The Activist Report

13D Monitor

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"Just Vote No" Campaigns Come of Age in 2011

By Steve Wolosky and Andrew Freedman

Recent rule changes and developments have paved the way for the resurgence of "just vote no" campaigns as a viable, low-cost tool for activist investors seeking management and strategy changes at public companies. Historically, "just vote no" campaigns, also commonly referred to as "withhold vote" campaigns, have been employed primarily as a fallback strategy for sending a symbolic message of concern to a company's board of directors. Many activist investors shied away from pursuing such campaigns since, for the most part, they served largely as a referendum on management's board nominees, with no guarantee that a successful campaign would result in any change at the company. More recently, however, with the elimination of broker discretionary voting in uncontested director elections and the rise of the majority voting standard, "just vote no" campaigns have taken hold as an increasingly effective tactic to not only send a message of concern, but also to effect desired change and put pressure on a board.

We are not suggesting that "just vote no" campaigns are an effective substitute for a proxy contest where a shareholder is seeking board representation as part of its activist strategy. However, there are certain situations where a "just vote no" or "withhold quorum" campaign can be a powerful and immediate strategic tool for giving shareholders a voice at a company. For example, advance notice bylaw provisions are becoming ever more cumbersome, with some requiring notice up to six months before an annual meeting. It is not always practical for a shareholder to know that far in advance if it wants to run a proxy contest. If the company's financial performance thereafter deteriorates and/or the company enacts questionable corporate governance measures, a "just vote no" campaign may be the ideal strategy for giving shareholders a platform to express their discontent.

In the past year, two of our clients have run successful versions of "just vote no"

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In the Cross Hairs

On August 31, 2011, Elliott Associates entered into a Standstill Agreement with **Blue Coat Systems, Inc.** that expires on December 10. This is what Elliott usually does before making an offer to acquire the Company. On February 9, 2009, they entered into a similar standstill agreement with MSC Software Corp. and on July 7, 2009 (one week after the expiration of the standstill agreement), MSC entered into an agreement to sell the Company to a group that included Elliott. Elliott did similar acquisitions at Novell and Metrologic, among others. Elliott has frequently partnered with Fransisco Partners in its previous acquisitions. Francisco not only owns the Company's Convertible Debt with Elliott, but has a seat on the Board, and Gregory Clark, who was recently named as CEO and director of Blue Coat, was formerly CEO of a Francisco portfolio company.

10 Questions with Martin Lipton

Martin Lipton, a founding partner of Wachtell, Lipton, Rosen & Katz, specializes in advising major corporations on mergers and acquisitions and matters affecting corporate policy and strategy and has written and lectured extensively on these subjects. Lipton is Chairman of the Board of Trustees of New York University, a Trustee of the New York University School of Law (Chairman 1988-1998), a member of the Council of the American Law Institute and a director of the Institute of Judicial Administration. Lipton is a member of the Executive Committee of the Partnership for New York City and served as its Co-Chair (2004-2006). He has been kind enough to take time out of his busy schedule to sit down with us for this week's edition of 10 Questions.

13DM: You literally invented the poison

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When The Fall is All that's Left . . .

In the movie *The Lion in Winter*, King Henry's sons, Richard and Geoffrey are in the dungeon awaiting their execution when Richard thinks he hears Henry approaching and says: "He's here. He'll get no satisfaction out of me. He isn't going to see me beg." Prince Geoffrey replies: "My you chivalric fool... as if the way one fell down mattered" to which Richard responds: "When the fall is all there is, it matters."

On October 27, Regis Corp. announced the results of its proxy fight with Starboard Value Fund – Starboard had successfully elected its three director candidates to the seven person Regis Board, with the three Starboard nominees receiving over 70% of the votes cast (six times more than the incumbent directors they replaced).

