

New Shareholder Activist Demands Create Fresh Challenges for Directors

Although the number of campaigns against US-listed companies fell slightly in the first half of 2019, shareholder activism remains a significant issue for companies and their directors and officers. And even though activity in the US has slowed, campaigns are increasingly being waged outside of the US, signaling a rise in shareholder influence internationally.

As activist campaigns increasingly succeed in altering corporate behavior, the balance of power between shareholders and boards of directors continues to shift. And as activism remains a vehicle for corporate change, companies should be aware of the new demands shareholders are making of boards, management, and directors across all industries.

A Focus on Mergers and Acquisitions

Almost half (46%) of all activist campaigns in the first half of 2019 were driven by mergers and acquisitions, up from 33% for all of 2018, according to financial advisory firm Lazard (see Figure 1). In many such campaigns, activists pushed for companies to be sold or broken up or for specific assets to be divested (see Figure 2).

These activist campaigns often emerge unexpectedly and begin when there is no transaction on the table. And increasingly, distinct activist campaigns are occurring simultaneously at the same company.

FIGURE 1

Nearly half of all shareholder activist campaigns in the first half of 2019 were driven by M&A.

SOURCE: LAZARD

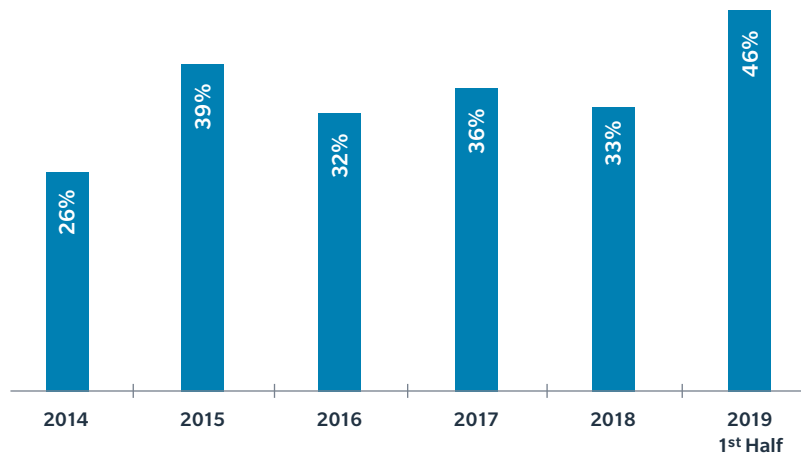
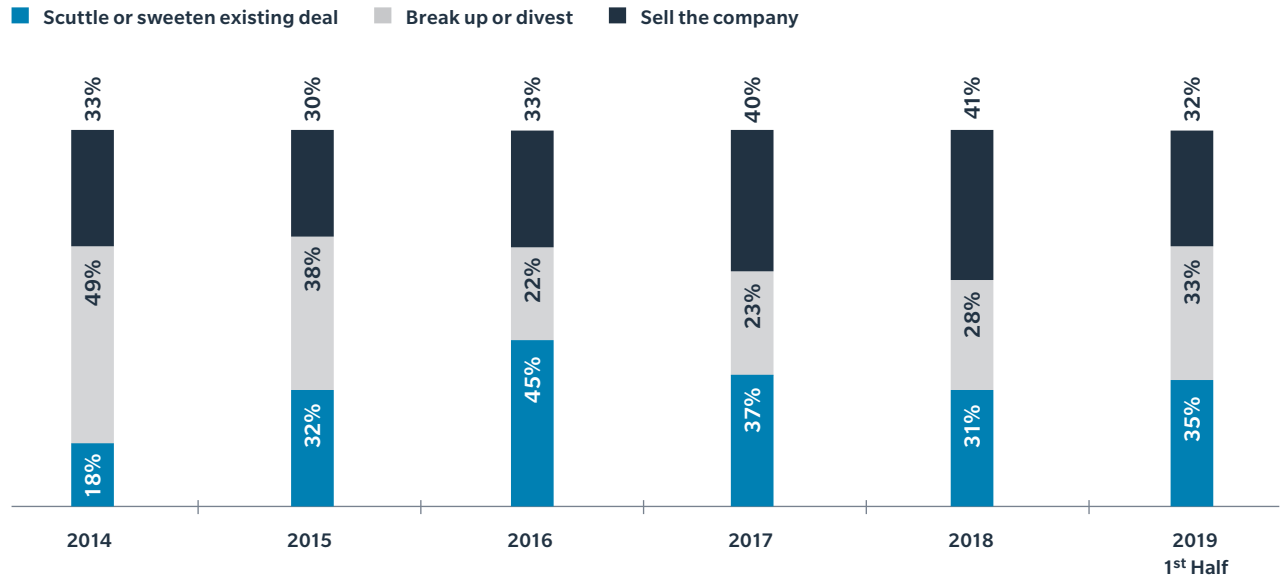


