors. His corporate governance experience includes playing a leading role in the establishment of board, committee, CEO and chairman mandates for one of Canada's leading financial institutions and advising boards on acquisition and related party transactions. Mr. Soliman regularly advises on regulatory issues, including continuous disclosure and other compliance matters and has acted for both dissidents, issuers and meeting chairs in some of the most contentious proxy battles in Canada. His structured product experience includes the establishment of dozens of index-linked and equity-linked deposit products for Canadian financial institutions and numerous Islamic finance compliant products.

In 2003, Mr. Soliman spent five months on secondment to the legal group of CIBC. In 2002, he spent three months on secondment to the Ontario Securities Commission in the Enforcement Branch. Prior to completing his law degree, Mr. Soliman worked as a senior assistant to a member of the Legislative Assembly of Ontario.

Global expertise: acquisition finance; asset management; banking and finance; capital markets; cleantech; commodities; corporate; debt capital markets; equity capital markets; financial services and markets; investment funds; Islamic finance; mergers and acquisitions; mining; real estate finance.

Local expertise: cleantech; corporate and commercial; corporate finance and securities; debt finance; mergers and acquisitions; mining and resources.

Key industry sectors: financial institutions.

Law school and education: LL.B., Osgoode Hall Law School, 2001.



Ken Squire
President
13D Monitor
+1 212.223.2282 | ksquire@icomm-net.com

Ken Squire is the founder of 13D Monitor and the 13D Activist Fund. 13D Monitor is a research provider specializing in 13D filings and shareholder activism founded in 2006 of which Mr. Squire serves as President and CEO. The 13D Activist Fund is an event driven mutual fund that invests in the most compelling activist 13D filings of the top activist investors. Mr. Squire serves as the Chief Investment Strategist and portfolio manager of the Fund. Mr. Squire has a weekly column in *Barron's* entitled "Activist Spotlight," has appeared on Bloomberg television to discuss activism and is frequently quoted in *The Wall Street Journal* and other publications.

Prior to 13D Monitor, Mr. Squire was a private equity investor as a principal of LSC Investors and Crown Capital Group, where he worked on analyzing, making and managing various investments in public and private companies. Previously, Mr. Squire was an associate in the Corporate and Securities Department at Weil, Gotshal & Manges, LLP in their New York office. Mr. Squire holds a B.S. with a concentration in finance from New York University's Stern School and a J.D. from New York University School of Law where he was an editor of the *Law Review*.



Gregory P. Taxin Managing Director Clinton Group, Inc.

Gregory P. Taxin is a Managing Director of Clinton Group, Inc., a registered investment advisor based in New York with more than \$2.5 billion in assets under management. Prior to joining Clinton, Mr. Taxin was the Managing Member of Spotlight Advisors, LLC, an activist fund based in New York City. Mr. Taxin has successfully advocated for changes in management, capital structure, governance and board composition at more than a dozen companies.

Prior to the founding of Spotlight, Mr. Taxin was the co-founder and Chief Executive Officer of Glass, Lewis & Co., an independent research firm that assists institutional investors in making more informed investment and proxy voting decisions. While Mr. Taxin was the Chief Executive, Glass Lewis covered more than 13,000 public companies from 65 countries and sold research to more than 350 institutional investors that collectively managed more than \$13 trillion.

Prior to co-founding Glass Lewis, Mr. Taxin was an investment banker. He provided strategic and financing advice to public and private companies, principally in the technology and telecommunications industries. Mr. Taxin was a Vice President at Goldman, Sachs & Co., a Director of Epoch Partners and a Managing Director with Banc of America Securities.

Mr. Taxin is an attorney and practiced with the firm of Wachtell, Lipton, Rosen & Katz. More recently, Mr. Taxin has served as an expert witness in litigation on the topics of M&A practices, executive compensation and proxy voting.

Mr. Taxin is a magna cum laude graduate of the Harvard Law School, where he was a John M. Olin Fellow in Law and Economics, and a graduate of the University of California, Berkeley.



2. About Schulte Roth & Zabel

TUESDAY, OCTOBER 16, 2012



Schulte Roth&Zabel

Schulte Roth & Zabel, a full service law firm, delivers sophisticated, leading-edge advice to the firm's clients, which include prominent financial institutions, corporations and investors. The firm strives to build and maintain long-term relationships with clients by emphasizing client service. With expertise in a broad array of practice areas, the firm provides comprehensive advice to achieve its clients' objectives.

SRZ is one of the leading law firms in the area of business transactions, including mergers and acquisitions, leveraged buyouts, distressed investments, activist matters, public offerings, high-yield debt issues and PIPE transactions. Clients include both financial and strategic investors.

SRZ has a preeminent practice specialty in the area of shareholder activism and activist investing, with an unparalleled expertise in the applicable securities laws, proxy rules and the current state of market practice. The firm has been counsel in many of the highest-profile activist matters in recent years, including campaigns involving The McGraw-Hill Companies, Marathon Petroleum Corporation, Allscripts Healthcare Solutions Inc., BMC Software Inc., CSX Corp., Time Warner Inc., Nabi Biopharmaceuticals, JAKKS Pacific Inc., Nutrisystem Inc., Radian Group Inc., Sabra Health Care REIT Inc., Pacific Sunwear of California Inc., Red Robin Gourmet Burgers Inc., Maguire Properties Inc., Mentor Graphics Corporation and The New York Times Co.

Serving issuers, activists and "occasional activists," we provide unparalleled expertise and cutting-edge advice on navigating the maze of Regulation 13D/G rules, Section 16(b), trading rules, Hart-Scott-Rodino and other applicable federal and state securities and corporate laws, as well as on other tax and regulatory issues. The firm counsels clients on a wide variety of activist and defensive strategies, from behind-the-scenes long-term partnerships with management to proxy contests and consent solicitations. We have extensive experience dealing with advance notice bylaws; "books and records" demands; handling regulatory approvals, investigations and legislative hearings; and engaging in defensive and offensive litigation. In short, our practice has a wealth of experience to bring to bear in helping our clients achieve their goals.

Key Contacts:



Marc Weingarten
Partner
+1 212.756.2280
marc.weingarten@srz.com

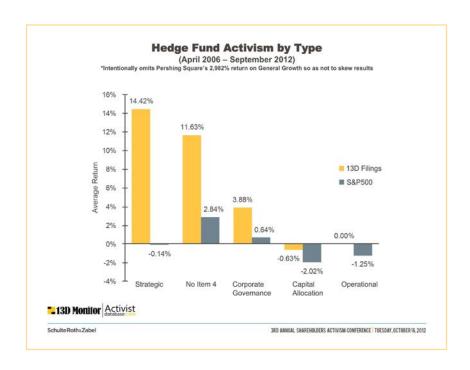


David E. Rosewater
Partner
+1 212.756.2208
david.rosewater@srz.com

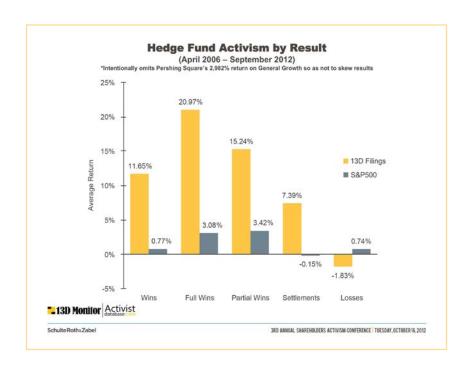


3. Activist Investor Strategies

TUESDAY, OCTOBER 16, 2012



Notes:			



Notes:			