Starboard initially nominated their slate in July of 2011 and the Company did the right thing – they hired an all-star team of advisors to help them navigate the minefield of a potential proxy fight. These advisors included Wachtell Lipton, arguably the most experienced law firm on activist defense, Joele Frank, the go-to public relations firm for corporations who are targeted by activists, Innisfree Proxy Solicitors, one of the two most experienced proxy solicitors for contested situations (the other being Mackenzie Partners) and Perella Weinberg Partners, an experienced investment banking firm.

Starboard used their long term outside counsel, Steven Wolosky of Olshan Grundman – a top choice of many hedge funds and activists, and proxy solicitor Okapi Partners, a formidable and respected solicitor. Proxy fights are not ordinarily this lopsided and at some point during the negotiations it had to be clear to all involved that the fall was all that was left. When this is clear, management has a decision as to whether to negotiate the best settlement possible so they can focus on Company operations or spend money and time to go down fighting, often to the detriment of the shareholders.

By many accounts both sides were certain that Starboard would win one seat, had a good chance at two and prior to the ISS recommendation, had an outside chance at three. So, how can this proxy fight not settle at two directors, save the stockholders money and put the distraction of a proxy fight in the rear view mirror.

But the Company either was in denial or they did not care how they fell. So, instead of settling on two directors, receiving a standstill agreement from Starboard and being able to go on with their full focus on operating the Company, they ended up spending more money and incurring more distraction to ultimately not only lose three seats, but lose in such a landslide that Starboard effectively had a "mandate" from the shareholders to implement its strategy.

Why did this play out this way? It was definitely not because of bad advice from their advisors. Their advisors were top notch and I am certain were providing the Board with good advice. The answer is likely a combination of the dynamics of this particular Board and a Board who did not defer enough to its advisors.

The Board consisted of seven directors, four of whom have been on the Board together for at least 16 years, two of whom would be removed from the Board pursuant to the settlement. One of those four would have to vote for any settlement for it to be approved. Of the remaining three directors, two were relatively new and likely did not have a strong enough voice to persuade any of the four long term directors, and the seventh had been on the Board for 14 years but was likely ineffective in these negotiations as he was resigning effective at this meeting.

Absent a strong independent lead director who could rally a majority to do the rational thing, it is up to the Board's advisors to try to get the Board to make the right decision. But getting Boards to defer to their advisors is often a tall order. After all, most CEOs and directors are where they are because they are very intelligent and successful and have a history of good decision making and leadership. Moreover, they ultimately are the client and have the luxury of blindly following the advice of their advisors or categorically dismissing it if they prefer. They all have been dealing with advisors, whether legal, financial or other, for many years and are used to taking in the advice of their advisors as just one of many factors that goes into their final decision. Why should a proxy fight be any different?

There is one major difference between proxy fight advisory representation and most other types of counseling, and that is the great disparity of experience levels. When a CEO and a CFO take the advice of investment bankers on raising money, it is likely that the CEO and CFO have participated in many offerings before and have experienced firsthand the benefits of a successful offering and the detriments of a failed offering. Likewise, when a CEO and a General Counsel meet with their outside legal counsel on a litigation or other legal strategy, it is often something that both the CEO and General Counsel have been through many times before. However, in a proxy fight the disparity of experience between advisors and management is greater than any other area. Advisors have gone through literally hundreds of proxy fights while the Board and management collectively may have gone through one or two, but more likely none. Moreover, both the ad-

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Martin Lipton (cont'd. from pg. 1)

pill and your firm has been far in the forefront on activist defense for several decades. What advice do you give to your corporate clients to prevent an activist from showing up at their doorstep?

ML: Our fundamental advice to our clients as to how to avoid attracting the attention of activists or as to how to respond to an activist who shows up is the same — "be prepared". Similar to takeover defense, the best defense to an activist is usually a high stock price. It is also important to have a robust investor relations program, so that the company knows what issues are on the minds of its shareholders. A company should also monitor analyst reports and understand what analysts are saying. Periodically reviewing the company's alternatives with the board permits the company and the board to explore and pursue ideas that make sense, and to explain to shareholders why ideas that others might be proposing don't make sense if the company and the board have come to that conclusion.

