

10 Ways that a Company is Made Unduly Vulnerable to an Activist Shareholder Due To its Board's Composition, Governance, Leadership and Compensation

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As 2009 draws to a close, it is fairly clear that it will set a record for the most proxy fights in at least a decade. According to data collected by FactSet SharkRepellent, there were 137 proxy fights in 2009 compared to 125 proxy fights in 2008 and 108 proxy fights in 2007.¹ Of the 137 proxy fights in 2009, 46 made it to a meeting or shareholder vote.² In addition, in 2009, activist shareholders secured board seats at 26 companies, either as a result of a proxy fight or other form of activist campaign.³ In each year since 2001, with the excep-

tion of 2004, the number of proxy fights that year increased from the previous year, and 2009's record 137 proxy fights is more than double the number that occurred in 2001.⁴

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One Year Subscription ■ 12 Issues ■ \$564.00
(ISSN#: 1095-2985)

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Notwithstanding the evidence that shareholder activism has surged over the past decade and should be expected to continue to increase in frequency, in the 2010 proxy season, many companies will still find themselves “sitting ducks” for activist shareholders. In a number of these situations, had these companies been more proactive and introspective, they would have discovered that they had available to them a variety of tools to make themselves less vulnerable.

In past articles, we have discussed various attributes that make a company unduly vulnerable to activist shareholders and have suggested various steps that companies can take to make themselves less vulnerable. In the April 2008 issue of the *Wall Street Lawyer*, in discussing 10 steps that a public company can take to make itself less vulnerable to an activist shareholder, we suggested that companies review their corporate governance documents, anticipate who is likely to target them, be the first to write a “white paper” on themselves, be prepared to defend their board nominees, make the case for why they should remain independent, demonstrate a commitment to best practices in corporate governance, have a plan for winning the “hearts and minds” of shareholders, publicize their successes, engage with their investor base, and have a “rapid response team” ready to go.⁵ In the December 2008 issue of the *Wall Street Lawyer*, we focused specifically on various bylaw provisions, the absence of which could make a company unduly vulnerable to an activist shareholder.⁶ In that article, we also suggested that companies consider bylaw amendments that would, among other things, require shareholders to provide advance notice of nominations and other proposals, require the proposing shareholder to be a record-holder of the company’s shares, provide directors with the exclusive right to fill vacancies on the company’s board of directors, eliminate any requirement for the annual meeting to be held on a fixed date, prescribe qualifications for all nominees for election as directors, restrict who can call a special meeting of shareholders, limit actions that can be considered at a special meeting of shareholders, provide a procedure for setting the record date for actions by written consent, and permit the chairman of any meeting of

shareholders to adjourn the meeting whether or not a quorum exists.⁷

In this article, our focus is on the company’s board of directors and we will discuss 10 ways that the composition, leadership, compensation and governance of a company’s board of directors can cause the company to be unduly vulnerable to an activist shareholder. While the activist shareholder may be seeking to have shareholders approve one or more bylaw amendments or other binding resolutions and one or more precatory or non-binding resolutions, the primary goal of the activist shareholder will typically be to obtain board representation. In addition to attempting to win the support of shareholders for its slate of board nominees, the activist shareholder will be attempting to persuade proxy advisory firms such as RiskMetrics Group, Inc., Glass Lewis & Co. Inc., PROXY Governance, Inc. and others to recommend to its subscribers that they vote in favor of all or most of its nominees and, perhaps most importantly, to recommend that they vote on the activist shareholder’s proxy card.

In seeking to make its case to the proxy advisory firms, the activist shareholder will need to make the case for why the company’s board could benefit from change. Assuming the activist shareholder is only seeking minority representation on the company’s board of directors, the burden on the activist shareholder will typically be lower than if it were pursuing control of the company’s board. For instance, in the case of RiskMetrics, the focus will be on two central questions: (i) has the activist shareholder demonstrated that change is warranted at the company; and if so, (ii) will the activist shareholder be better able to effect such change versus the incumbent board?⁸ Where the activist shareholder is seeking a minority position on the board, RiskMetrics will not require from the activist shareholder a detailed plan of action, nor will it require that the activist shareholder prove that its plan is preferable to the plan of the company’s incumbent directors.⁹ Rather, RiskMetrics will require the activist shareholder to demonstrate that change in the composition of the company’s board of directors is preferable to the *status quo* and that the activist shareholder’s slate of board nominees will add value to delib-

erations of the company's board by considering the issues from a different viewpoint than the incumbent board members.¹⁰