FIGURE
2

Activists often sought for companies to be sold or broken up.

SOURCE: LAZARD



Changing Corporate Culture

Many activist campaigns in recent years have centered on promoting diversity and changing corporate policies to address minority representation and gender equality within corporations. This trend is expected to continue through the balance of 2019.

Shareholder activists continue to push for more female representation in both boardrooms and management-level positions. States have also inserted themselves into these issues, with California passing a [“board gender quota” law](#) that requires all public companies principally based in the state to have at least one female director on their boards by the end of 2019, with that number increasing by the end of 2021. [A similar law is pending in the New Jersey legislature](#), and several advisory firms now explicitly recommend against nominating committee chairs of all-male

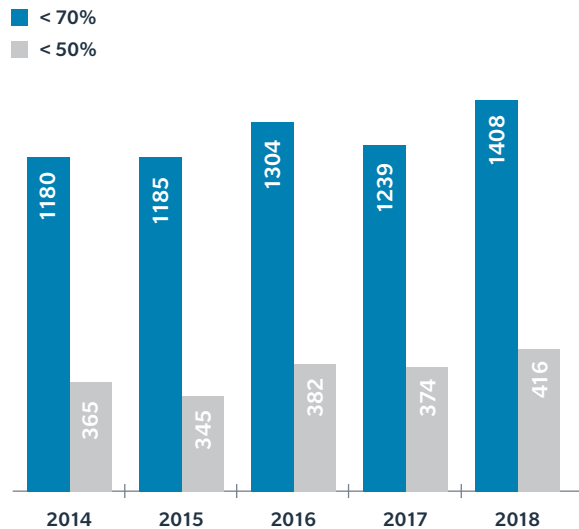
boards, in the hopes that boardroom diversity will lead to C-suite diversity.

Activist campaigns also continue to focus on workplace conduct, including corporate policies surrounding workplace harassment, unethical behavior, and inappropriate conduct of senior leadership. For the remainder of 2019, we expect to see more such campaigns, as the movement against gender discrimination and harassment remains a focal point across all industries.

FIGURE
3

The number of directors failing to receive majority or 70% of support increased in 2018.

SOURCE: BROADRIDGE FINANCIAL SOLUTIONS/PWC



Long Slate Nominations and the Decline of Director Support

Boardrooms continue to see a shake-up of who sits at their tables as activists increasingly push for new board directors, which often results in incumbent directors being replaced or losing shareholder support. In the 2018 proxy season, more than 400 directors failed to receive majority shareholder support, while more than 1,400 directors failed to attain at least 70% shareholder support, [according to a report published by investor communications firm Broadridge Financial Solutions and accounting firm PwC](#) (see Figure 3). Activists will usually support and push for specific alternative directors to replace ousted board members.

Long slate nominations — which are made when activists intend to get directors to replace 50% or more of incumbent board members — were frequently made in the first half of 2019. Activists tend to

take this approach in order to maintain a longer hold over a board’s initiatives and policies, rather than simply driving one-issue campaigns.