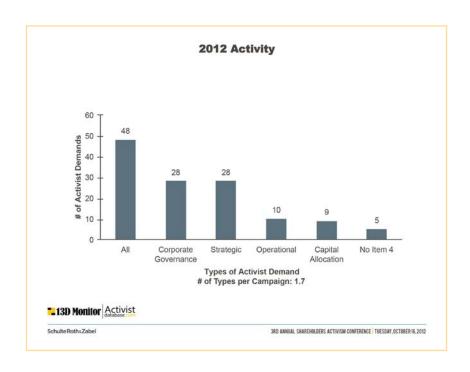
Hedge Fund Activism
(April 2006 – September 2012)
*Intentionally omits Pershing Square's 2,982% return on General Growth so as not to skew results

	Number	13D Filings	S&P500	Holding Period (Days)
Positive Return Situations	364	50.79%	7.24%	422
Negative Return Situations	257	-45.39%	-7.50%	612

13D Monitor Activist

Schulte Roths Zabel

Notes:	



Notes:			

Notes:	

Notes:	

Notes:	



TUESDAY, OCTOBER 16, 2012

4. Shareholder Activism in Canada



Background

- Norton Rose Canada Special Situations Team
- Rise of activism in Canada
- Developing legal principles



Schulte Roth&Zabel

200 ANNITAL SUADEUNI DED ACTIVISM CONCEDENCE THESDAY OCTORED IS 201

Notes:			

Primer

Three ways for activists to implement change

- 1) 5%+ shareholder(s) may requisition shareholder meetings between annual general meetings of shareholders
 - Board has 21 days to accept/reject requisition
 - Shareholder(s) may call their own meeting at the expense of the issuer
- 2) Solicitation without a circular to up to 15 shareholders (most jurisdictions)
- 3) Solicitation by public broadcast (most jurisdictions)



Schulte Roth&Zabel

2DD ANNIAL SUADEUNI DED ACTIVISM CONCEDENCE THESDAY OCTORED IS 20

Notes:			

Primer

- Reporting threshold is 10%
- Much less definition around parties "acting jointly or in concert"
- Proxy circulars are not cleared by securities regulators
- Many extraordinary opportunities



Schulte Roth&Zabel

200 ANNITAL SUADEUNI DED ACTIVISM CONCEDENCE THESDAY OCTORED IS 201

Notes:	

2012 Legal Update

- Advance notice by-laws: Maudore Minerals Ltd.
- Advance notice policies: Mundoro Capital Inc.
- **Independent chair:** Western Wind Energy Corp.
- Empty voting: TELUS Corporation
- Televote: Mosquito Consolidated Gold Mines Limited



Schulte Roth&Zabel

200 ANNUAL SUADEUNI DED ACTIVISM CONCEDENCE THESDAY OCTORED IS 201

Notes:	

Kingsdale's Experience in Canada

- Founded in 2003, Kingsdale is the most active proxy firm in Canada, participating in over 90% of the proxy contests, and 80% of M&A transactions that occur each year
- Represents issuers and dissidents in equal number, the depth and breadth of our experience has provided us with some unique insights into board dynamics, offensive and defensive tactics and shareholder behavior
- Evolved away from the traditional "proxy solicitor" model, to a multidisciplinary team approach that is lead by financial, governance, legal and communications experts
- Working with issuers often involves confidential ongoing defensive mandates that includes development of strategies and tactics to fortify the board against dissident shareholders
- Mediates between dissidents and issuers to bring about settlements in several high-profile cases — prior to the issuance of proxy circulars



Schulte Roth&Zabel

Notes:			

Types of Dissident Action in Canada

- Three types of dissident action we are witnessing in Canada
 - Traditional proxy contests seeking partial or total replacement of the board
 - Vote "No" campaigns, seeking to withhold votes from certain directors to trigger majority voting policies and force board renewal
 - Contested corporate transactions, i.e., M&A, capital structure reorganization



Schulte Roth&Zabe

2DD ANNIAL SUADEUNI DED ACTIVISM CONCEDENCE THESDAY OCTORED 16 2012

Notes:

Profile of Dissidents in Canada

- Until 2009, with a few exceptions, dissident actions tended to be associated with smaller companies, and dissidents were aggrieved former officers, founders or directors
- The face of dissident shareholder actions has changed over the past three years with the emergence of professional activist or catalyst investors — and increased activism on the part of traditional asset managers
- Pershing Square's action against CP Rail was seen by many as a watershed event in Canada in fact it reflected a trend started by Canadian funds like Goodwood and West Face Capital and U.S. funds like Mason Capital
- What has changed dramatically is the willingness of traditional fund and pension managers to support and even lead dissident shareholder action



Schulte Roth&Zabe

2DD ANNITAL SUADDURINDED ACTIVISM CONCEDENCE THESDAY OCTORED IS 201

Notes:	

Waging a Successful Campaign

- With benefit of working from the perspective of issuers and dissidents, we have observed that activist investors have enjoyed higher rates of success when they first seek to build a quiet consensus among large shareholders prior to launching a public campaign
- This runs counter-intuitive to the conventional strategy of launching a public "air war," followed by a "ground-war" if the dissident's demands are not met
- We have frequently stymied dissident shareholders by provoking them into issuing angry statements that feed into the activist/hedge fund stereotype
- By contrast, tactics like presenting shareholders with a reasoned and well-thought out business plan have repeatedly demonstrated their effectiveness in bringing shareholders onside
- We have also observed that Canadian institutions are more apt to support plans that are based on unlocking value through process improvements, rather than an outright sale, which tend to be more effective



Schulte Roth&Zabel

Notes:

Impact of Proxy Advisers

- Both ISS and Glass Lewis tend to be influential in the Canadian institutional market and do play a significant role in proxy contests
- The proxy advisers can provide important cover for institutional money managers who want to support a dissident shareholder but are worried about retaliation from the issuer or incumbent directors
- The prevalence of bank-owned investment funds and the politicized governance of certain pension funds makes this a particularly acute issue in Canada
- Governance issues can also be used as a pretext or to provide support for an activist action; however, we have observed a difference in how those issues are treated by ISS and Glass Lewis in the context of a contested meeting
- ISS appears to give greater emphasis to governance sins when considering which side to support in a proxy contest, while Glass Lewis tends to exclude them from consideration in the contest of a contested director election



Schulte Roth&Zabel

Notes:	

Key Statistics

- Since 2008, Canada has seen 125 contested meetings, with approximately two dozen each year, except in 2009 which peaked at
- In addition, 3 to 6 dissident actions are mounted and settled in Canada each year without ever reaching the public domain, or perhaps with just the outcome being revealed (i.e., the CEO resigning to spend more time with his/her family)
- Adjusting for withdrawals and settlements, about 60% of proxy contests end in a management win
- When we tried to measure ISS and Glass Lewis' impact, we found that in the 35 proxy contests since 2010 where they made a recommendation, ISS recommended for management 68% of the time, while Glass Lewis recommended for management 75% of the time
- This incumbency bias appears to reflect their policies of demanding a fulsome plan from the dissident before issuing a favorable recommendation



Schulte Roth&Zabel

Notes:	

Notes:	

Notes:	

Notes:	