In press releases, "fight" letters to shareholders and investor presentations, including presentations prepared especially for the proxy advisory firms, the activist shareholder will seek to make its case that change in the composition of the company's board of directors is preferable by directly attacking the company's board and placing the blame for the company's financial and operating performance and low stock price squarely on them. To support its argument that the company's board of directors is responsible for the company's poor financial and operating performance, it will attempt to draw a correlation between such performance and various aspects of how the board is composed, how the board is led, and how it functions, governs and is compensated. The issues that the activist shareholder will point to will have significant resonance with shareholders, particularly shareholders who are very disappointed with the company's financial and operating performance as reflected in a low stock price. Given that the proxy advisory firms are typically very concerned with corporate governance issues, the activist shareholder's attacks on the company's board of directors will also have significant resonance with the proxy advisory firms even if the issues that the activist shareholder cites may have had little, if any, causal connection with the company's poor performance.

Based on the proxy contests and other activist campaigns that we have been involved in over the years, either in defense of the company or on behalf of the activist shareholder seeking board representation, below are the 10 criticisms that we have seen most often lodged against a board of directors, without regard to any ranking in frequency or importance, that relate to the board's composition, leadership, compensation and governance:

1. Insufficient Level of Industry Expertise;
2. Absence of Core or Necessary Competencies Among Board Members;
3. Insufficient Level of Board Independence;
4. Little or No Stock Ownership;
5. Excessive Board Compensation;
6. No Separation of the Chairman and Chief Executive Officer (CEO) Roles;
7. Low Turnover Among Board Members;
8. Failure to Heed the Will of Shareholders;
9. Record of Supporting or Facilitating Its Own Entrenchment; and
10. Failure to Hold Management Accountable.

1. Insufficient Level of Industry Expertise

An activist shareholder may attempt to argue that the company's board of directors does not have sufficient industry expertise among the independent members and the lack of such experience is responsible for the company's poor financial and operating performance. For instance, if the company is in the computer software industry, the activist shareholder would argue that—other than the CEO who one would expect to have some level of industry expertise—the board of directors is lacking in members who have experience and depth in the computer software industry. To buttress that point, the activist shareholder might be expected to organize its slate so as to contain a number of nominees who have extensive experience serving in senior leadership positions in the computer software industry.

When we see arguments for more "industry expertise" among board members, we typically see "industry expertise" referred to in the broadest possible way with little attention paid to the nuances of what relevant "industry expertise" really means with respect to a given company. For instance, the computer software industry is not homogenous. There are companies that cater to consumers, companies that cater to businesses, companies that cater to government and companies that cater to a variety of customers. If the company is one that mostly focuses on the sale of enterprise software applications to large corporate customers, how relevant is the expertise of a

director whose only experience in the software industry was at companies that sold “off the shelf” software to consumers and small businesses? What if the industry expertise is from a different end of the supply chain? How about customer expertise vs. supplier expertise? If the company sells software mostly to the U.S. Government, couldn’t experience selling to that customer be perhaps more relevant than specific experience working in the company’s industry? How much industry expertise is sufficient? Should the whole board be composed of industry experts? If not, and again assuming that the CEO is on the board and is someone who could be regarded as an industry expert, how many other directors need to be industry experts?

While the absence of industry expertise among the company’s board members makes for a good “sound bite,” particularly when the activist shareholder is proposing nominees that it argues will fill this void, there is no evidence that we are aware of that suggests that the presence of industry experts on a company’s board of directors is directly correlated with a company’s ability to outperform its peers. In addition, one might want to recall that industry expertise among board members was clearly not lacking in many of the banks and financial services companies that found themselves in very challenging circumstances during last year’s financial crisis.