The Push for a More Sustainable Future

Beyond campaigning for diversity and improved workplace conduct, activists are increasingly concentrating on environmental issues and sustainability. While these types of campaigns are not new to boardrooms, they have grown in 2019.

Such campaigns generally push for the creation of environmentally friendly corporate policies and to analyze corporate pollution and climate risk. Environmental activists also tend to request divestment from companies, organizations, and governments that do harm to the environment. And with climate change already a high-profile and polarizing issue, these campaigns often generate media attention.

In August 2019, [Business Roundtable published a statement](#) in which 181 CEOs committed to leading their companies “for the benefit of all stakeholders” rather than seeking to primarily drive shareholder profits, which has long been a foundational tenet of corporate governance. This demonstrates the substantial influence that media attention and scrutiny can have on how public companies and their boards conduct business.

Seeking Employee Representation

Recently, investment groups such as CtW Investment Group have gained notoriety for activist campaigns geared toward appointing employee representatives to corporate boards. Investment groups believe that employee satisfaction is critical to corporate success, and thus boards require employees’ insights to best represent their views and ultimately drive shareholder value.

Meanwhile, several Democratic presidential candidates have said they support legislation that would require companies to allow employees to elect a certain percentage of their companies’ directors. As income inequality and minimum wage remain major political and social issues across the country, we expect to see more shareholder campaigns geared towards employee representation on corporate boards.

D&O Insurance and the Activist Defense

Responding to and defending against an activist campaign in any form can be expensive and time-consuming. Depending on the circumstances, some companies can turn to directors and officers liability (D&O) insurance as a source for transferring the risk and costs associated with prolonged proxy fights or other forms of activism that could affect their balance sheets.

Coverage for activist activities varies greatly based on specific D&O policy wording and the form of the activism itself. Traditionally, coverage for activist defense has been limited at best. But as demand has increased, some D&O insurers have begun to consider adding some type of specific activist defense coverage grant — at an additional cost — in order to remain competitive. For now, insurers are more likely to engage in client-specific discussions regarding the potential for activist defense insurance coverage.

For more information, visit marsh.com, contact your Marsh representative, or contact:

SARAH D. DOWNEY
Directors and Officers Liability Product Leader
Marsh FINPRO
+1 212 345 3122
sarah.d.downey@marsh.com

MICHAEL J. LOHNES
Partner
Katten Muchin Rosenman LLP
+1 312 902 5341
michael.lohnes@katten.com

Marsh JLT Specialty is a trade name of Marsh LLC.

Marsh is one of the Marsh & McLennan Companies, together with Guy Carpenter, Mercer, and Oliver Wyman.

This document and any recommendations, analysis, or advice provided by Marsh (collectively, the "Marsh Analysis") are not intended to be taken as advice regarding any individual situation and should not be relied upon as such. The information contained herein is based on sources we believe reliable, but we make no representation or warranty as to its accuracy. Marsh shall have no obligation to update the Marsh Analysis and shall have no liability to you or any other party arising out of this publication or any matter contained herein. Any statements concerning actuarial, tax, accounting, or legal matters are based solely on our experience as insurance brokers and risk consultants and are not to be relied upon as actuarial, tax, accounting, or legal advice, for which you should consult your own professional advisors. Any modeling, analytics, or projections are subject to inherent uncertainty, and the Marsh Analysis could be materially affected if any underlying assumptions, conditions, information, or factors are inaccurate or incomplete or should change. Marsh makes no representation or warranty concerning the application of policy wording or the financial condition or solvency of insurers or reinsurers. Marsh makes no assurances regarding the availability, cost, or terms of insurance coverage. Although Marsh may provide advice and recommendations, all decisions regarding the amount, type or terms of coverage are the ultimate responsibility of the insurance purchaser, who must decide on the specific coverage that is appropriate to its particular circumstances and financial position.

Copyright © 2019 Marsh LLC. All rights reserved. MA19-15850 403397598