TUESDAY, OCTOBER 16, 2012

5. Shareholder Activism in the Banking Sector



Investing in Banking Institutions: What Every Activist Must Know

- I. Almost all activists will want to avoid being deemed a "controlling" shareholder
 - A. Consequences of acquiring "control"
 - 1. Individuals Prior notice requirement, but no ongoing regulation or supervision
 - 2. Entities Prior notice/approval requirement AND pervasive and extensive ongoing regulation and supervision by the Federal Reserve Board ("Fed"), which includes
 - (a) Activity restrictions
 - (b) Capital requirements
 - (c) Leverage limitations
 - (d) "Source of strength" obligations; and
 - (e) Reporting requirements
 - B. "Control" is defined as
 - 1. The power to vote 25 percent or more of any class of voting securities (except pursuant to a proxy solicitation, as discussed in Section I.B.3.a.iv)
 - 2. The power to determine, in any manner, the election of a majority of a board of directors (except pursuant to a proxy solicitation, as discussed in Section I.B.3.a.iv); or
 - 3. Any other facts or circumstances that the Fed believes enable a party to exert a "controlling influence" over "management or policies." Under this prong, the Fed has significantly expanded the situations which give rise to a conclusive or presumptive finding of control
 - (a) Voting rights
 - (i) The power to vote less than five percent of any class of a banking institution's voting securities is presumed not to constitute control
 - (ii) The power to vote 10 percent or more of any class of a banking institution's voting securities is presumed to constitute control (except pursuant to a proxy solicitation, as discussed in Section I.B.3.a.iv
 - (iii) While not automatic, under certain circumstances (e.g., where the banking institution is in a "troubled" condition), the Fed will presume control to exist at ownership levels as low as five percent of a class of voting securities
 - (iv) Proxies Proxies that entitle the holder to vote at an upcoming shareholders meeting do not count toward any of the foregoing thresholds, provided they expire after that single meeting

(b) Total equity

- Ownership of 25 percent or more of a banking institution's total equity will be presumed to constitute control, regardless of the amount, or absence, of voting rights
 - (1) Unless the holder also holds 15 percent or more of a class of voting securities, in which case control will be conclusive
- (ii) Ownership of one-third or more of a banking institution's total equity will, conclusively, constitute control, regardless of the amount, or absence, of voting rights

(c) Board representation

- (i) In general, noncontrolling shareholders are only permitted a single representative on a banking institution's board of directors
 - (1) Under certain circumstances, a second representative may be permitted
- (ii) Whether a nominee is independent of a shareholder is a more detailed analysis than under normal securities law

II. Activists seeking to avoid "control" must also avoid "concerted action"

- A. If two or more parties are deemed to be "acting in concert," then their aggregate interests and rights are attributed to each one of them, for the purpose of the control thresholds
- B. "Acting in concert" is defined as knowing participation in joint or parallel action toward the goal of acquiring control, regardless of whether there is any express agreement

III. Presumptive control is rebuttable, however doing so precludes any significant future activism

- A. Includes executing a series of "passivity commitments" and "anti-association commitments" which, among other things, prohibit
 - 1. Proposing directors in opposition to management
 - 2. Soliciting proxies; and
 - 3. Entering into voting agreements

Notes:	

Notes:	

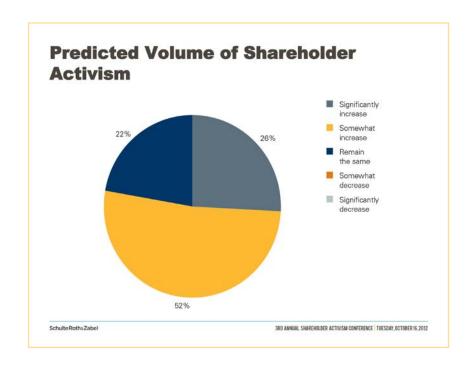
Notes:	



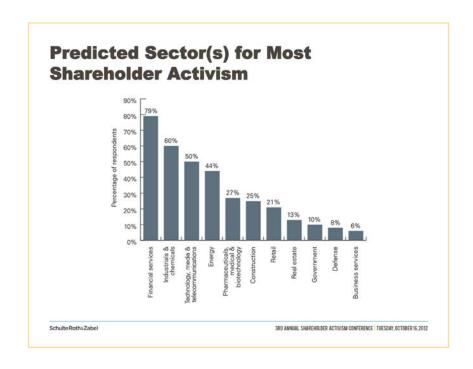
TUESDAY, OCTOBER 16, 2012

6. mergermarket Shareholder Activism Insight Study

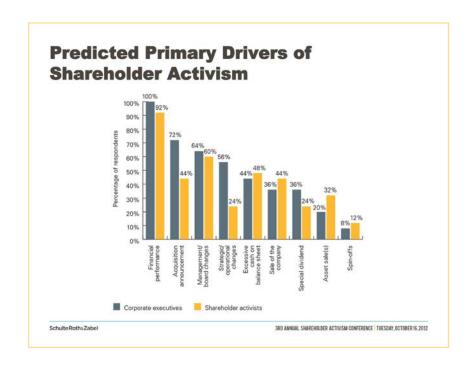




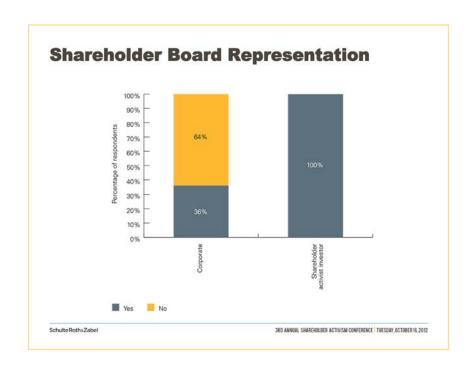
Notes:			



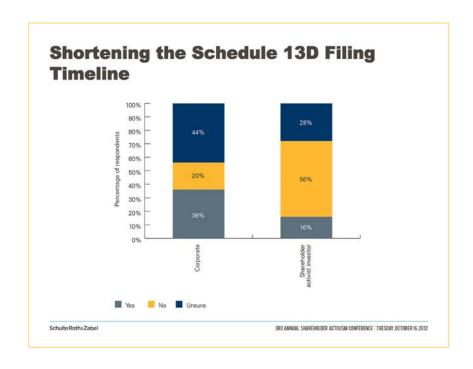
Notes:			



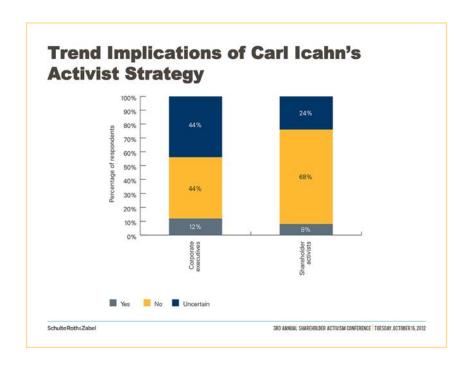
Notes:		



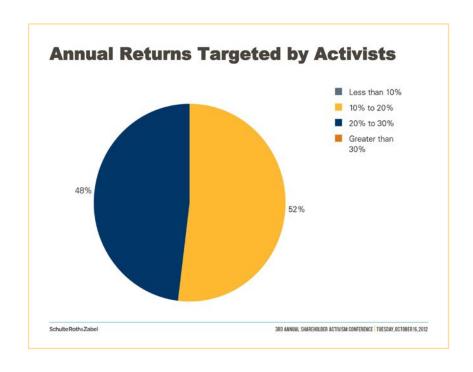
Notes:			



Notes:			



Notes:	