2. Absence of Core or Necessary Competencies Among Board Members

In addition to attempting to point to a void in the board of directors due to the lack of any industry expertise, the activist shareholder may also attempt to point to other voids in the composition of the company’s board of directors not directly related to industry expertise. The activist shareholder may attempt to argue that the nature of the company’s business dictates that certain competencies be present among one or more board members. For instance, if the company is a large nationwide retailer, it may not be lacking in board members with retail experience. However, the activist shareholder may argue that since that large

retailer also has a significant credit card portfolio, it should also have a director with experience in consumer finance that can help the company not only oversee the credit card portfolio but who also, from time to time, can help the company evaluate appropriate strategic alternatives for maximizing value from such a portfolio. Likewise, if that large nationwide retailer has extensive real estate holdings, the activist shareholder may argue for additional real estate competency among the directors.

As another example, the company may have a history of poorly executing on its acquisition transactions. Like many companies that saw their market values shrink during the recent financial crisis, notwithstanding the strategic and other merits of the target companies that it had acquired, the company may have been forced to incur significant impairment charges in connection with one or more acquisitions. That may cause an activist shareholder to argue that the company overpaid for its acquisitions and that its acquisitions were ill-conceived and poorly executed. Accordingly, the activist shareholder may argue that the company is in need of one or more directors with a strong background in mergers and acquisitions, either as a corporate development executive or as an investment banker.

In addition, Section 407 of the Sarbanes-Oxley Act of 2002 requires that public companies have at least one “audit committee financial expert” on their audit committee. In the rules adopted by the Securities and Exchange Commission to implement Section 407, the SEC provides a list of the attributes that a person must have to qualify as an “audit committee financial expert” and how such attributes should have been acquired. Notwithstanding that all public companies should now have among their board members someone who qualifies as an “audit committee financial expert,” an activist shareholder can still attempt to discredit the “expert” and argue that there is a lack of sufficient literacy in financial and accounting matters among the board members. To support its argument for increased accounting or financial literacy among board members, the activist shareholder can be expected to point to any recent issues involving the company’s accounting

or financial function such as an accounting re-statement, an announcement that the company's independent public accountants had determined that there are material weaknesses in the company's internal controls, any significant tax disputes with any foreign, federal or state taxing authority or any history of disputes with the company's independent public accountants.

3. Insufficient Level of Board Independence

An activist investor may attempt to argue that the company's board is not sufficiently independent and because of that it is not able to protect the interests of shareholders by providing independent oversight of management. It may also argue that by enhancing the independence of the company's board, investors' confidence in the company will be enhanced and investors will be able to more confidently rely on the decisions made by the board. To support its argument that the board's independence should be enhanced, the activist shareholder can be expected to point to any recent crisis or scandal involving the company, particularly if such crisis or scandal received a significant amount of publicity.

If the company is listed on the New York Stock Exchange (NYSE) or the Nasdaq Stock Market, the applicable exchange will dictate a minimum level of independence that must be met by the company's board of directors.¹¹ For instance, pursuant to Nasdaq Marketplace Rule 5605(b), a majority of the members of the company's board must be independent, as defined by Nasdaq Marketplace Rule 5605(a).¹² If the company's board of directors has nine members, that means that only five need to be independent under Nasdaq's rules and that the remaining four members could be members of management. An activist shareholder may argue that the company's CEO should be the only member of management on the company's board of directors. The activist shareholder may also argue that a majority is too low of a threshold for promoting an independent board and may even seek an amendment to the company's bylaws to require that, for example, two-thirds of the board members be independent.

The proxy advisory firms mentioned above and many of the leading corporate governance groups each have their own definitions as to what constitutes an independent director. Under a number of these definitions, directors who might qualify as being independent under the rules of the NYSE or Nasdaq would not be deemed independent. For instance, under the definition of independent director adopted by the proxy advisory firm RiskMetrics Group, which is significantly more stringent than that adopted by either stock exchange, a truly independent director, or "independent outside director," is someone with no material connection to the company other than a board seat.¹³ Notwithstanding that the company may be properly adhering to the definition of independence adopted by the stock exchange where its shares are listed, the activist shareholder may attempt to argue that the company's board is adhering to only a minimal standard for determining independence and that had a more heightened definition of independent director been adopted, such as the RiskMetrics definition of "independent outside director," a number of the current directors would not be deemed independent. For example, if the founder or former CEO is on the board and if such service was more than three years ago, that director could still be deemed independent, under the Nasdaq's rules.¹⁴ Under the RiskMetrics definition of an "independent outside director," the founder or former CEO could *never* be deemed independent.¹⁵ In addition, it is still not rare to see a lawyer or investment banker on a board of directors where such person's firm provides professional services to the company. Under Nasdaq's definition of independence, a director would be disqualified if he or she or a family member accepted any compensation from the company or any parent or subsidiary in excess of \$120,000 during any period of 12 consecutive months within the three years preceding the determination of independence, other than the following: (i) compensation for board or board committee service; (ii) compensation paid to a family member who is an employee (other than an executive officer) of the company; or (iii) benefits under a tax-qualified retirement plan, or non-discretionary compensation.¹⁶ In contrast, under the