Avoiding and responding to activists is an art, not a science. A key element of preparation is the formation of a team of advisors: investment banker, legal counsel, public relations counsel and proxy solicitor and regular meetings of that team with management to review current market conditions and the business and finances of the company. The board of directors also needs to be kept apprised of developments. In addition to regular fire drills by the advisor-management team, we advise an annual fire drill with the board of directors so that they are familiar with the company's preparations and with the outside advisors; this fire drill with the board helps the directors ensure that they are acting in the best interests of the company and fulfilling their fiduciary duties. With respect to dealing with activists, we prepare a checklist every year of the current matters to be aware of and how to be best prepared for them.

"IT CAN BE A MISTAKE FOR THE COMPANY IF THE FIRST TIME IT VISITS A LONG-TERM INSTITUTIONAL INVESTOR IS AFTER AN ACTIVIST HAS ARRIVED" -MARTY LIPTON

13DM: When is the right time for a company to first start a dialogue with large institutional holders when an activist investor shows up?

ML: As noted above, we advise our clients to have regular meetings and discussions with institutional shareholders and the security analysts who follow the company. If the company is aware of and demonstrating that it is responsive to the views of the institutions and analysts, it goes a long way toward not attracting activists. Equally important, regular dialogue with the institutions and analysts facilitates enlisting their support for the company's rejection of the demands of an activist, if one appears. It can be a mistake for the company if the first time it visits a long-term institutional investor is after an activist has arrived. Often it is desirable to have some of the independent directors engage with the institutional investors when the company is rejecting the demands of an activist. This is particularly important when a proxy fight is on the horizon.

13DM: What piece of advice would you give an activist who is trying to get a board seat at a company?

ML: We don't advise activists. When a *responsible* activist informs the company, in a thoughtful manner, that it believes the company's strategy should be changed and that it wishes to have board representation in order to try to convince the board that its views should be accepted, we do sometimes advise the company to grant board representation rather than face a proxy fight, provided that the activist's nominee for the board is a person qualified to be a director of the company and that the activist enters into a standstill agreement of the type just announced by Relational Investors and Hewlett-Packard. [**Editor's Note:** In the Relational/HP situation, Ralph Whitworth was named to the Board and

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"Just Vote No" (cont'd. from pg. 1)

campaigns. After McCormick & Schmick's rejected an acquisition offer from Landry's and adopted a poison pill to thwart a takeover, Landry's launched a "withhold quorum" campaign at McCormick & Schmick's upcoming annual meeting to pressure the board of directors to either negotiate a transaction with Landry's or conduct a sale process. Two weeks later McCormick & Schmick's issued a press release announcing its decision to put itself up for sale. Recently, Cadian Capital Management, a first-time activist, ran a successful "just vote no" campaign that resulted in the removal of two directors from the board of Comverse Technology. Cadian Capital launched its "just vote no" campaign on October 17, 2011, a mere month before the company's scheduled annual meeting.

A Little Background on "Just Vote No"

"Just vote no" campaigns are a proxy strategy utilized by a shareholder to convince fellow shareholders to vote "against" or "withhold" on one or more directors in an effort to communicate a message of shareholder dissatisfaction to the board. They are not to be confused with the related "withhold quorum" campaign in which a shareholder urges fellow shareholders not to vote at all in order to stymie a quorum from existing at an annual meeting, thereby preventing any business from being conducted. The "just vote no" strategy first took root in the early 1990's as a mechanism for disgruntled shareholders to send a vote of no-confidence. The post-Enron era, when board scrutiny intensified to unprecedented levels, witnessed an increase in the use of such campaigns, with the most famous being the withhold campaign by Roy Disney in 2004 seeking the ouster of CEO Michael Eisner.