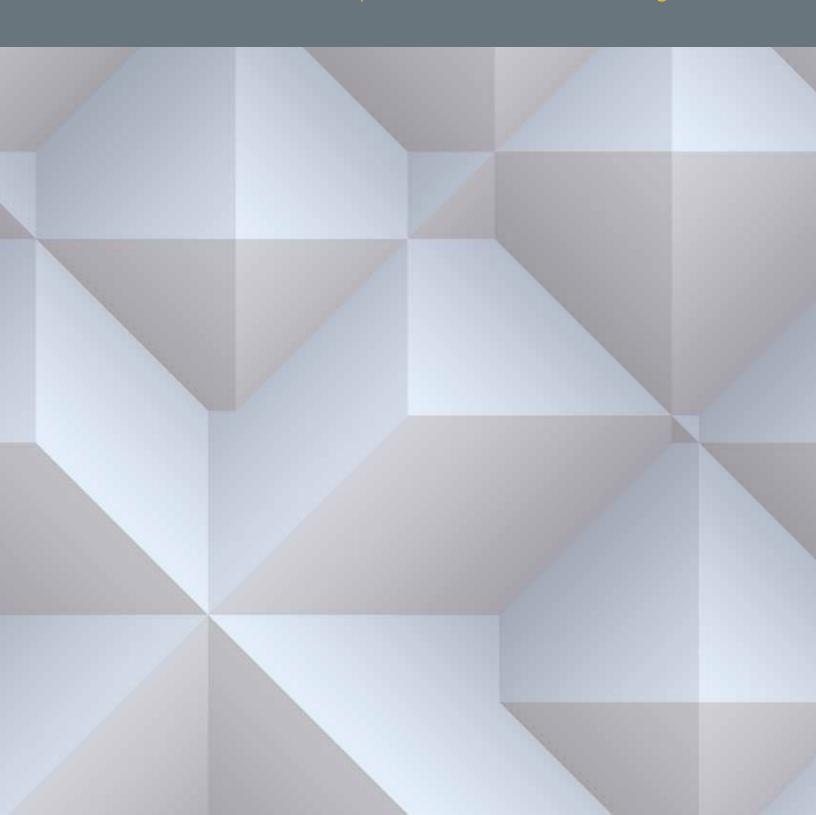


Notes:			

Schulte Roth&Zabel

Shareholder Activism Insight

A Schulte Roth & Zabel LLP report in association with mergermarket



Contents

Foreword	3
Methodology	3
Study findings	4
About SRZ	18
About mergermarket	19

Foreword

Schulte Roth & Zabel is pleased to present the 2012 edition of Shareholder Activism Insight, published in association with mergermarket. Based on a series of interviews with corporate executives and activist investors, this report highlights emerging trends in shareholder activism, as well as insights into the changing corporate landscape investors and executives will face in the coming years.

Corporate executives should expect to see increasing opposition from shareholders during next spring's proxy season, according to the 78% majority of overall respondents. Using poor financial performance and the need for management or operational change as motivation, hedge funds, pensions and unions will continue the growth of shareholder activism. A significant increase in shareholder proposals will result, according to 84% of respondents.

The financial services sector is expected to see the greatest amount of shareholder activism as investors look to repair the still recovering industry after the crash of 2008. Distant runners-up, the industrials and chemicals, technology, and energy sectors are also expected to see more disputes with investors.

Half of respondents believe an active dialogue between shareholders and management can be the most effective defense tactic against activism. When a company prefers to be more active in preventing shareholder disputes, respondents cite offensive litigation, poison pills and staggered board elections as the likely defense tools.

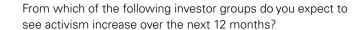
Respondents report a busy 2012 proxy season for investors and corporates. The primary demands of shareholder proposals featured voting rules, operational changes, and board nominations, among others. The majority of shareholder activist respondents and plurality of corporate executive respondents expect between 20% and 30% of the proposals will have received majority support.

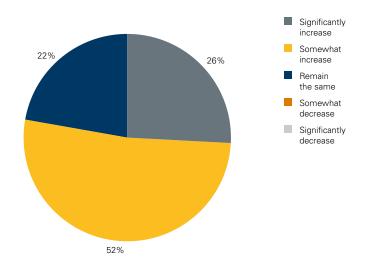
In addition to the above findings, this report provides insight into procedural details, mergers and acquisitions, drivers of activism, activist strategies, and various other issues concerning the shareholder activism environment. We hope you find this study informative and useful, and as always we welcome your feedback.

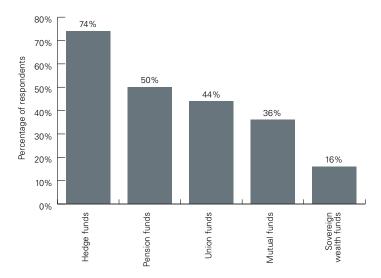
Methodology

In the second quarter of 2012, Schulte Roth & Zabel commissioned mergermarket to interview senior corporate executives and activist investors regarding their experience with shareholder activism and their expectations for the upcoming 12 to 24 months. All respondents are anonymous and results are presented in aggregate.

What do you expect to happen to the volume of shareholder activism over the next 12 months/next proxy season?







After a busy start to this year's proxy season, both corporate and activist respondents widely expect shareholder activism to increase through 2012 and into the 2013 season. A lack of changes to management after repeat showings of poor performance is causing the increase, according to activist investors. A hedge fund partner explains the environment: "Shareholders have not seen any returns because of the extended fall in share prices, but management has not been affected. Shareholders will raise questions."

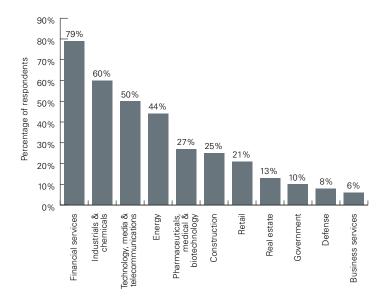
Some corporate executives, whose prediction for increased activism is identical to that of shareholders, seem to welcome the changes and improvements activists can force into companies more than would be expected. During the financial crisis, activists' ability to keep management on their toes proved most valuable, says an executive respondent from the tech sector: "Shareholder activists have been successful in improving governance and creating value. Activists have demonstrated their ability to affect companies' policies and decisions and this will cause more investors to take an activist approach."

With a very similar outcome to the 2010 Shareholder Activism Insight report, overall respondents (74%) agree that hedge funds will be most likely to increase activist initiatives. Other groups expected to see growth in shareholder activism are pension funds (50%) and union funds (44%). A private equity investor explains: "They have intensified their corporate governance activities and are trying to establish themselves as sophisticated players in the investment community while attempting to attain greater involvement in strategic corporate decisions and control in decision making."

"The broadening out of the types of investors involved in shareholder activism has significant implications for corporate policy, governance and executive pay practices – companies must take notice when investor groups that have been less active previously become vocal with their views and dissatisfaction."

David E. Rosewater, Partner, Schulte Roth & Zabel

In which sector(s) do you expect to see the most shareholder activism over the next 12 months?



The top four sectors expected to see increased shareholder activism are financial services, industrials and chemicals, technology, and energy; there is little difference in corporate and activist feedback when it comes to sector predictions.

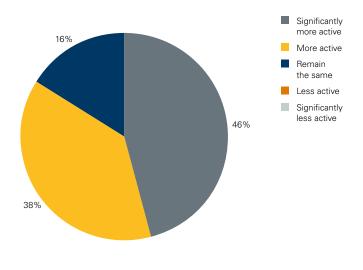
As was the case in 2010, respondents are expecting noticeably more bullish activity in financial services compared to other sectors. This most likely reflects tumbling stock prices, controversial executive pay packages and a high volume of asset sales from larger banks. An activist respondent explains: "Financial services will continue to see high shareholder activism, in response to continued poor performance and high pay packages rolled out to the executive management. The financial crisis has also increased attention to business operations and corporate governance."

Talking specifically about the dynamics of his sector, a technology CFO explains: "Technology companies have cash, off-balance sheet assets, and other hidden assets that they can take advantage of when their share price is down. Shareholder activists will come into play when the companies are not using the available assets to implement changes to improve performance."

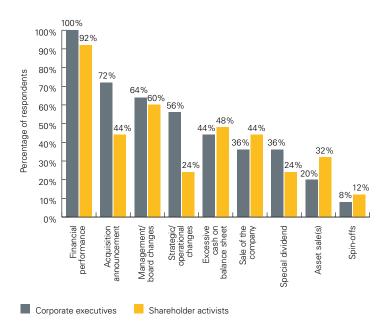
"Given the damage and upheaval in the financial sector since the financial crisis, it is not surprising that the financial sector has been regularly viewed in our surveys (in 2008, 2010 and this current survey) as the anticipated most active sector – investors are still looking for responsible governance and improved results from a critical sector."

