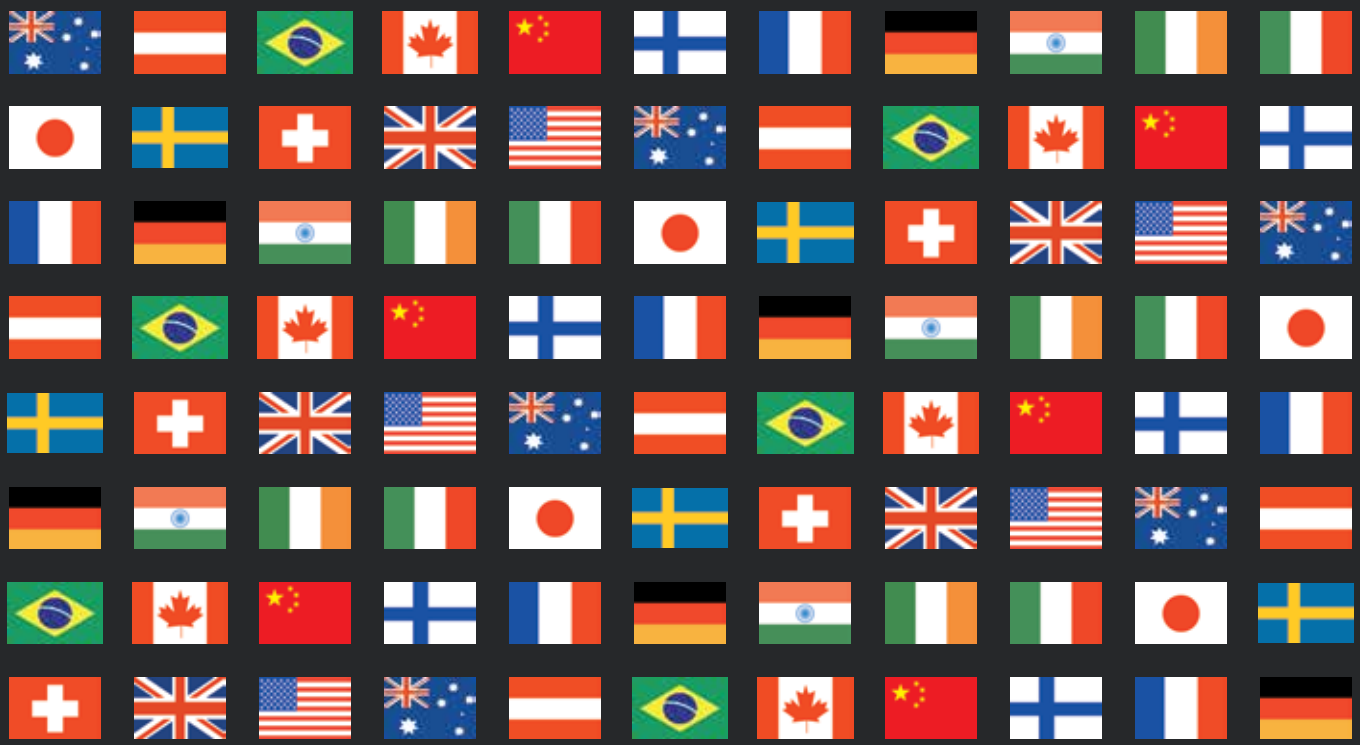
Shareholder Activism & Engagement

Contributing editors
Arthur F Golden, Thomas J Reid and Laura C Turano



2018

GETTING THE DEAL THROUGH

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Shareholder Activism & Engagement 2018

Contributing editors

Arthur F Golden, Thomas J Reid and Laura C Turano

Davis Polk & Wardwell LLP

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CONTENTS

Preface

Shareholder Activism & Engagement 2018

Third edition

Getting the Deal Through is delighted to publish the third edition of *Shareholder Activism & Engagement*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria and Ireland.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Arthur F Golden, Thomas J Reid and Laura C Turano of Davis Polk & Wardwell LLP, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
January 2018

Introduction

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Davis Polk & Wardwell LLP

In 2017 shareholder activism remained front-page news, with activist mainstays doubling down on their strategies and pursuing high-profile target companies. As in 2016, there were examples of shareholder activists suffering difficult investment returns, regulatory or legal challenges and trying proxy contest defeats. Despite these challenges, however, shareholder activism remained an undiminished force to be reckoned with, and shareholder engagement continued to be front of mind in the boardroom and the c-suite. It has become a 'chronic', as opposed to an 'acute', part of the landscape and boards regard it as such as they regularly review company strategies, risks and challenges.