RiskMetrics definition, however, if such director (or a family member) receives more than \$10,000 per year for professional services, the director cannot be deemed independent.¹⁷ By attempting to argue that an alternative and stricter definition of independent director is applicable, the activist shareholder may seek to disqualify—at least in the minds of shareholders and the proxy advisory firms—as many directors as possible from being deemed independent. The activist shareholder may also propose a bylaw amendment to have shareholders adopt a more heightened definition of independent director such as the one adopted by RiskMetrics.

4. Little or No Stock Ownership

It is not rare to see a situation where the activist shareholder has more shares of stock in the company than all of the directors combined. It may also be the case that it has been quite a while since any of the company's directors purchased any shares of the company's stock in the open market. The lack of insider stock purchases may have a very reasonable explanation. For instance, if the company has been considering a number of initiatives to enhance shareholder value such as a sale of the company, it may be that there have been few, if any, open trading windows during which directors could make purchases in the open market. The lack of stock purchases is much harder to justify over a longer period of time, particularly with a board where the average tenure for a director is relatively long.

An activist shareholder may attempt to argue that the company's poor financial and operating performance and its low stock price are due to the directors not having any "skin in the game" and their interests not being sufficiently aligned with those of shareholders which would only occur if the directors were required to hold stock in the company. While the directors may have stock options or restricted stock, the activist shareholder typically believes that the directors should use their own funds to purchase stock—not the company's funds and may even ignore such equity holdings when they criticize the lack of stock ownership by directors. The activist shareholder

may also argue that the company should adopt stock ownership guidelines for all directors and executive officers as many other public companies have done.

5. Excessive Board Compensation

The activist shareholder may argue that directors are excessively compensated on not only an absolute basis but also in relation to the members of their peer group. Where the directors have recently exercised options and/or sold stock and realized significant gains, the activist shareholder's argument that director compensation is excessive may be further bolstered.

The activist shareholder may also argue that a meaningful portion of each director's compensation should be provided in restricted company stock, stock options or other forms of equity. As discussed above, an activist shareholder may attempt to argue that the company's poor financial and operating performance and its low stock price are due to the directors not having any "skin in the game" and their interests not being sufficiently aligned with the interests of shareholders which would only occur if the directors held stock in the company.

In addition to arguing that the company board's compensation is excessive, the activist shareholder may also argue that such excessive compensation compromises a director's independence since a director may have become so dependent on such compensation that he or she may not want to "rock the boat" and jeopardize a significant source of his or her income.

6. No Separation of the Chairman and CEO Roles

If the company has not separated the roles of Chairman and CEO, an activist shareholder may argue that the roles need to be separated in order for the board to properly and effectively fulfill its duties, oversee the executives of the company, and set a pro-shareholder agenda without the management conflicts that could be faced if the CEO also served as Chairman. The activist shareholder may also argue that a separation of the roles of Chairman and CEO would lead to:

(i) an enhanced ability of the board to express its views on management; (ii) better supervision of the CEO; (iii) better division of labor as the Chairman focuses on shareholder interests while the CEO focuses on managing the company; (iv) increased focus on long-term strategic issues by the Chairman while the CEO focuses on near-term profitability issues; and (v) improved succession planning since a separate Chairman may be more amenable to focusing on succession planning than the CEO, who may not be in a hurry to help identify his or her successor.