Marc Weingarten, Partner, Schulte Roth & Zabel

Compared to the last year, how active will shareholders be in influencing companies' M&A decisions over the next 12 to 24 months?



What will be the primary drivers of shareholder activism over the next 12 to 24 months?

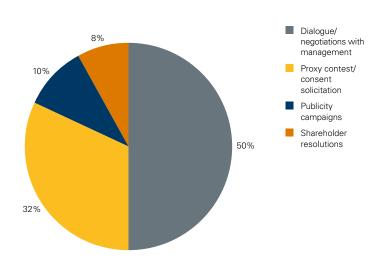


The influence of shareholders is expected to increase, according to 84% of all respondents. In the previous edition, respondents were divided with over half of corporates believing shareholders would not have any impact on M&A decisions. Since the last survey was conducted in Q2 2010, corporate executives have become widely aware of shareholders' skepticism for all decisions including M&A. One corporate executive notes: "Shareholders are very concerned about the volatile market situation and are not confident in management's M&A decision making. Shareholders are now actively involved in these deals."

Financial performance has grown from being a primary driver of shareholder activism for roughly half of total respondents in 2010 to just shy of 100% of respondents this year. A clear sign that earnings have fizzled for companies across all sectors, the focus has shifted heavily toward weak earnings, marking a change from the past two reports. In 2010, excess cash was the top concern of activist respondents and financial performance was considered the most significant trigger by the majority of corporate respondents. In 2008, the majority of overall respondents identified a period of flat or negative growth, profitability or stock price as the key driver of shareholder activism.

A partner at a private equity firm explains: "Recent steep drops in the share prices are driving the investors to show their frustration with management. Shareholders are coming out of the dark and are comfortably questioning management activities and dealings. Many proposals will be aimed at board changes."

Which activist strategy is most effective for achieving desired results?



"It's interesting to note the significant divergence of views with respect to two of the drivers – corporate executives expect acquisition announcements and strategic or operational change to be much more significant drivers of shareholder activism than the activists themselves."

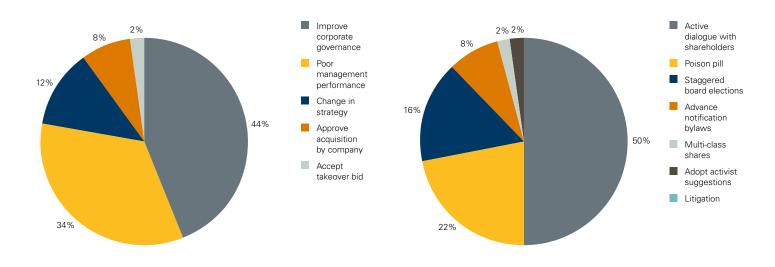
Marc Weingarten, Partner, Schulte Roth & Zabel

Communication between shareholders and management remains the most effective method for activists to achieve their goals. According to one activist respondent: "Dialogue can produce the changes desired by investors. Not only can it be less confrontational, but continuous dialogue helps in building relationships between management and shareholders in the future."

Proxy contests have grown in popularity since the 2010 edition with nearly a third of overall respondents citing this as the most effective strategy. Providing an opportunity for minority stakeholders to gain an advantage, activists have succeeded in gaining the attentive ear of management who previously would not have listened.

What is the primary motivation for requesting changes to the board?

What is the most effective defensive tactic a company can use against activist shareholders?

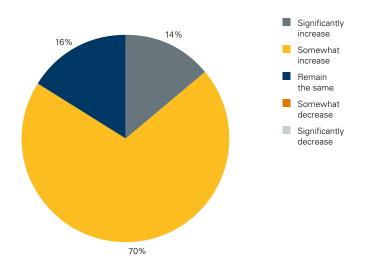


Corporate governance and poor performance by management are the top drivers of unseating board members, according to 44% and 34% of respondents, respectively. The two issues have created increased scrutiny and made historically successful companies' boards more progressive. A shareholder activist describes the evolving dynamic: "Poor corporate governance is the cause of concern and the main reason behind increasing shareholder activist activity. Even the largest corporations, which were once pioneers of management and decision making, have witnessed constant change in top level management."

Compromise is key as half of respondents believe a company's best defense from activist shareholders is keeping dialogue open, which respondents also consider ideal for activist strategies. The response is slightly tapered from the 2010 report as poison pills and staggered board elections have become a more recognized tactic by 22% and 16% of respondents, respectively.

Respondents maintain that keeping active dialogue is the preferred route, but in the face of extreme inflexibility, offense is the best defense. A corporate VP comments: "Ideally, the company should try to negotiate and reach for a settlement. But if the shareholder continues to be resistant, switch strategies to more offensive litigation."

Compared to the previous 12 to 24 months, what will happen to the volume of shareholder proposals over the next 12 to 24 months?



"As I said in our survey four years ago, often potentially active shareholders want primarily to know that their value-enhancement ideas have been seriously considered by the management and board of directors. Careful consideration of an activist's proposals at the board level can also serve to weaken an activist's potential director election campaign. Defensive tactics implemented after an activist arrives publicly on the scene can often backfire – the often influential proxy advisory services, in particular, tend to take a negative view of what they see as entrenchment activities."

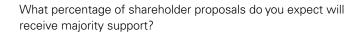
David E. Rosewater, Partner, Schulte Roth & Zabel

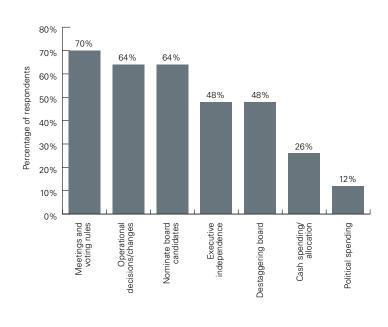
Shareholder proposals will increase over the next 12 to 24 months, according to 84% of respondents. Proposals, which were once restricted to corporate governance improvement, are reaching more aspects of management and increasingly impacting a company's direction, respondents say. One shareholder activist explains: "With the emergence of environmental, political, and social concerns, shareholder activists have increased their involvement in company affairs, increasing the volume of proposals significantly."

"Shareholder proposals are a significant tool in the toolbox of shareholder activists – binding shareholder proposals can implement corporate governance reform, and even non-binding proposals can significantly influence the direction of a company, as management and boards that ignore shareholders are much more likely to face negative recommendations from the proxy advisory services and stronger opposition from shareholders at the next meeting."

Marc Weingarten, Partner, Schulte Roth & Zabel

What are/were the primary demands of shareholder proposals during the 2012 proxy season?





60% 56% 50% Percentage of respondents 40% 36% 33% 30% 25% 20% 10% 4% 0% Shareholder activists 10% to 20% 20% to 30%

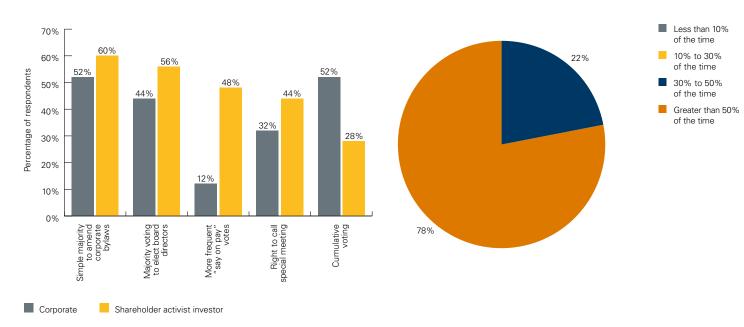
During the 2012 proxy season-to-date, respondents most frequently reported meetings and voting rules, operational decisions, and board nominations as primary proposal demands. The ability to call special meetings and replace existing board members is what shareholders believe will best counter balance poor corporate governance practices and maximize market value, respondents say. Capital allocation, which was a top concern of shareholders in recent years, has fallen toward the bottom of the priority list with just a quarter of respondents citing it.