In the past year, the size of average shareholder activist investments has grown, with activists investing considerable amounts in large-cap, household-name companies. For example, campaigns in the past year have included: ADP (Pershing Square), BHP Billiton (Elliott Management), Bristol-Myers Squibb (JANA Partners), CSX (Mantle Ridge), DowDuPont (Glenview, Third Point, Trian Partners), GE (Trian Partners), Honeywell (Third Point) and Procter & Gamble (Trian Partners). At an increasing rate, activists are seeking company management transitions and pushing ambitious operational changes and strategic transactions. This bull's-eye focus on company management and operational overhauls has sharpened the rhetoric on both sides of the table and has been a reminder of the importance and evolving nature of effective communications during shareholder activist battles. We have also seen the line continue to blur between activist fund and institutional investor. Institutional investors, with ever-increasing amounts under management, have also continued to demonstrate a willingness to wield (publicly and privately) their influence at portfolio companies in furtherance of their own agenda and the agenda of shareholder activists.

The chapters of this third edition of *Shareholder Activism & Engagement* are the results of the efforts of practitioners from all around the world, including some of the foremost experts in the expanding and global field of shareholder activism. This introduction identifies some of the trends and topics that we have seen as 2017 comes to a close, and we look forward to providing readers with in-depth, country-by-country coverage in the chapters that follow.

The adage remains true, no company is immune to shareholder activism

In 2017, the number of activist campaigns against target companies is reported to be relatively stable from 2016. Similarly, the breakdown of companies targeted by market capitalisation also largely remained unchanged from 2016. Despite the stagnant number of campaigns and size of companies targeted, 2017 has seen a sharp increase in deployed capital to the tune of more than double that of 2016, in effect raising the stakes from the prior year. For example, in 2017 there was Pershing Square's approximately US$4.2 billion stake in ADP, Trian Partners' approximately US$3.5 billion stake in Procter & Gamble, Elliott Management's approximately US$2.2 billion stake in NXP Semiconductors and Mantle Ridge's investment of the entirety of its inaugural approximately US$1 billion fund in CSX. Related to the increased size of individual investments, we have also seen activist funds (such as other hedge funds) attempt to persuade their investors to lock up their money with the fund for longer. This is a development that over time may impact the size and number of companies targeted by an activist fund, as well as the average holding period by the activist prior to making a public demand and after settlement with the target company.

We would also note that while the number of campaigns and size of companies targeted has remained stagnant, the rhetoric of campaigns has been anything but monotonous. Perhaps reflecting the personal aspect of shareholder activist campaigns when management is targeted and significant changes are proposed, we have seen company spokespeople and activists speak publicly in no uncertain terms about one another. Carlos Rodriguez (the CEO of ADP) saying on CNBC that the founder of Pershing Square reminds him of a 'spoiled brat' and that the founder 'doesn't know what he's talking about', is just one example. We expect the rhetoric of the past year to cause renewed focus on maintaining a scripted message, while at the same time causing some to question (especially after ADP defeated Pershing Square) whether fiery rhetoric (within limits and depending on the circumstances) can sometimes help a company effectively deliver its message to shareholders. However, having been in the midst of many such campaigns, we continue to think that the ad hominem comments shed more heat than light on these contests, and can be counter-productive. Most shareholders, especially institutional shareholders, are more interested in, and likely to be persuaded by, the economics and value implications of the positions taken.

Institutional investors in the forefront

One focus of last year's discussion was the rise of institutional investors in the activist marketplace. At the same time that institutional investors have shown an increased desire to engage (publicly and privately) with their portfolio companies, they have also experienced a sharp rise in assets under management. In 2016, institutional investors experienced approximately US$250 billion in net investment inflows, and net investment inflows have been estimated to be approximately US$500 billion in 2017. The larger amount of capital at the disposal of institutional investors has had many effects on the shareholder activism and engagement landscape, including larger percentage holdings in, and resulting influence over, portfolio companies, as well as more personnel and resources dedicated to identifying and pursuing engagement strategies and policies.

In January 2017, the Investor Stewardship Group was formed. The group's initial signatories hold over US$17 trillion in assets under management and include both institutional investors such as BlackRock, State Street and Vanguard and perennial activists such as Trian Partners and ValueAct Capital. The group is reported to have been formed in response to public criticism that governance campaigns generally amounted to no more than well-intentioned window dressing, and that words should be put into action. The group is an important reminder that institutional investors and traditional shareholder activists do not work in separate silos.