An activist shareholder may also propose a by-law amendment or other proposal requiring the Chairman's position be filled by an independent director. Where the CEO is new or inexperienced, there is a history of poor oversight by the board, the company is in transition as a result of a significant merger or other event, or there is any other need for increased supervision of the CEO, the activist shareholder's argument that the roles need to be separated may have resonance. According to RiskMetrics' corporate governance voting guidelines, it would generally support such a proposal, unless the company satisfied a detailed set of criteria demonstrating that it maintains a counterbalancing governance structure.¹⁸ Such a counterbalancing governance structure includes the designation of a lead director with clearly delineated and comprehensive duties, elected by and from the independent board members. The duties of the lead director should include, but are not limited to, the following: (i) presiding at all meetings of the board at which the Chairman is not present, including executive sessions of the independent directors; (ii) serving as liaison between the Chairman and the independent directors; (iii) approving information sent to the board; (iv) approving meeting agendas for the board; (v) approving meeting schedules to assure that there is sufficient time for discussion of all agenda items; (vi) having the authority to call meetings of the independent directors; and (vii) if requested by major shareholders, ensuring that he is available for consultation and direct communication.¹⁹

Such counterbalancing governance structure would also include (i) a two-thirds independent board; (ii) all key committees being composed of

independent members; and (iii) the adoption of corporate governance guidelines.²⁰

In addition, the company cannot have any problematic governance or management issues, examples of which include, but are not limited to: (i) egregious compensation practices; (ii) multiple related-party transactions or other issues putting director independence at risk; (iii) corporate and/or management scandals; (iv) excessive problematic corporate governance provisions; or (v) flagrant actions by management or the board with potential or realized negative impacts on shareholders.²¹

7. Low Turnover Among Board Members

As noted above, assuming the activist shareholder is only seeking minority representation on the company's board of directors, in making its case to the proxy advisory firms, the activist shareholder needs to demonstrate that change is warranted at the company, and if so, that the activist shareholder will be better able to effect such change versus the incumbent board. RiskMetrics will require the activist shareholder to demonstrate that change in the composition of the company's board of directors is preferable to the *status quo* and that the activist shareholder's slate of board nominees will add value to deliberations of the company's board by considering the issues from a different viewpoint than the incumbent board members.

Certainly, where there has historically been low turnover in the company's board of directors, where the average tenure of a member of the board of directors is, for example, greater than 10 years and where there has not been a new addition to the board in several years—juxtaposed together with the company's poor financial and operating performance and a low stock price—the activist shareholder's ability to meet its burden would not appear to be too difficult. The activist shareholder could be expected to argue that that it is time for a change on the company's board and that shareholders would benefit from the fresh perspectives, fresh ideas, fresh viewpoints and the new energy that its nominees would bring to the company's

board. The activist shareholder would argue that with no prior decisions to justify, its nominees will not hesitate to take a fresh look at the company's current initiatives and practices, and propose—if warranted—changes in the way business has been conducted in the past.

8. Failure to Heed the Will of Shareholders

Shareholders have various ways to communicate their will to the company's board of directors. The most significant way that shareholders express their will is by how they vote in the election of directors. Shareholders may also be asked to vote for bylaw amendments proposed by activist shareholders. The results of such votes are binding on the company. However, shareholders can also express their will in the form of precatory or advisory votes. This is where a proposal is submitted to shareholders urging the board to take some action. Typically, when proposed by an activist shareholder, it is when the shareholder would not otherwise have the right to vote on a binding proposal with respect to the matter. For instance, an activist shareholder cannot unilaterally propose that the company's certificate of incorporation be amended to eliminate the board's classified or staggered nature and have all directors elected annually for one-year terms. However, the activist shareholder can have shareholders vote on a proposal urging the board to take the necessary and appropriate action to further the elimination of the classified nature of the board. While the company's board is not obligated to act on such a non-binding proposal since it is only advisory in nature, the consequences of ignoring the will of shareholders in such a situation can result in the company alienating many of its institutional shareholders.