In a "just vote no" campaign, the shareholder hopes that a substantial showing of votes "against" or "withhold" on one or more directors can generate enough negative publicity to prompt the board to act voluntarily and

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the Company agreed to nominate and support him for the next two annual meetings assuming Relational continues to own 0.5% of the Company's common stock. Relational agreed to vote in favor of the Company's director slate and recommendations at those meetings, not make any shareholder proposals or solicit proxies or otherwise seek to change the composition of the Board or influence management, and cap its ownership at 9.9%.]

13DM: What do you think the most pressing corporate governance issues will be over the next five years?

ML: The most pressing corporate governance issues over the next five years will be how to modulate the effect of the plethora of corporate governance laws, regulations, rules and "best practices" advanced by advisory organizations on the ability of the board of directors to guide the company's strategy to achieve long-term growth and value creation instead of responding to shareholder demands for short-term stock appreciation. In light of the dramatic shift in the last 25 years towards shareholder-centric governance, it will probably be necessary to impose duties on institutional investors to focus on long-term investment strategies and not force companies to focus on short-term stock market gains and take undue risks to achieve them. To the extent we do not fix this problem, it will have an adverse impact on the American corporation's effectiveness in the global economy. Corporations need to have the flexibility to invest in the long-term or they will be harmed in their ability to compete.

13DM: If you could add or change one corporate governance rule, what would it be?

ML: I believe that the ability of a company to follow strategies to achieve long-term growth and increase shareholder value should be the principal objective of corporate governance. Accordingly, I would amend the laws and regulations that facilitate activists' tactics to pressure companies for short-term results. In this connection I think we must reverse the recent trend to federalize corporate governance and revert to state corporation laws and jurisprudence which for more that 70 years has demonstrated an ability to mediate between the interests of shareholders and management in a fair and efficient manner.

13DM: There has been a lot of talk lately about proxy access and universal ballots. What are your thoughts about giving shareholders more flexibility to vote amongst candidates in a contested election?

ML: I think shareholders have all the flexibility they need to influence, and obtain representation on, boards of directors. In view of institutional ownership of more than 75% of the shares of most major public companies, the present ability of shareholders to run full proxy fights, nominate short slates and withhold votes for nominees, provides shareholders with all the means appropriate to influence corporate boards. In my experience boards today are fully responsive to the reasonable views of their large shareholders and it is not necessary to supplement the activists' toolbox by allowing proxy access. I have long argued against proxy access and I think the new SEC position allowing shareholder 14a-8 proxy resolutions seeking proxy access is a mistake.

13DM: Your firm has advocated for reduced 13D disclosure periods based in part on the theory that certain shareholders might not have sold if they had known that an activist was going to catalyze change. Isn't it inherent in this argument that activists add value and are a desired player in the marketplace? If so, wouldn't chilling activism by reducing the 13D disclosure period be detrimental to shareholders and the marketplace in general?

ML: The accumulation of stock by an activist often results in a short-term price increase in a company's stock, even when there is no long-term value creation. Studies indicate that, in the long-term, the presence of an activist shareholder does not result in long-term stock price increases in companies that are not sold to a third party. Nevertheless, the short-term impact on stock price indicates that an activist's accumulation of a significant stock position does constitute material information as defined by our securities laws. In light of this, I see no policy justification for permitting them to secretly accumulate large blocks of a company's stock at the expense of both individual shareholders and institutions. I think that activists who seek short-term gains are doing a disservice to American business and our economy. If the fact of significant ownership is material information, that information should be required to be disseminated promptly, as is other material information. Other jurisdictions have much shorter disclosure windows, often at lower ownership disclosure thresholds than our 5% level. Moreover, the rules need to be changed to require the disclosure of all derivative positions.

13DM: But many of those same jurisdictions also have rules that prohibit staggered boards or allow for 5% of shareholders to call a special meeting. Are there any rules of other jurisdiction that are more pro-shareholder that you think should be adopted by the US?