International engagement continues to climb

As in prior years, the United States remains the epicentre of shareholder activism. However, the relative rate of global campaigns continues to rise. In particular, as of the date of this writing, more capital had been deployed on activist campaigns in Europe in 2017 than in the previous three years combined, fuelled in large part by sizable engagements by activist mainstays Elliott Management (Akzo Nobel) and Third Point (Nestlé). Outside Europe, global markets for shareholder activism

continue to emerge. The number of campaigns in Asia (by nearly 50 per cent) and Australia (modestly) each rose in 2016, a trend that is likely to hold once 2017 comes to a close, and even smaller markets such as Israel and South Africa have seen recent upticks. The reasons for this trend vary, and run the gamut, from investors looking for opportunities competitors may not have identified (consider that as many as 20 per cent of US public companies are estimated to have already been targeted by activist campaigns) to seeking to apply strategies that, while hackneyed in the United States, are novel elsewhere. While global campaigns are still in their relative infancy, we expect international activist engagement to continue to rise in the coming years.

Final note

In this third edition of *Shareholder Activism & Engagement* we and the other contributing editors have prepared a number of updates to reflect the rapid evolution of the landscape of shareholder activism and engagement across various jurisdictions of interest, and are pleased to announce the addition of Austria and Ireland to this year's edition. Throughout this year's publication, we and the other contributors have identified key changes in regulations and market practice over the past year to enable our readers to better engage with the marketplace. We look forward to following continued developments with great interest as participants adapt their strategies to position themselves for future campaigns.

Australia

John Elliott, Raymond Lou and Hugh McDonald
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General

1 What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

The laws and regulations relating to shareholder activism are mostly embedded in the Corporations Act 2001 (Cth) (the Corporations Act) and regulations, and the Australian Stock Exchange (ASX) listing rules.

The varied sources of law reflect a shared regulatory role with respect to listed companies. The ASX monitors compliance by publicly listed companies with the ASX Listing Rules. The Australian Securities and Investments Commission (ASIC) is responsible for enforcement of the Corporations Act. The Corporations Act gives ASIC power to impose certain civil penalties (eg, fines) without having to go through the court system in Australia.

In addition to ASIC, the Takeovers Panel may also become involved if the shareholder activism matter is likely to have an effect on the control of the target company, and is the exclusive forum for resolving disputes in connection with a takeover (or any matter which is a de facto takeover) until the bid period has ended. The Takeovers Panel is not part of the Australian court system, and has broad discretion to declare circumstances 'unacceptable' having regard to the takeover laws in Australia, without necessarily having to establish a breach of the Corporations Act. Outside of the takeover context, the courts system in Australia has jurisdiction to hear disputes regarding breaches of the Corporations Act.

In addition to mandatory rules, there are also industry body guidelines relating to corporate governance that sometimes affect how institutional investors should act during an activism campaign. These industry bodies include:

- the Australian Council of Superannuation Investors;
- the Financial Services Council;
- the ASX Corporate Governance Council; and
- the Australian Prudential Regulatory Authority.

For completeness, we note that where there are foreign entities involved in a shareholder activism matter, the Foreign Investment Review Board (FIRB) acts as the 'border patrol' for inbound investment in Australia. Broadly speaking and subject to exceptions, a foreign investor (together with its associates) intending to acquire more than a 20 per cent interest in an Australian company or business valued at over A$252 million (a number adjusted yearly) is required to seek prior approval from the Australian Treasurer under Australia's foreign investment laws before proceeding. If the foreign investor is a 'foreign government investor' (eg, a sovereign wealth fund or government pension fund), then any non-passive investment or investment above 10 per cent is likely to require prior approval.

2 What are the other primary sources of practices relating to shareholder activism and engagement?

The main industry body which regulates the activities of larger institutional investors is the Australian Financial Services Council (FSC). FSC members include companies in funds management, superannuation, life insurance, financial advice businesses and trustee services, as well as a range of service suppliers supporting the industry, such as legal and accounting firms. In 2013 the FSC published a binding standard (FSC Standard No. 13), which requires all members (including super funds) to:

- approve a formal 'voting policy' that sets out the principles and guidelines under which rights to vote are exercised and how these rights are exercised; and
- vote on all resolutions attributable to the holding of relevant investments where they have voting authority and responsibility to do so, regardless of the 'materiality' of a resolution.