Corporate and activist respondents are more divided in their expectations for shareholder proposal outcomes. One quarter of corporate executives think 30% or more of shareholder proposals will reach a majority. A media CFO explains the environment: "Shareholder support is increasing at a considerable rate. Most proposals relate to corporate governance, anti-takeover measures, and shareholder rights, which largely obtain majority support."

The shareholder activists, while optimistic, are slightly more cautious when asked about support and implementation of proposals. A much smaller minority expect greater than 30% of proposals will receive support while 40% of respondents believe the actual number will fall on the lower end of the scale. Disputes among shareholders give management an edge and put activist initiatives at risk of failure, respondents mention. One activist respondent comments: "Disparate views among shareholders are common and present many challenges. Also, response to the shareholder proposals are generally negative and fail to gain management support."

Which changes to procedural requirements were (or are likely to be) made to meetings and voting rules?

In your experience, how often do activist investors and corporations work together cooperatively without receiving media attention?



Corporate and activist respondents agree that voting rules on amending corporate bylaws and majority voting to elect directors are among the most likely procedural changes to take place during the 2012 or 2013 proxy sessions. These two changes reflect a broader push for corporate governance reform, which many respondents say is at the heart of today's shareholder activism.

The number of "say on pay" votes held annually is the change that most divides corporate and activist respondents. Shareholder activists are four times more likely to expect more frequent voting on executive's salaries than corporates. For the corporates, it's unclear whether the gap is due to their expectations of such rule changes or whether they are answering subjectively based on their interests. But one activist respondent maintains: "Boards will inevitably need to reopen the discussion on "pay for performance," and either refine communication with investors or revisit their compensation policies."

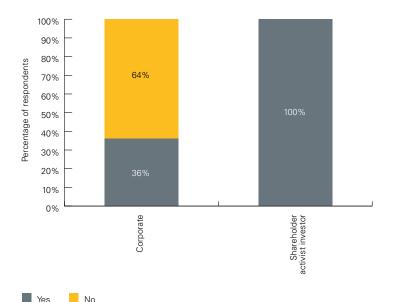
Both groups of respondents agree that staying out of the media is best for both parties when negotiating. Disputes that appear in the media can often negatively affect the value of the company. One corporate CFO recalls: "Most of the institutional investors are organized and tend to solve the issue relatively well with cooperation."

A shareholder activist agrees, but adds that the media can be used for leverage by some activist investors. The respondent comments: "It depends on the type of activist investor. With hedge funds the discussion often goes public as they employ a short-term strategy. They look for quick returns and thus do not get involved in prolonged dialogues and rather go public to put pressure on the management. But other activist investors like mutual funds and pension funds cooperate with the management very well and work together most of the time."

"It doesn't make for attention-grabbing headlines, but cooperation between shareholder activists and companies does constitute the norm. Boards tend to be more willing to compromise when the activist hasn't gone public."

Marc Weingarten, Partner, Schulte Roth & Zabel

Do you believe it is appropriate for shareholders to have board representation?



Respondents disagree on the issue of board representation. Activist respondents unanimously agree that shareholders should have board representation, but only 36% of corporate respondents feel the same. A private equity VP sums up many of the activists' responses: "Board representation is important in improving transparency and reducing the number of disputes. Decisions can be taken more easily if shareholders have a board seat, as it greatly improves trust in management and prevents overly cautious scrutiny of a company's documents."

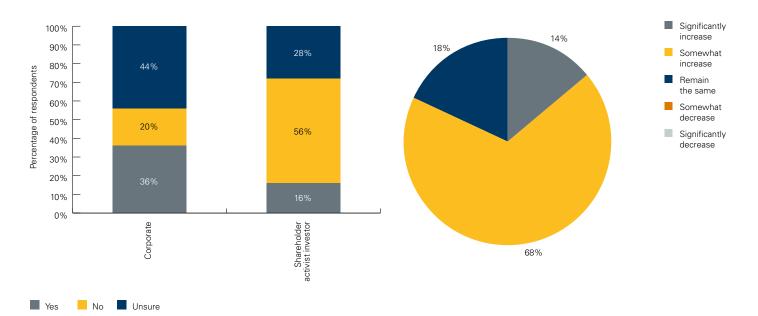
But many corporates believe the presence of shareholders in board meetings adds unnecessary complications to negotiations. The CFO of a leading media company explains: "There is no need for board representation from the shareholders. It has its advantages, but can cause more harm than good in making effective management decisions. Shareholder representation will falter the voting mechanism and cause frequent disagreements." Another corporate respondent states that management can work with shareholders on the board, but with certain limitations: "There should be proper rules, so that the shareholders' representatives do not influence the daily operations decisions, but are restricted to taking active part in strategic decisions."

"The extent to which corporate executives take a dim view of shareholder representation on the board of directors is surprising and a significant change from prior surveys. This attitude suggests that there may be more contentious contests between companies and activists in the future as companies may be more likely to fight to keep shareholder representatives out of the board room."

David E. Rosewater, Partner, Schulte Roth & Zabel

Do you expect the Schedule 13D filing timeline to be shortened from 10 days?

What do you expect will happen to the volume of proxy access proposals in the next 12 months?



Many respondents – 44% of corporate and 28% of activists – are unsure of the SEC's eventual decision on the timeline for 13D filings. Most shareholder activists – 56% compared to just 20% of corporates – do not expect any change to the filing period rule.

The shortening of the current 10 day requirement for filing of Schedule 13D following the acquisition of more than 5% beneficial ownership of a company has been under consideration in recent years. Legal experts representing corporate interests have reportedly been in favor of the change in order to protect companies from what they view as aggressive or harmful shareholder activism.

Activist respondents believe that despite a shortened filing requirement, hedge funds will develop a new strategy to work around the new rules. Some corporates agree, but most insist that the shortening will provide management with increased protection from activists. Overall, most respondents see that the cost of building a position greater than 5% will be increased by a shortening.

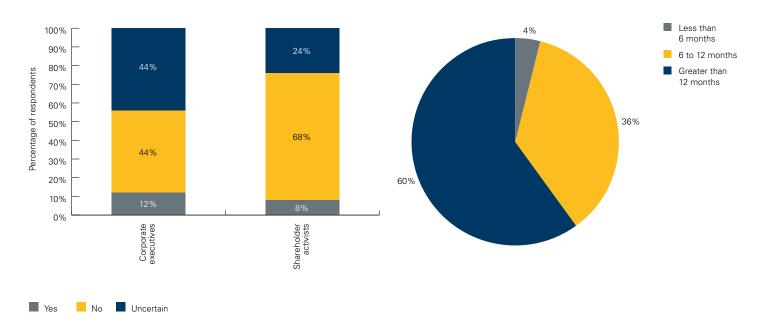
Proxy access proposals are expected to increase over the next 12 months, according to a majority of overall respondents. Activists have succeeded in reducing corporate defenses in recent years, respondents say, and the gates for more proxy contests have opened. An activist respondent elaborates: "A series of rules, including those related to proxy access and activism, will be enacted soon. This will increase the proxy access proposals and bump up a crop of proxy fights. Investors are certainly going to utilize the changing regulations to their full advantage during the next proxy season."

The issue of proxy access remains important for a majority of respondents. A private equity director explains the significance: "Proxy access enables shareholders to include proposals in company proxy materials recommending amendments to company bylaws that would give qualified shareholders proxy access for their own director nominees."

Do you expect Carl Icahn's activist strategy of making an acquisition proposal to a company to force a sale (CVR Energy, Clorox, Oshkosh) to become a trend within the shareholder activist community?

Activists only

What is the average holding period of an activist investment?