ML: I don't think these other rules that

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ACTIVISTS AND ACTIVISM ARE NOT ALL BAD; HOWEVER TO THE EXTENT THEY FACILITATE AND PROMOTE SHORT-TERMISM THEY DO A GREAT DISSERVICE TO OUR ECONOMY.

"Just Vote No" (cont'd. from pg. 3)

take action following the vote of no confidence. Unlike a proxy contest, where a shareholder nominates its own slate of director candidates for election to a company's board, a "just vote no" campaign is instead a referendum on management's board nominees. At many public companies, directors are elected by a plurality vote, meaning a director will be elected upon receiving any affirmative votes in his or her favor regardless of how many votes there are "against" or "withheld." So while a "just vote no" campaign may have little practical ability to legally effect the removal of one or more directors at such companies, a significant number of votes withheld from one or more nominees can still go a far way in signaling shareholder displeasure and create political pressure for the targeted board members to step down. The strength of the message sent to a company's board depends on the size of the withhold vote and the power of the messaging involved in the campaign. While boards of directors are not required to act on a clear referendum backed by a significant withhold vote, directors put their reputations on the line when such a call goes unheeded.

The Elimination of Discretionary Voting and Proliferation of Majority Voting Have Opened the "Just Vote No" Door Even Wider

Back in July 2009, the SEC approved an amendment to NYSE Rule 452 to eliminate broker discretionary voting in uncontested elections of directors. This amendment, which is applicable to all public companies regardless of the exchange on which they are listed, helped open the door even further for "just vote no" campaigns. Previously, where beneficial shareholders who own through a broker did not return voting instructions to their broker at least 10 days before a scheduled meeting, brokers would in almost all instances vote such uninstructed shares in favor of management's nominees. Uncontested elections therefore resulted in an artificially high vote in favor of a company's nominees. Following the Rule 452 amendment, brokers are no longer permitted to vote such uninstructed shares in uncontested elections, making it more difficult for management nominees to achieve a majority vote and in some instances more difficult for companies to obtain a quorum for their annual meetings.

Amended Rule 452 has also increased the influence of institutional investors in director elections as the number of retail shareholder votes cast in uncontested director elections has decreased. The increased influence of institutional investors in uncontested director elections has, in turn, increased the effect that the proxy advisory firms have on the outcome of uncontested director elections.

Another important factor contributing to the increased efficacy of "just vote no" campaigns is the recent increase in the number of companies that have adopted majority voting provisions for the election of directors. Generally, a director nominee for a company that has adopted majority voting must receive at least a majority of the votes cast in the election to be elected to the board of directors. Because brokers used their discretionary authority in the past to vote in favor of management slates, the elimination of a significant number of broker votes for management as a result of lack of instruction from shareholders has made it more difficult for management nominees to receive a majority of the votes cast in an uncontested election. It should be noted, however, that many companies that have adopted a majority voting standard do not require a director to step down automatically upon receiving less than a majority, but instead to submit a conditional letter of resignation. It is then ultimately up to the board whether or not to accept the director's resignation. Regardless, the board will be under serious pressure to deal with the issue underlying the high withhold vote. For example, ISS policy is to: "VOTE WITHHOLD/AGAINST the entire board of directors (except new nominees, who should be considered on a CASE-by-CASE basis), if: At the previous board election, any director received more than 50 percent withhold/against votes of the shares cast and the company has failed to address the issue(s) that caused the high withhold/against vote." It should also be noted that even if a director is forced to resign from the board under majority voting, the board itself remains in control of selecting a replacement.

This interplay between the elimination of discretionary voting in uncontested director elections and the proliferation of majority voting standards has made companies more vulnerable to "just vote no" campaigns, which has made these campaigns more attractive to activist investors.

When is "Just Vote No" an Appropriate Strategy for an Activist Investor to Consider?