An institutional investor who is a member of the FSC may decide to abstain from voting, but must not fail to take any action (ie, the taking of a 'no action' approach is not permitted under FSC Standard 13). However, although the FSC Standards are compulsory, the nature of the FSC as an industry body limits its disciplinary powers with regard to any breaches by its members.

Most large institutional investors have followed FSC Standard 13 and published a 'voting policy' to manage their proxy voting processes. For example, the latest published voting policy of one large institutional investor in Australia provides that it will ensure that voting instructions are lodged for all internally managed portfolios, and its preference is to support and vote in favour of a board or management. This investor also discloses that it engages the services of proxy advisers to assist in gathering the information used to formulate and support voting decisions.

The significance of proxy advisers in Australia and the influential power they hold in recommending proxy votes has been increasing. There are three main proxy advisory entities operating in Australia:

- Glass Lewis;
- Institutional Shareholder Services; and
- Ownership Matters.

Historically, the role of proxy advisers in Australia is limited to providing research and information to assist institutional investors to decide how to vote at a company's general meeting. Increasingly, however, we have seen a move towards the US trend where the proxy advisers themselves are starting to influence the voting behaviour in the Australian equities market. In the majority of the activist cases in the past five years, we have seen activist shareholders receiving support from proxy advisers in cases of electing an independent director to a board that has a majority of non-independent directors (eg, CGI Glass Lewis's support for the appointment of an additional independent director to the board of Brickworks) or the removal of a long-term serving non-independent director (eg, ISS's support for Lone Star's proposal to remove two executive directors from the board of Antares).

Lastly, although shareholder activism is still in its infancy in Australia compared to the US, there are a number of other factors that favour the increased activism activity in Australia, including:

- supportive legislation: as set out in more detail in the remainder of this chapter, the Corporations Act gives a 5 per cent shareholder certain rights to agitate the target company;
- no poison pills: the principles set out in the takeovers law section of the Corporations Act generally prohibit the target board from taking any action specifically aimed at defending a takeover bid, thereby precluding US-style poison pill arrangements;
- lack of cross-shareholding: unlike in some other Asian jurisdictions such as Japan, free float for ASX-listed companies has generally been very high; and

- rise of passive funds: as in the US, there has been a steady rise in passive funds in Australia which are more likely to support an activist campaign if they can improve the company's long-term returns. These investors are unlikely to be able to vote with their feet when the target company performs poorly and therefore have more incentive to agitate for structural or strategic changes to deliver a higher return on equity.

3 How is shareholder activism generally viewed in your jurisdiction? Are some industries more or less prone to shareholder activism?

Shareholder activism has become increasingly prominent over last few years and has been largely welcome in Australia. In particular, the recent introduction of the 'two-strike' rule which enables shareholders to vote on a board spill if more than 25 per cent of votes are cast against a company's remuneration report at the annual general meeting of the company in two consecutive years (see question 6), has been seen as a positive mechanism to align executive pay and performance. However, activist activity by self-interested shareholders seeking to achieve their own investment goals is viewed less positively and can be seen as an unwanted distraction and disruptive, depending on the circumstances.

Shareholder activism can be triggered by a multitude of factors and these factors may or may not be industry-specific. Generally, industries that are underperforming and companies whose financial results are not meeting forecasts are more likely to be prone to attack. These may include:

- a company that can raise its financial leverage to increase equity returns to its shareholders; or
- companies that are trading at a substantial discount to their sum-of-parts.

In addition, shareholders who wish to seek board seats may use tactics to nominate their own directors to the board of a company to achieve specific investment goals.

There are no industry-specific rules as both the Corporations Act and the ASX Listing Rules in Australia are fairly standardised across all sectors (other than the additional periodic reporting requirements for mining companies). Therefore shareholder activism is an issue faced equally by all industries.

4 What are the typical characteristics of shareholder activists in your jurisdiction?

Until recently, Australia's main exposure to shareholder activism has been in the form of wealthy individuals wishing to obtain board control. For example, James Packer attempted to appoint a nominee director of Echo Entertainment and requisition a general meeting to remove the chairman; and Gina Rinehart attempted to appoint three directors to the board of Fairfax Media after acquiring a significant stake in the company.

Since then, activism in Australia has begun to expand with the emergence of Australia-based activist funds (eg, MH Carnegie & Co, Thorney Opportunities, Companion Fund), international activist funds (eg, TCI), asset managers (eg, Perpetual) and wealthy individuals.

In order for activist campaigns to be successful, shareholder activists must receive support from key institutional investors and proxy advisory firms.