The failure to heed the will of shareholders can also result in proxy advisory firms such as RiskMetrics advising shareholders to vote against or withhold their votes for the company's board nominees. According to RiskMetrics' voting guidelines, it will vote against or withhold from all nominees of the board of directors, (except from new nominees, who will be considered on

a case-by-case basis) if the company fails to heed the will of its shareholders in any of the following ways: (i) the board fails to act on a shareholder proposal that received approval by a majority of the shares outstanding the previous year; (ii) the board fails to act on a shareholder proposal that received approval of the majority of shares cast for the previous two consecutive years; (iii) the board fails to act on takeover offers where the majority of the shareholders tendered their shares; and (iv) at the previous board election, any director received more than 50% withhold/against votes of the shares cast, and the company has failed to address the underlying issue(s) that caused the high withhold/against vote.²²

In a similar vein, boards who avoid seeking shareholder input on certain matters, even if that input would be advisory and non-binding in nature, can also expect the proxy advisory firms to vote against or withhold votes for the company's board nominees. According to RiskMetrics' voting guidelines, it will vote against or withhold from all nominees of the board of directors, (except from new nominees, who will be considered on a case-by-case basis) if the board adopts or renews a poison pill without shareholder approval, does not commit to putting the pill to shareholder vote within 12 months of adoption (or in the case of an newly public company, does not commit to put the pill to a shareholder vote within 12 months following the IPO), or reneges on a commitment to put the pill to a vote, and has not yet received a withhold/against recommendation for this issue.²³

9. Record of Supporting or Facilitating Its Own Entrenchment

An activist shareholder may attempt to show that the board has a history of entrenching itself which usually means that shareholders have, to some extent, been disenfranchised. Among the areas of focus for an activist shareholder attempting to support its argument that the board has been facilitating its own entrenchment could be any of the following: (i) a classified or staggered board of directors; (ii) bylaws that specifically provide that only the board, and not shareholders, can fill va-

cancies on the board, whether created by death, removal, resignation or an increase in the size of the board; (iii) unreasonable advance notice by-law provisions with respect to shareholder nominations and other proposals, either in the form of unreasonable time periods for the submission of a “timely” advance notice or unreasonable requirements as to what must be contained in a “proper” advance notice; (iv) no right for shareholders to call a special meeting, an unusually high threshold of stock ownership required for shareholders to call a special meeting, or other restrictions on what types of proposals can be acted on at a special meeting; (v) supermajority voting requirements to amend the bylaws or certain provisions thereof; (vi) unreasonable director qualification requirements; (vii) no right for shareholders to take action by written consent; (viii) the adoption of a poison pill that does not allow shareholders to seek the redemption of the rights issued thereunder upon the receipt of a permitted bid or qualified offer for the company; (ix) restrictions on the ability of shareholders to remove directors, whether for cause or without cause; (x) dual-class voting structures; (xi) majority vote standard for director elections with no carve out for contested elections; and (xii) the failure to hold an annual meeting of shareholders in more than a year.

10. Failure to Hold Management Accountable

An activist shareholder may attempt to show that the board of directors has failed to hold management accountable for the company’s poor financial and operating performance and the company’s low stock price. There are a variety of ways to hold management accountable including, but not limited to: (i) annual evaluations of the CEO; (ii) designing compensation systems that incentivize management to outperform their peer companies; (iii) refusing to award discretionary bonuses in the wake of poor performance; (iv) moving quickly to replace members of senior management who are not able to deliver value to shareholders; (v) requiring senior management to regularly brief the board or committees thereof on the strategic direction of the company and how

any operation or financial performance issues are being addressed; (vi) conducting internal reviews at the company, either directly, or with the assistance of outside counsel or other consultants; and (vii) having open lines of communications with all members of senior management that are not filtered or controlled by the CEO.

Among the areas of focus for an activist shareholder looking to show that the board has failed to hold management accountable could be any of the following: (i) the board’s failure to suspend discretionary stock bonuses in light of poor operating results; (ii) the board’s failure to set bonuses based on objective financial goals; (iii) the granting of significant stock options to management following poor operating results, particularly if they provide management with unusually low priced stock options; (iv) the failure of the board to make necessary changes in the executive suite on a timely basis; and (v) the failure of the board to engage in succession planning.

In addition, it is not uncommon for the CEO to have a say in the selection of new board members and many members of the board may have come directly or indirectly through the CEO’s network. The activist shareholder may attempt to demonstrate that the CEO dominates the board, that the board is intimidated by or afraid to confront the CEO and that the board is a “rubber stamp” for the decisions of the CEO. Such an argument is buttressed when the directors were long-time friends, former colleagues, classmates or neighbors of the CEO as opposed to being introduced to the board by another board member, a significant stockholder or an executive search firm.

