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Shareholder Activism: 2013 and Beyond

Posted by Noam Noked, co-editor, HLS Forum on Corporate Governance and Financial Regulation, on Thursday February 13, 2014

Editor's Note: The following post comes to us from Marc Weingarten and David E. Rosewater, partners and co-heads of the shareholder activism practice at Schulte Roth & Zabel LLP, and is based on their article "Shareholder Activism: 2013 and beyond," which appeared in *The Activist Investing Annual Review 2014*, published by Activist Insight in association with Schulte Roth & Zabel LLP. The complete publication is available here.

Schulte Roth & Zabel's Shareholder Activism practice was at the forefront of the industry in 2013, advising our clients in a number of proxy contests. These are our observations from a busy year.

Rapid growth with many new entrants

By almost any measure, shareholder activism became more popular in 2013 than ever. With assets under management quickly growing and returns consistently outperforming the average hedge fund, the activist sector has seen an influx of new activist-oriented funds. As activist investors have appeared on the cover of *Time* magazine and filled the pages of *Vanity Fair* throughout the year, it is clear that investors and boards are not the only ones interested in learning more about shareholder activism.

Size is no longer a deterrent

A shareholder activist targeting a large-cap company with deep pockets used to be a one-off event that would dominate headlines for months. A few years ago, almost no one would have predicted that giants such as Apple, Procter & Gamble and Hess would become attractive targets for activists. Over the past year, however, such activist activity has become the norm rather than the exception. Today, almost one-third of shareholder activism takes place in companies with market capitalizations of more than $2 billion. While activists have long recognized that a greater variety of strategic alternatives are likely available for large companies, the persistent targeting of such companies has only been made possible by the influx of capital into activist funds over the past few years and the ever-increasing willingness of passive investors and institutional shareholders to side with the concerns of activists.

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More majority slates

Activist campaigns seeking a majority of seats on a board have historically been, and continue to be, difficult to win. Incumbent boards have long argued that such campaigns are ploys by activists to gain control of the company without paying shareholders a control premium. This argument, however, appears to be losing ground with shareholders, as majority board campaigns in 2013 have garnered significant shareholder support in contests such as the ones between TPG-Axon and SandRidge Energy, or Clinton Group and Stillwater Mining Company.

Activists incentivize nominees

In proxy contests involving Hess and Agrium in 2013, activist shareholders offered their nominee slates compensation arrangements with payouts tied to the targeted company’s performance, launching an intense debate over the propriety of such arrangements. A number of boards have since adopted bylaws that purport to prohibit nominee compensation. In November, ISS entered the fray and recommended that shareholders withhold votes from directors at Provident Financial Holdings after the company adopted a bylaw prohibiting such arrangements.

What lies ahead in 2014

Given the consistently high returns for the activist sector, one could expect the flow of capital into activist funds to continue to grow. More asset managers are likely to dip their toes into activism as portfolio managers who are value investors can unlock additional shareholder value—and increase returns—by serving as catalysts for their investment theses. Ultimately, it seems likely that 2013 will prove to be more akin to ‘the end of the beginning’ of the first phase of an invigorated age of shareholder activism rather than just the peak of a brief trend.