The typical characteristics of shareholder activism in Australia will usually begin by the activist building a stake in the company and requesting to speak with the company, announcing their demands. If the company agrees to implement the activist's plan, then an agreement in relation to the company's affairs will be resolved privately. If not, the activist may go through the public route. By this stage, the company and the activist may announce a settlement plan and disclose that to the market, or there will be a proxy fight where the activist typically seeks to nominate their own directors to the company's board in order to drive the activist's agenda and solicit institutional investors and proxy advisory firms to vote in favour of its nominees.

5 What are the main operational, governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

Demands from activists in Australia vary. They include:

- operational issues such as return of capital, disposal or splitting of business divisions, change in strategy, or merger proposals;
- governance issues such as changes to the board (often arguing lack of independence), takeover defences, remuneration of executives; and
- sociopolitical activism such as environmental proposals, support of ethical causes and political issues, or a combination of these.

As discussed in question 3, shareholder activism most commonly arises in response to a company underperforming financially or failing to deliver on its announced strategic objectives. To remedy these failures, activists tend to demand changes to operational and governance areas.

Socio-political activism is less common among traditional shareholder activists such as hedge funds or other private institutional investors but has become increasingly popular with industry bodies and superannuation funds, which tend to have long-term investment horizons and ethical and socially responsible investment mandates. In Australia, we have seen shareholder groups proposing resolutions at annual general meetings of large listed companies requiring regular disclosure of human rights information and dedicated human resources to examining its supply chains. Although these kind of socio-political agendas do not usually get formally approved at shareholder meetings, they have forced companies to make formal commitments to working collaboratively with stakeholders to identify and address human rights risks in Australia.

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

The Corporations Act provides the general support for the works of an activist.

In the preparatory stage, the activist shareholder may seek a copy of the shareholder register from the company to analyse its likely support base. Under the Corporations Act, any shareholder may seek to inspect or request a copy the member register without charge. Non-shareholders may also seek to inspect a company's member register without charge or request copies of the company's member register, but may be required by the company to pay a prescribed fee. There are very limited circumstances under which the company may deny a request for a copy of the member register. The Corporations Act also confers a general obligation upon the chair of an annual general meeting to allow reasonable opportunities for the members as a whole at the meeting to ask questions or make comments, and does not discriminate on the basis of the type or number of shares held. However, the words 'reasonable opportunity' and 'members as a whole' mean that this right does not amount to an entitlement for individual members who wish to ask questions and make statements to do so.

Following the conduct of the preparatory work, an activist is likely to acquire a minority stake in the target company to start off its campaign. In Australia, a person (together with its associates) is not permitted to acquire a relevant interest in the company of 20 per cent or more, unless it makes a general takeover offer to all shareholders (or another exception applies) ('the 20 per cent rule'). At 5 per cent or above, there is a requirement to lodge a 'substantial shareholder notice', thereby disclosing the identity of the legal and beneficial owner to the market. Therefore, an activist shareholder in Australia generally acquires between 2 per cent and 4.9 per cent interest in a company so as to not show its hand early to the company. Companies do have the ability to issue beneficial ownership tracing notices to shareholders to uncover underlying ownership of shareholdings.

Once the activist has acquired the toehold interest in the company, it may proceed with its activist campaign (alone or together with other supporting shareholders) by doing one or more of the following:

- requisitioning a meeting: shareholders with at least 5 per cent of the votes that may be cast at the general meeting may requisition a meeting of shareholders, to put forward a shareholder resolution (eg, seeking to nominate or remove directors);
- proposing a resolution at the general meeting: shareholders with at least 5 per cent of the votes that may be cast on a resolution or at least 100 members who are entitled to vote at a general meeting may give a company notice of a resolution that they propose to move at a general meeting (the resolution needs to be considered

at the next general meeting that occurs more than two months after the notice is given); and
- requesting the company to pass on the statement proposed by shareholders on the resolution: shareholders with at least 5 per cent of the votes that may be cast on a resolution or at least 100 members who are entitled to vote at a general meeting may request a company to give to all shareholders a statement provided by those members about a resolution that is proposed to be moved at a general meeting.