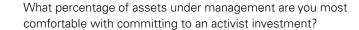
Strategies and campaigns employed by well-known activist investor Carl Icahn are not expected to trigger a long-term trend, according to overall respondents, although corporate respondents are not as certain about this.

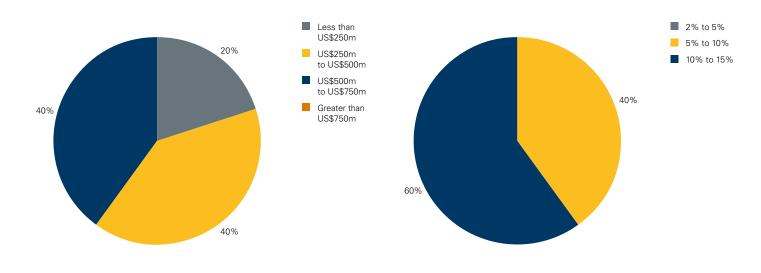
"It is not surprising to see that this strategy is unlikely to become significant, as few activists have the wherewithal, management capabilities or inclination to credibly make takeover proposals or the willingness to accept the illiquidity of ownership."

Marc Weingarten, Partner, Schulte Roth & Zabel

The average holding period of activist investments has remained relatively unchanged since the 2010 survey. Though, by a larger margin, 60% of respondents still say most investments are held for at least one year, compared to 48% in 2010. The increase may be attributed to the growth of non-hedge fund investors in shareholder activism, as one managing director explains: "Institutional investors like mutual funds and pension funds who tend to hold onto their investments for long-term returns have increased the average holding period of activist investors."

What is the ideal market cap range for activist investors?





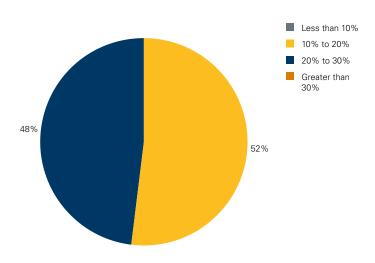
Activist investors say the mid-market is the most attractive place to execute activist strategies. While high profile individual activists involved in large-cap companies tend to attract the most media attention, respondents to this survey say this is not the norm.

Investors' expectations of activist opportunities appears to be on the rise as a 60% majority say they are comfortable with committing 10% to 15% of assets under management to such investments. Only 6% were as comfortable with this allocation in 2010, and that year 42% were willing to use only the lowest amount possible.

"This marks a return to pre-economic crisis concentration approaches. Investment concentration has the potential to affect the intensity of an activist campaign, but it does carry liquidity risks and it is a bit of a surprise to see the magnitude of those willing to take highly concentrated positions."

David E. Rosewater, Partner, Schulte Roth & Zabel

What annual returns do you target in activist investments?



This year, activist investors are targeting higher returns with just under half stating an expected range of 20% to 30%. Previously, less than a quarter of respondents were willing to aim as high. Indeed, in the last survey 14% targeted a return under 10%, whereas respondents are unanimously more optimistic today.

Interestingly, not since the 2008 edition have respondents cited returns greater than 30%.

Schulte Roth&Zabel



Clients of all sizes turn to us for help with their campaigns.

Representative activist campaigns include:













The New Hork Times











Schulte Roth& Zabel ® is the registered trademark of Schulte Roth & Zabel LLP. All other company logos are the trademarks of their respective owners. The contents of these materials may constitute attorney advertising under the regulations of various jurisdictions.

Schulte Roth&Zabel

About SRZ

Schulte Roth & Zabel, a full service law firm, delivers sophisticated, leading-edge advice to the firm's clients, which include prominent financial institutions, corporations and investors. The firm strives to build and maintain long-term relationships with clients by emphasizing client service. With expertise in a broad array of practice areas, the firm provides comprehensive advice to achieve its clients' objectives.

SRZ is one of the leading law firms in the area of business transactions, including mergers and acquisitions, leveraged buyouts, distressed investments, activist matters, public offerings, high-yield debt issues and PIPE transactions. Clients include both financial and strategic investors.

SRZ has a preeminent practice specialty in the area of shareholder activism and activist investing, with an unparalleled expertise in the applicable securities laws, proxy rules and the current state of market practice. The firm has been counsel in many of the highest-profile activist matters in recent years, including campaigns involving The McGraw-Hill Companies, Marathon Petroleum Corporation, Allscripts Healthcare Solutions Inc., BMC Software Inc., CSX Corp., Time Warner Inc., Nabi Biopharmaceuticals, JAKKS Pacific Inc., Nutrisystem Inc., Radian Group Inc., Sabra Health Care REIT Inc., Pacific Sunwear of California Inc., Red Robin Gourmet Burgers Inc., Maguire Properties Inc., Mentor Graphics Corporation and The New York Times Co.

Serving issuers, activists and "occasional activists," we provide unparalleled expertise and cutting-edge advice on navigating the maze of Regulation 13D/G rules, Section 16(b), trading rules, Hart-Scott-Rodino and other applicable federal and state securities and corporate laws, as well as on other tax and regulatory issues. The firm counsels clients on a wide variety of activist and defensive strategies, from behind-the-scenes long-term partnerships with management to proxy contests and consent solicitations. We have extensive experience dealing with advance notice bylaws; "books and records" demands; handling regulatory approvals, investigations and legislative hearings; and engaging in defensive and offensive litigation. In short, our practice has a wealth of experience to bring to bear in helping our clients achieve their goals.

For more information, please contact:



Marc Weingarten, Partner +1 212.756.2280 marc.weingarten@srz.com



David E. Rosewater, Partner +1 212.756.2208 david.rosewater@srz.com



Eleazer Klein, Partner +1 212.756.2376 eleazer.klein@srz.com

Schulte Roth&Zabel

Schulte Roth & Zabel LLP New York919 Third Avenue
New York, NY 10022
+1 212.756.2000
+1 212.593.5955 fax

Schulte Roth & Zabel LLP Washington, DC 1152 Fifteenth Street, NW, Suite 850 Washington, DC 20005 +1 202.729.7470 +1 202.730.4520 fax

Schulte Roth & Zabel International LLP London

Heathcoat House, 20 Savile Row London W1S 3PR +44 (0) 20 7081 8000 +44 (0) 20 7081 8010 fax

About mergermarket



mergermarket is an unparalleled, independent mergers & acquisitions (M&A) proprietary intelligence tool. Unlike any other service of its kind. mergermarket provides a complete overview of the M&A market by offering both a forward-looking intelligence database and a historical deals database, achieving real revenues for mergermarket clients.



Remark, the events and publications arm of The Mergermarket Group, offers a range of publishing, research and events services that enable clients to enhance their own profile, and to develop new business opportunities with their target audience.

To find out more please visit:

www.mergermarketgroup.com/events-publications/

For more information please contact:

Matt Leibman Publisher, Remark The Mergermarket Group

Tel: +1 212 686 6305

Email: Matt.Leibman@mergermarket.com

Schulte Roth&Zabel

Disclaimer

This publication contains general information and is not intended to be comprehensive nor to provide financial, investment, legal, tax or other professional advice or services. This publication is not a substitute for such professional advice or services, and it should not be acted on or relied upon or used as a basis for any investment or other decision or action that may affect you or your business. Before taking any such decision, you should consult a qualified professional adviser. While reasonable effort has been made to ensure the accuracy of the information contained in this publication, this cannot be guaranteed and neither Schulte Roth & Zabel nor mergermarket nor any of its subsidiaries or any affiliate thereof or other related entity shall have any liability to any person or entity which relies on the information contained in this publication, including incidental or consequential damages arising from errors or omissions. Any such reliance is solely at the user's risk.