As noted above, "just vote no" campaigns are not suitable for all situations. We have seen them used effectively by a hedge fund who is looking to make some 'noise' at a public company without committing to the time and expense that go along with a full-blown proxy contest. "Just vote no" campaigns can be substantially less expensive than a proxy contest, are easier

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"Just Vote No" (cont. from pg. 5)

to manage and avoid the complexities and potential pitfalls with nominating candidates. Also, the shareholder can squarely focus on its concerns with the company without allowing the company the opportunity to divert attention away from its own problems by highlighting issues with the nominees' experience and background.

We have also seen "just vote no" campaigns used as an effective tool for giving shareholders a voice to express disapproval where a nomination deadline has come and gone. In these instances, the campaign can also help set the stage for the following year's annual meeting, especially where the company's board ignores a substantial withhold vote. A "just vote no" campaign will come on ISS's radar screen, and ISS may more closely scrutinize the Company's performance and governance practices and allow the shareholder to make a presentation outlining its concerns. We have also seen a "just vote no" strategy, or the closely related "withhold quorum" strategy, used effectively, like in the Landry's / McCormick & Schmick's situation, as a tool to pressure a company's board to negotiate a friendly deal where a shareholder is not otherwise permitted to act by written consent or call a special meeting under the company's organizational documents. In these cases, the "just vote no" or "withhold quorum" strategy becomes the vehicle for allowing shareholders' voices to be heard on any given issue or topic, which sometimes is all it takes to prompt a company to act.

Schedule 13D Disclosure Should be Carefully Drafted to Preserve the "Just Vote No" Rule 14a-2(b)(1) Exemption Under the SEC's Proxy Rules

"Just vote no" campaigns are an attractive alternative because (i) they are low-cost in terms of both time and expenses, (ii) they are easier to run than full-blown proxy contests involving a slate of nominees and (iii) they can be launched with effective planning and very little lead time. Contributing to the low-cost component is the idea that a "just vote no" campaign does not require the filing of a proxy statement with the SEC, or the related expenses of printing and mailing, so long as the shareholder complies with one of the exemptions under the SEC's proxy rules. Under the proxy rules, a "solicitation" includes any "communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy."

To avoid the full-blown proxy filing and disclosure requirements, the shareholder must qualify for the exemption under Rule 14a-2(b)(1). This rule exempts communications by any person who does not, at any time during the solicitation, seek the power to act as proxy for another shareholder and does not furnish or request a form of proxy or revocation. This Rule 14a-2(b)(1) exemption, however, is explicitly not available to any person "who is required to report beneficial ownership of the registrant's equity securities on a Schedule 13D, *unless such person has filed a Schedule 13D and has not disclosed pursuant to Item 4 thereto an intent, or reserved the right, to engage in a control transaction, or any contested solicitation for the election of directors.*" (emphasis added). It is therefore vital for a shareholder who wishes to preserve the "just vote no" exemption under the proxy rules not to announce an intent, or otherwise reserve the right, in its boilerplate Item 4 language to engage in a control transaction of any type or to engage in a contested election. While there is another exemption to the proxy rules under the definition of "solicitation," it is less useful since it limits the shareholder to only stating how it intends to vote and the reasons why and prohibits the soliciting of other shareholders to also withhold their votes.

Cadian Capital's "Just Vote No" Campaign at Comverse Technology

Cadian Capital recently led a successful "just vote no" campaign that resulted in the removal of two directors from the board of directors of Comverse Technology. From start to finish, the campaign took only a month. Pursuant to Comverse's organizational documents, directors are elected to the board by a "majority of votes cast," meaning that the number of shares voted "for" a nominee must exceed the number of votes cast "against" that nominee in order for that person to be elected as a director. Cadian Capital launched its "just vote no" campaign on October 17, 2011, less than one month before the company's scheduled annual meeting, by filing a notice of exempt solicitation to state its opposition to the election of three of the company's nominees and to urge other shareholders to join in voting against these nominees at the 2011 annual meeting.