In addition to the rights given to a 5 per cent shareholder, Australia also has recently introduced a 'two-strike' rule in connection with the remuneration arrangements for key executives. Under that rule, if the company receives more than 25 per cent of the votes cast against a resolution to approve the remuneration report (the resolution itself is advisory only and not binding on the board) in two consecutive years, shareholders will have the opportunity to vote on a board spill. Shareholders associated with the company's executives are not permitted to vote on the remuneration report resolution, but may vote in the subsequent board spill resolution. To date, there have been no successful board spills following the trigger of the two-strike rule in Australia, but it does provide dissenting shareholders or activists with a means of engaging the company or other shareholders on broader corporate governance issues.

However, there are constraints on some of these powers. It is a well-settled principle in Australian law that shareholders cannot direct directors on how to run the company, unless specifically allowed for in the company's constitution. Most Australian company constitutions exclusively vest in the board the power to manage the business of the company and to exercise all powers that are not otherwise required to be exercised by members at a general meeting. Any change in a company's constitution requires a special resolution passed by at least 75 per cent of the votes that may be cast on the matter. This has historically been more of an issue for sociopolitical activism. For example, most recently a court found in favour of a company and allowed certain resolutions expressing shareholder opinions on environmental issues to be excluded from the notice of general meeting, on the basis that these were advisory resolutions and were not valid and capable of being legally effective.

As illustrated above, shareholders with at least 5 per cent voting rights have additional rights by virtue of the Corporations Act in relation to processes and guidelines, which are not available to a shareholder with less than 5 per cent voting rights.

7 What common strategies do activist shareholders use to pursue their objectives?

There are a range of tactics commonly adopted by shareholders to pursue their objectives. These may range from moderate approaches such as seeking to engage with the company (at least initially, to be cost-effective), or to more aggressive strategies such as demanding a proxy vote to secure sufficient votes to pass a resolution or to initiate a board spill.

Legal tools available to shareholders of a listed company to pursue their objectives include:
- seeking a copy of the shareholder register;
- requisitioning a shareholder meeting by putting forward a resolution to remove and nominate board members (detailed in question 6);
- exercising a right to speak at an annual general meeting; and
- initiating a board spill under the two-strike rule by voting against the remuneration report.

Other than the legal tools described above, activist shareholders usually adopt a combination of the following tactics to achieve their intended objectives:
- acquiring a stake in the company through direct acquisition or a gradual build-up;
- engaging in private discussions with the board, which can either lead to issues being resolved or being further agitated;
- personal attacks on directors and past decisions made by directors;
- undertaking social media, general media and public relations campaigns to exert pressure on boards;
- seeking proxy votes or convincing proxy advisers to agree with their position;
- conducting a proxy fight to get board representation at an annual general or special meeting;
- seeking to form an alliance with institutional investors (subject to not breaching the 20 per cent rule which requires a formal takeover bid to be made) or rallying institutional investors and sell-side research analysts to support the activists' arguments;
- launching legal proceedings to reverse a board decision, to allege breach of directors' duties, or to gain access to information that may not have otherwise been available (relatively rare in Australia); or
- seeking control of the company by making their own 'stalking horse' bid or partnering with a hostile acquirer to build substantial holding positions in the target to facilitate a takeover.

8 May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

As noted in question 6, shareholders with at least 5 per cent of the votes that may be cast at a general meeting may requisition a meeting, either by putting in a request to the company or by themselves (in which case the shareholders requesting the meeting must pay for cost of convening the meeting).

There is generally no provision under the Corporations Act for shareholders to act by written resolution, other than by unanimous consent. This is impractical for listed companies with a broad shareholder base.

Shareholders who support the activist campaign need to be aware that they may be viewed to be associated by acting in concert with each other under the takeover laws in Australia. ASIC has indicated that there is a strong argument that the signing of a request to requisition a shareholders' meeting is sufficient to create an association, which may give rise to issues such as:
- the obligation to lodge substantial holding notices (discussed in question 19);
- the risk of contravention of the takeover prohibitions by inadvertently acquiring shares in breach of the 20 per cent rule; and
- regulatory intervention by ASIC, the Takeovers Panel or the FIRB to challenge the collective action.

9 May directors accept direct compensation from shareholders who nominate them?

In Australia, directors are appointed as officers of the company and therefore there would be a contractual arrangement between the company and the director with respect to the roles, duties and remuneration. Having said that, it is not uncommon in Australia for shareholder-nominated directors to receive no remuneration for their role as a director (other than reimbursement for expenses properly incurred in carrying out the director's duties). The director may then have a separate fee arrangement with the shareholder either as an employee or independent contractor in connection with the nominee director role.

Directors nominated by activist shareholders are often portrayed as truly independent industry experts who can help turn around the company. Any such directors appointed to the board of a listed company will be deemed as a non-executive or independent director, and will generally be remunerated by the company in accordance with standard market practice in Australia.