Conclusion

We fully expect that activist shareholders will be very visible and active this proxy season and for the foreseeable future, and that many companies will find themselves clearly in their “cross-hairs.” If the company is undervalued or has underperformed, but has significant potential, it is a potential target for an activist shareholder. How attractive of a target the company is will be a function of number of factors, including how vulnerable the company is and whether it is “easy

prey” as compared to other targets that the activist shareholder may be evaluating. The company’s ability to prevail over an activist shareholder in a proxy contest or other contested solicitations will depend on whether the company has taken the necessary steps to both assess and mitigate some of its more obvious vulnerabilities and, consequently, avoid being perceived by an activist shareholder as a “sitting duck.” We hope the above is helpful in engaging in a proactive review of the company board’s composition, leadership, governance and compensation and being able to eliminate or ameliorate many of the obvious areas of vulnerability discussed above.

The views expressed in this article are the authors’ and do not necessarily represent the views of the partners of Blank Rome LLP or the firm as a whole. This article is intended to provide a general introductory overview of the issues discussed and is not intended to provide a complete analysis of such issues. This article is not intended to provide legal advice or to establish an attorney-client relationship and readers should not act upon the information contained in it without professional counsel. This article may be considered attorney advertising in some jurisdictions. The hiring of an attorney is an important decision that should not be based solely upon advertisements.

NOTES

1. FactSet SharkRepellent.net (November 13, 2009).
2. FactSet SharkRepellent.net.
3. FactSet SharkRepellent.net.
4. FactSet SharkRepellent.net.
5. Keith E. Gottfried and Barry H. Genkin, “Ten Steps to Take to Prepare a Company for the New Age of Shareholder Activism & Prevent It from Being a Sitting Duck this Proxy Season,” *Wall Street Lawyer* (West Services, Inc., April 2008; vol. 12, no. 4).
6. Keith E. Gottfried and Barry H. Genkin, “Ten Bylaw Amendments That May Lessen Your Company’s Vulnerability to a Shareholder Activist and Prevent It from Being a Sitting Duck This Proxy Season,” *Wall Street Lawyer* (West Services, Inc., December 2008; vol. 12, no. 12).
7. Gottfried and Genkin, “Ten Bylaw Amendments [...]”.
8. RiskMetrics Group, Inc, The M&A and Hedge Fund Activism Landscape, Presentation by

Chris Young—Director of M&A and Proxy Fight Research (October 2009), p. 71.

9. RiskMetrics; Presentation by Chris Young at 71.
10. RiskMetrics; Presentation by Chris Young at 71.
11. For companies listed on the New York Stock Exchange, the applicable rule on director independence is Section 303A.02(b)(ii) of the NYSE Listed Company Manual. For companies listed on Nasdaq, the applicable rule on director independence is Nasdaq Marketplace Rule 5605(a)(2).
12. Nasdaq Marketplace Rules, Rule 5605(b).
13. RiskMetrics Group, Inc., 2009 U.S. Proxy Voting Guidelines Summary (December 24, 2008), p. 11, available at <http://www.riskmetrics.com/sites/default/files/RMG2009SummaryGuidelinesUnitedStates.pdf>.
14. Nasdaq Marketplace Rules, Rule 5605(a)(2).
15. RiskMetrics, 2009 U.S. Proxy Voting Guidelines Summary; p. 10.
16. Nasdaq Marketplace Rules, Rule 5605(a)(2).
17. RiskMetrics, 2009 U.S. Proxy Voting Guidelines Summary at 10.
18. RiskMetrics, 2009 U.S. Proxy Voting Guidelines Summary at 14.
19. RiskMetrics, 2009 U.S. Proxy Voting Guidelines Summary at 15.
20. RiskMetrics, 2009 U.S. Proxy Voting Guidelines Summary at 15.
21. RiskMetrics, 2009 U.S. Proxy Voting Guidelines Summary at 15.
22. RiskMetrics, 2009 U.S. Proxy Voting Guidelines Summary at 8.
23. RiskMetrics, 2009 U.S. Proxy Voting Guidelines Summary at 8.