

## Activists, Gone Mainstream, Poised To Bet Bigger In 2014

By Karlee Weinmann

*Law360, New York (January 01, 2014, 10:08 AM ET)* -- Fresh off a record run, activist investors will continue carving out a more prominent place for themselves in 2014 — a year experts predict will be defined by a flood of newcomers to the marketplace and bigger, more accommodating targets.

The past 12 months, underpinned by a string of high-profile campaigns, have provided activists momentum that will carry them into the 2014 proxy season, expected to be another banner round of more sophisticated calls for change. And the successes also added something else — mainstream support for the activist strategy that had previously eluded even its best-known players.

“Investors and media have warmed up to activist investing,” said Andrew Freedman, a partner in Olshan Frome Wolosky LLP’s activist practice. “It’s become a generally accepted practice. Back in the day, five or 10 years ago, there was a negative perception of activists, but we’re way past the ‘corporate raider’ days.”

Both increasingly cooperative targets and supportive shareholders signal a new era for activism that is far from over, said David Rosewater, a Schulte Roth & Zabel LLP partner who has been on both sides of activist battles. And moving forward, cash-flush activists stand poised to capitalize on their newfound leeway to launch shakeup campaigns.

“For a long time, there was probably some hope or expectation by some in the corporate sector that this would be a short-lived situation and it could be back to business as usual, but I think what’s become clear now is the success of [activism] means it’s not likely to go anywhere,” Rosewater said.

Here, experts share some of the trends they’re tracking for 2014.

### A Flood of First-Timers

Activist hedge funds have overtaken other vehicles in recent years to become pacesetters in the marketplace, delivering heftier returns than their counterparts. As activists prove they know how to squeeze more value from companies small and large, newcomers have cropped up with increasing frequency — a shift experts expect to take firmer hold in 2014.

“Those that for a while sat largely on the sidelines as passive investors, who now see activist investors becoming more widely accepted, they’re more willing to jump into the fray,” Freedman said.

A report published in the fall by hedge fund analyst Preqin showed that 16 percent of investors surveyed planned to back activist funds in the future, suggesting that first-time fund managers will have the support they need to prove themselves.

Typically, inexperienced activists will start small, with companies whose market caps land in the \$150 million to \$200 million range, leaving the bigger fish to more established powerhouses.

### **A Longer Look at Bigger Targets**

While smaller companies are sure to see increased activist interest amid an onslaught of newbie investors, companies with large market caps won't be off the hook in 2014.

"More and more investors, including huge state pension vehicles, have been investing in an array of activist vehicles, thereby giving these growing activist funds the wherewithal to focus their sights on these large market cap companies," Freedman said. "I see that as a trend that's certainly going to continue."

Historically, companies with large market caps have been able to use their size as a shield from activist involvement. But that landscape has changed as the activists themselves have grown both in terms of this financial reserves and the louder voices they have cultivated, attorneys said.

Between 2011 and 2012, there were four proxy battles involving companies with market caps of more than \$2 billion. In 2013 alone, the figure doubled to eight, suggesting that activists are growing tougher and bolder in both their targets and tactics, and hinting at more growth in 2014.

Still, another SRZ partner, Marc Weingarten, said the shakeup pushes focused on behemoth companies, though often the best publicized, will not necessarily provide the most noteworthy insights into the fast-rising activist culture.

"I don't think that activism in 2014 is going to be defined by the largest campaigns," he said. "We're going to see a tremendous increase in the number of campaigns, generally."

### **Digging Deeper**

Beneath the general uptick in activism lies a separate trend that experts say reflects changing priorities among the investors themselves, and will be a prominent piece of the coming year's activity.

What was once a ready-made activist play, pressing a company to sell itself outright or focusing primarily on other one-off outcomes, is becoming less common. The investors are instead favoring a more holistic, long-range look at their targets, Rosewater said, often urging leadership changes or a reshuffled strategy.

The rebounding M&A market and economy in general have not quite overcome the lingering effects of the recession, which dealmakers expect to persist on some level through 2014. In a lagging marketplace where simply shopping a company can be risky or short on value, activists will continue to mainly look in-house to shake out returns.

"We'll see more and more white papers from the activists with regard to their investment theses, with a very sophisticated approach from the activists as to how to fix and restructure the company," Freedman said, adding that investors will still pursue one-time payouts like buyouts or dividends when it makes sense.

### **Performance Over Governance**

Swelling activist pressure over the past couple of years has fed into shifts in how companies structure governance. Now, it is more common to see declassified boards or boards with majority voting

standards as well as other measures promoted by proxy advisers as best practices, leaving activists to divert their attention to other concerns.

“Governance will take a bit of a backseat to performance,” Freedman said. “I think it'll still always be an issue, but it won't be as central to activist campaigns unless there are egregious governance practices.”

Potential targets will be under more pressure to come out ahead in their peer groups as hungry activists stand ready to bite into targets that hang near the middle of the pack or further behind.

### **Friendlier Corporate Attitudes**

With the specter of a proxy fight looming larger than ever, companies will be backed into increased transparency and ongoing, informal strategic reviews to make sure they are creating enough value and redistributing enough of it among shareholders in order to head off any disputes, said Chris Ruggeri, a principal in Deloitte's advisory services practice who advises corporations on value creation and transactions.

“At a minimum, I think it's really causing management and the boards to become very well acquainted with the various strategies and alternatives they should be considering in the normal course of business, and doing that regularly as part of their normal planning process,” she said. “That's a very good thing for shareholders and companies.”

The increased popularity of shareholder activism, and its increasing prevalence, will continue to help demystify the investment strategy, Ruggeri said. In many cases, a deeper understanding of activism in general can take the edge off testy exchanges and give way to more constructive communication between once-reticent targets and the activists circling them.

“The rise of activism is causing companies to be much more attuned to the will of the shareholders,” Weingarten said.

### **A Boon for Practitioners**

Aside from the dealmaking itself, shareholder activism will continue to be one of the highest-growth practice areas for law firms that represent both the investors and their targets. Attorneys handling the matters say they've been busier than ever before over the past year and anticipate setting a new benchmark in 2014.

“It used to be that activists were most active around the traditional proxy season,” Weingarten said. “Now, it's become year-round. The activists are often calling special meetings or acting by consent, undertaking campaigns in the middle of the year.”

The specialists who handle activist plays are fielding more requests from clients that are increasingly complex and varied. Against the backdrop of a rise in activism in general, the investors have wiggle room to devise more sophisticated and diverse approaches to their craft, challenging attorneys to adapt.

“It's one of the areas of law that's growing, without question,” Rosewater said.

--Editing by John Quinn.