10 May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

Under the Corporations Act, shareholders have a right to remove any director by ordinary resolution passed in general meeting. As discussed in question 6, shareholders with more than 5 per cent shareholding in a company or at least 100 members who are entitled to vote at a general meeting have the ability to require the company to put a resolution on the agenda of a general meeting and to circulate to all members a statement about a proposed resolution or any other matter that may properly be considered at a meeting.

Under the Corporations Act, all publicly listed company constitutions must allow for shareholders to nominate a director for election. The constitution will generally set out in more detail the nomination process.

While a director has a right to defend his or her position as an officer of the company, shareholders do not need to provide reasons for any dismissal resolution – although this is commonly provided in the short circular prepared by the activist shareholder. Companies must prepare and convene the relevant meeting to consider the resolution. The meeting must be held within two months after the requisition by the activist shareholder.

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

Shareholders of Australian companies are able to seek court permission to bring a derivative action in the name of the company. Minority shareholders will often use a derivative suit to pursue directors on the grounds of oppression. To make an order, the court must be satisfied that the conduct of a company's affairs or a proposed act, omission or resolution is either contrary to the interests of the members as a whole, or is oppressive to, unfairly prejudicial to, or unfairly discriminatory against a member or members in any capacity.

Directors may defend such a claim by establishing that the act, omission or resolution was for a proper purpose and was not oppressive, considering elements of procedural and substantive fairness. The courts in Australia have a general discretion to order that a company meet a shareholder's costs in bringing a derivative action under the Corporations Act.

These actions are not a common part of the activist's armoury.

Company response strategies

12 What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

Shareholder activism has certainly required more attention from company boards in recent years. Broadly speaking, a company can effectively prepare for and respond to an activist campaign by:

- knowing where it stands;
- thorough preparation;
- engagement with activists; and
- having a sound defence strategy.

Knowing where it stands

Companies should review their operational performance against peers; align executive compensation to company performance; test the strength of their balance sheet; showcase the board's track record; review internal valuations against market valuation and thereby limit the likelihood of the shareholder activist turning up in the first place. In addition, companies must have answers for any gaps in their operational performance and should continue to engage shareholders to ensure that existing shareholders do not become, or sell to, activists.

Prepare

Companies should assess their board strategy and performance. It is vital to monitor the share register for suspicious movements or early signs of activist investments. Where suspicious movements have been identified, issue a tracing notice or get early intelligence on the activists. Companies who have regular and honest communications with shareholders tend to have more steady shareholder support. Having an active presence on social media and being socially responsible will also stand companies in good stead. It also helps for companies to have an up-to-date takeover response manual and company policies (such as continuous disclosure policy and trading policy), so that shareholder activist matters can be readily addressed once they are enlivened. The board should consider potential triggers for activism and understand the trigger factors of activism.

Engage

When being approached by activists, companies should consider if there is merit in the activists' proposal and the specific outcomes that the activists have in mind. If possible, engage directly with the activist and resolve issues in private. Meanwhile, identify the activists' supporters, motives, past strategies and allies. Engaging with the activists will also help to deter the activist campaign, giving the board more time to work out its plan of attack. Once engaged, the board should ensure swift responses to attacks and statements, and ensure an effective message is delivered to shareholders to enable them to make an informed decision (utilising stock exchange announcements).

Defend

See question 13.

13 What structural defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

The overriding principle of takeover laws in Australia is ensuring that the acquisition of shares in companies takes place in an efficient, competitive and informed market. In that context, the Takeovers Panel has issued a guidance note on 'frustrating actions', which in summary prevents target companies from taking any action for the purpose or which has the effect of frustrating a control transaction. Examples of frustrating actions that may give rise to declaration of unacceptable circumstances by the Takeovers Panel include:

- significant issuing or repurchasing shares, or issuing convertible securities or options;
- acquiring or disposing of a major asset, including making a takeover bid;
- undertaking significant liabilities or changing the terms of its debt;
- declaring a special or abnormally large dividend;
- significant change to company share plans; and
- entering into joint ventures.

Therefore US-style poison pill arrangements are generally not found in Australian companies.

The ASX Listing Rules also contain additional prescriptive provisions around what can or cannot be included in the company's constitution and governance structure. For example, the ASX Listing Rules require all directors of a listed company to hold tenure for a period of no more than three years, after which the person must seek re-election at a general meeting. The rules also require there only be one class of ordinary shares on issue by the listed company, and comply with the 'one share, one vote' rule. All of the above makes it more difficult for Australian companies to be made 'takeover-proof', and therefore increasing the chance of them becoming the target of shareholder activism.