TUESDAY, OCTOBER 16, 2012

7. Overcoming Advance Notification Bylaws and Poison Pills



Overcoming Advance Notification Bylaws Fundamental Corporate Changes

Schulte Roths Zabel

Notes:		

Advance Notice Bylaw Provisions

- Require stockholders to provide prior notice to a company of intention to nominate or propose other business at an upcoming annual meeting
- Minimum informational requirements for set forth
- Delaware courts have deemed advance notice provisions valid when serving a proper corporate purpose
- Since the late 1980s, standard in public company bylaws with limited stockholder challenges

Schulte Roths Zabel

Notes:			

The Problem with the "Timeliness" Requirement

- Requirement that the notice be submitted significantly in advance of the annual meeting
- Impact of post-notice deadline developments

Schulte Doth: Zahe

Notes:	

Hubbard: "Material Change in Circumstances" (1991)

- Hubbard v. Hollywood Park Realty Enterprises (1991)
- The Court's standard: "an advance notice by-law will be validated where it operates as a reasonable limitation upon the shareholders' rights to nominate candidates for director"
- A "material change of circumstances" required waiver of advance notice provision to afford Hollywood's stockholders a fair opportunity to nominate

Schulte Roths Zabel

Notes:	

Icahn: "Fundamental Deviation" (2012)

- After the advance notice deadline, Amylin announced rejection of an acquisition proposal, contrary to prior assertion that it would consider any value-maximizing transaction
- Icahn sought to enjoin the enforcement of advance notice provision, based on
 - A "fundamental deviation" in the board's outlook
 - Board's breach of fiduciary duties by refusing to waive the advance notice requirement

Schulte Roths Zabel

Notes:			

Icahn: "Fundamental Deviation" (2012)

- Motion for expedited proceedings
- The Court found that Icahn adequately alleged that the board had "radically changed its outlook" after the advance notice deadline had passed and, if true, Amylin's stockholders were "denied the opportunity to exercise their voting rights at an arguably critical time"
- · Settlement shortly after the hearing

Schulte Roths Zabel

Notes:	

HealthCor v. Allscripts: "Extraordinary Change" (2012)

- After the notice deadline, chief financial officer and four board members (including the chairman) resigned
- HealthCor sought extension of advance notice deadline, postponement of annual meeting and new record date
- Granted expedited review: "the board is subject to...a review for how it uses a by-law and whether it's using it for proper purposes consistent with its duty of loyalty"
- Strine: "extraordinary change" in corporate governance

Sch	offer	Dot	he 7	aha

Notes:

The Future of Advance Notice Provisions

- No final judgment on waiving advance notice provisions after interim fundamental corporate change
- Icahn and HealthCor increasing scrutiny applied to the use of advance notice provisions
- · Enforcement reasonably related to
 - Circumstances surrounding the fundamental corporate change
 - Resulting impact on stockholders' fundamental right to vote in the election of directors

Schulte Roths Zabel

Notes:	

Overcoming Poison Pills

Potential Invalidity of 10% Pills Against Activists

Schulte Doth: 7ahol

Notes:	

Overcoming Poison Pills

- Issuers are increasingly adopting 10% pills when an activist surfaces
- We believe it likely that Delaware courts will find 10% threshold invalid against an activist with no control intent

Schulte Roths Zabel

Notes:	
	_
	_
	_
	_
	_

Unocal Test for Pill Validity

- Adoption/refusal to waive protected by business judgment rule so long as
 - Board had reasonable grounds to believe a danger to corporate policy or effectiveness existed
 - Defensive response is neither preclusive of proxy contest nor coercive, and is reasonable in relation to the threat posed

Schulte Roths Zabel

Notes:

Overcoming Poison Pills

- Pill as preclusive making a successful proxy contest "realistically unattainable"
 - Little chance of success: Del. Supreme Court in Versata v. Selectica found a 5% NOL pill not preclusive
- Pill as coercive only if it "crams down" on shareholders a management-sponsored alternative

Schulte Roths Zabel

Notes:			

Threat Presented

- "Danger to corporate policy or effectiveness"
- Common case: acquisition of control without paying an adequate premium
 - · Selectica: protect corporate asset (NOL)
 - ebay v. Craigslist: preserving not-for-profit culture at for-profit corporation inadequate
 - Interco: non-coercive tender is a mild threat if board has proposed an alternative recap
- Activist with non-control intent: not yet tested

Schulte Roths Zabe

Notes:	

Yucaipa v. Riggio (August 2010, Strine)

- Riggio owned 29% of Barnes & Noble
- Burkle bought up to 19%; B&N adopted 20% pill and capped Riggio at 29%
- Burkle "follower" Peter Eichler at Aletheia bought 17%
- Burkle asked board to raise pill threshold to 37%, claiming he was just an activist — not seeking control, just three board seats

Schulte Roths Zabel

Notes:		

Strine Doesn't Believe Him

- HSR filings sought to buy up to 50%
- 13D "reserved the right" to pursue (a)–(j) Item
 4 events propose M&A transactions
- Burkle has discussed LBO with iBankers
- Proposed changes in governance: three directors, partnership with HP, acquire best of Borders
- · Risk of grouping with Aletheia

Schulte Roths Zabel

Notes:			

Strine Notes ...

- Burkle & Aletheia could exert "potent influence over, if not outright control of" B&N — forming "an effective control block"
- Burkle, with 37% and three board seats, could use influence to advance his own self-interest adverse to the company's other stockholders
- Pill trigger at "high end" of typical range at 20% as opposed to "more common" 15%

Schulte Roths Zabel

Notes:	

Conclusion: 10% Pill Against an Activist Investor with No Control Intent is Likely Invalid

- Indications by Delaware bench that 10% is too low
- Keep HSR and statements to below 15–20%
- Narrow 13D reservation of rights exclude control and any self-interested transactions
- Proposal of value-maximizing conduct should not be viewed as a serious threat

Schulte Roths Zabel

Notes:			



TUESDAY, OCTOBER 16, 2012

8. Keynote Presentation



Notes:	

Notes:	

Notes:	

Disclaimer

This information and any presentation accompanying it (the "Content") has been prepared by Schulte Roth & Zabel LLP ("SRZ") for general informational purposes only. It is not intended as and should not be regarded or relied upon as legal advice or opinion, or as a substitute for the advice of counsel. You should not rely on, take any action or fail to take any action based upon the Content.

As between SRZ and you, SRZ at all times owns and retains all right, title and interest in and to the Content. You may only use and copy the Content, or portions of the Content, for your personal, non-commercial use, provided that you place all copyright and any other notices applicable to such Content in a form and place that you believe complies with the requirements of the United States' Copyright and all other applicable law. Except as granted in the foregoing limited license with respect to the Content, you may not otherwise use, make available or disclose the Content, or portions of the Content, or mention SRZ in connection with the Content, or portions of the Content, in any review, report, public announcement, transmission, presentation, distribution, republication or other similar communication, whether in whole or in part, without the express prior written consent of SRZ in each instance.

This information or your use or reliance upon the Content does not establish a lawyerclient relationship between you and SRZ. If you would like more information or specific advice of matters of interest to you please contact us directly.

© 2012 Schulte Roth & Zabel LLP. All Rights Reserved.

Schulte Roth&Zabel

Schulte Roth & Zabel LLP New York

919 Third Avenue New York, NY 10022 +1 212.756.2000 +1 212.593.5955 fax

www.srz.com

Schulte Roth & Zabel LLP Washington, DC

1152 Fifteenth Street, NW, Suite 850 Washington, DC 20005 +1 202.729.7470 +1 202.730.4520 fax

Schulte Roth & Zabel International LLP London

Heathcoat House, 20 Savile Row London W1S 3PR +44 (0) 20 7081 8000 +44 (0) 20 7081 8010 fax

The contents of these materials may constitute attorney advertising under the regulations of various jurisdictions. Schulte Roth&Zabel® is the registered trademark of Schulte Roth & Zabel LLP.