Cadian Capital, which had never led an activist campaign before, was highly critical of Comverse's poor stock and operating performance, flawed corporate governance practices, mismanagement and lack of accountability. The "just vote no" campaign was an expeditious and cost-efficient tactic to effect change to the board after the deadline for nominating individuals to the board had passed and the company continued to significantly underperform and suffer from a lack of effective oversight. ISS recommended a vote against two of the Comverse directors and Glass Lewis recommended a vote against five Comverse directors. At the end of the day, two of the company's nominees failed to receive the support of a majority of votes cast at Comverse's 2011 annual meeting held on November 16, 2011, and the Company filed a Form 8-K the following day to disclose that the two company nominees had tendered their resignation from the board for failure to receive a majority of votes cast as required by the company's Bylaws and, in accordance with the company's Corporate Governance Guidelines and Principles.

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The Fall (cont'd. from pg. 2)

visors and the activist on the other side of the table have a great deal of experience with proxy fights. So the board and management find themselves in a very unfamiliar position – they are the only ones in the room that have not been through this process many times before. While they might consider themselves the smartest ones in the room, and maybe they are, 75% of being smart is knowing what you are stupid at, and when it comes to making decisions on proxy fight strategy and settlements, it would often behoove them to defer a little more to their advisors than they are used to.

So, after the dust had cleared Regis was left with an eight person Board (immediately following the stockholder meeting, Randy Pearce, the Company's president was added to the Board) with three Starboard directors, two additional new directors (Pearce and Michael Merriman, who replaced David Kunin) and three incumbent directors (Finkelstein, Conner and Watson). Not only do the new directors outnumber the incumbent directors, but several other dynamics of the new Board favor Starboard. Finkelstein had recently resigned as CEO effective February 2012 and his director status at that point is unclear, the other two incumbent directors are relatively new, having only been on the Board for 1 and 3 years, and new director Michael Merriman is the former CEO of Lamson & Sessions, a former Starboard portfolio company. So, Starboard's proxy fight had an extraordinary effect on the Board that went way beyond the three seats they won.

However, Starboard would be the first to tell you that this is not the end of the process, but the beginning. Now they have to implement the operational changes and strategies they have been advocating to enhance shareholder value. The drastically different board composition should be a good sign for them, as a less fractious board should give them a better chance at success.

Marty Lipton (cont'd. from pg. 4)

you characterize as "pro-shareholder" should be adopted in the U.S. Over the past 25 years we have developed a very shareholder-centric system of governance. Rather than additions from other jurisdictions, we need to reexamine our rules and adjust them to enable our companies to compete effectively in the global marketplace.

13DM: Can an activist ever create long term value to the markets and society?

ML: An activist can add long-term value to a company. In my experience, this is more likely to happen when the activist works constructively with a company behind the scenes, without publicity, proxy fights and the like. There are several activists who have demonstrated their ability and commitment to do so. In a number of situations where an activist has come forward with a good strategy, the company has adopted it to the benefit both of the activist and the long-term shareholders of the company. Activists and activism are not all bad; however to the extent they facilitate and promote short-termism they do a great disservice to our economy. In a global economy, American companies must compete with companies in jurisdictions that promote long-term investment in both their companies and their national infrastructure.

13DM: Do you see the level of shareholder activism increasing or decreasing over the next five to ten years?

ML: I think shareholder activism will fluctuate with the economy and the markets. I think that American companies are acutely aware of the necessity to be competitive and that boards of directors recognize their obligation to monitor company performance and compliance. Over time the opportunities for activism will continue to shrink, and our companies will continue to create long-term value for shareholders and the economy.

"Just Vote No" (cont'd. from pg. 6)

Practical Limitations of "Just Vote No" Campaigns

It should be noted that "just vote no" campaigns, while a valuable and inexpensive option for activist investors (and possibly the only option if a nomination deadline has been missed), do have certain operational limitations. One of the most significant drawbacks is the lack of access to the vote tally. Since a "just vote no" campaign proponent does not distribute its own proxy materials, it will not be allowed access to updated vote count information from Broadridge as it would in a fully contested election. Additionally, since the meeting will not be viewed as "contested" at Broadridge, the company will have the ability to not only contact shareholders by phone, but to actually take these retail votes over a recorded line. Despite these operational limitations, "just vote no" campaigns have nonetheless proven to be quite effective catalysts of change.

"Just Vote No" in 2012 and Beyond

"Just vote no" campaigns have the potential to become even more valuable tools for activist shareholders seeking corporate change in years to come. While the SEC's proxy access rules may have hit a roadblock, "just vote no" campaigns are alive and well as a low-impact/low-cost activist strategy.

Steve Wolosky and Andrew Freedman are attorneys in Olshan's Activist Practice Group, one of the nation's premier practices representing investors in activist situations

IN NEXT MONTH'S ISSUE:

2011: THE YEAR IN ACTIVISM

New Filings for November

Company Name	Investor	Mkt. Cap.	Filing Date	%	Cost	Item 4 Action
Brocade (BRCD)	Elliott	2.3B	11/4/2011	9.8%	4.43	n/a
Sonesta (SNSTA)	GAMCO	114.6M	11/14/2011	29.6%	n/a	oppose strategic transaction
Mac-Gray (TUC)	Moab Capital	194.1M	11/14/2011	7.8%	n/a	disagrees with TUC's rejection of takeover offer
Par Pharm. (PRX)	Relational	1.1B	11/25/2011	8.7%	29.02	improve company operations

One to Watch

Company
Par Pharmaceuticals Co. (PRX)
Market Cap.: $1.2B ($32.66/share)
Enterprise Value: $907.3M
Cash: $257M
Debt: $0
EBITDA: $185.2M

Investor
Relational Investors, LLC
13F Holdings: $4.0B
# of 13F Positions: 23
Largest Position: $477.1M
Avg. Return on 13Ds: 29.8%
Versus S&P500 avg: 7.05%

PRX Investment
Date of 13D: 11/25/2011
Beneficial Ownership: 8.7%
Average Cost: $29.02
Amount Invested: $92.21M
Highest price paid: $29.66
# of larger shareholders: 0

Relational believes that several major factors have contributed to the Company's undervaluation and underperformance, including: (i) operating losses in the Strativa business, (ii) lack of visibility into the sustainability of the Company's business model, and (iii) lack of a well-defined capital allocation discipline. Relational is gaining confidence that actions taken by the Company's management to right-size Strativa's cost structure will improve the Company's future earnings profile and that management understands the factors contributing to the shares' undervaluation and is prepared to take action to improve the Company's disclosure regarding the long-term growth prospects for the Company as well as the Company's capital allocation discipline. Despite these opportunities for improvement, Relational believes that the Company may continue to trade at discounted prices because of industry challenges and the Company's sub-optimal size and product scope. If the discount persists, Relation believes that the Company's board will be required to consider broad strategic alternatives, including a sale of the Company to a strategic buyer.

Relational is a very seasoned and respected activist investor that takes relatively few, high concentrated positions. Their style is operational improvement and redirection of investment when necessary. They look for companies with financial flexibility with solid franchises and strong cash flows that are selling at steep discounts to what it deems their true value. The firm tries to close that gap by persuading company directors and management to take various measures to "enhance shareholder value." Relational will take one or two board seats if necessary, but prefers to effect change without going public or forcing their way onto the board. In this situation, the company has a branded business that is not competitive and losing money and a generic business that is a good, profitable business. Their growth strategy was to build the branded business, which they have softened quite a bit on. Relational believes they are back on the right track by refocusing around the generic business and trying to improve operating performance, but they ultimately may be better off being sold to one of the many potential buyers of this business. As a patient investor, Relational will allow the company to earn its independence through improved stock price performance, but if that does not happen they will likely push management to sell the company. Right now the Company is trading cheaply, has significant cash flow, $257 million of cash and no debt.

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