Having said that, there are still some structural defensive strategies that can be adopted by the target board within the framework of the Australian takeovers law and the ASX Listing Rules. These include:

- blocking stake: working with one or more of the institutional or strategic shareholders to build a blocking stake to any takeover or shareholder activism activity;
- convertible securities: it is possible for the company to, for proper funding purposes, issue convertible securities, which has the effect of diluting any shareholding of an activist shareholder on conversion;
- poison pill loans: although poison pill provisions are not permitted to be included in the governance documents or arrangements in Australia, a change of control provision in an appropriately drafted loan agreement may have similar effect of discouraging hostile takeover or shareholder activism, especially if it is difficult for the shareholder to procure replacement financing;
- share buy-backs: this has the dual benefit of increasing the share price of the company and also utilising any excess cash that the company may have on its balance sheet; and
- asset-based strategies and acquisitions: again, assuming the additional acquisitions are made for a proper purpose, these strategies may make the company less palatable for a would-be activist who is looking to distribute excess cash for short-term gain.

There have been few legal developments in Australia that limit the defences available to companies.

14 May shareholders have designees appointed to boards?

As outlined above, while shareholders with at least 5 per cent voting rights may requisition a meeting and propose resolutions to the company to appoint or remove directors, at least 50 per cent of votes cast

are required to carry such resolutions. Hence attempts by activists to appoint nominee directors to boards are not always successful.

There is no prescriptive provision in the Corporations Act or ASX Listing Rules which gives a significant shareholder any right to appoint directors on the board of a listed company. Therefore directors on the listed company board may only be appointed by:

- the board itself to fill in a casual vacancy. Any such appointment must be ratified by the shareholders at the next annual general meeting; or
- the shareholders pursuant to an ordinary resolution.

Practically, it is common for shareholders with at least a 15 to 20 per cent shareholding in the company to discuss with the company and seek a nomination right to have at least one representative director on the board. This is a commercial matter negotiated and agreed between the shareholder and the company. To have any binding effect, any such arrangement must be set out in the company's constitution and therefore requires the approval of at least 75 per cent of the votes of the shareholders.

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

The relevant constituent document for a public listed company is its constitution. Constitutions of public listed companies are publicly available on the relevant stock exchange websites. The constitution can be downloaded from the ASX by searching for the company name or code under the announcements tab in www.asx.com.au.

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

Yes, under the Corporations Act, shareholders have the right to inspect the company's register of members without charge or request a copy of the register of members, but may be required by the company to pay a prescribed fee. A non-shareholder may also inspect or request a copy of the company's register of members but may be required by the company to pay a prescribed fee in respect of each.

Any application for a copy of the register must state the purpose for which the person is accessing the copy. The company then has seven days to provide a copy of the register to the person making the request. Information obtained from a register of company members may only be used or disclosed if the information is relevant to the holding of the interests recorded in the register or the exercise of the rights attached to them, or has been approved by the company. The company may resist a request for a copy of the shareholder register if it has been requested for an improper purpose, which includes:

- making an unsolicited offer to purchase financial products off-market;
- the solicitation of a donation from a member of a company;
- the solicitation of a member of a company by a broker; and
- gathering information about personal wealth of a member of a company.

A listed company or ASIC (but not the shareholder) can trace the beneficial ownership of shares by directing a member to disclose information about that member's relevant interests in the company's shares by providing a disclosure notice: section 672A(1)(a). The beneficial ownership of significant shareholders with relevant interests in the company of 5 per cent or more must be publicly disclosed through publication of 'substantial holder notice' on the ASX.

17 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

Most companies have shareholder communication policies that are usually available on the company website. However, dialogue with one or more individual shareholders who have expressed concern about the company's operations are usually conducted behind closed doors by the CEO, chair or investor relations officer. There is no immediate obligation to disclose the engagement unless there is disclosure of materially price-sensitive information that is not already in the public domain.

The ASX continuous disclosure rules require a company to immediately disclose to the market any materially price-sensitive information, subject to a few exceptions (eg, if the information remains confidential and is part of an incomplete negotiation process). The ASX has taken the view that selective disclosure of materially price-sensitive information may result in the information no longer being confidential, and therefore trigger the obligation to immediately disclose this information to all shareholders under the continuous disclosure rules. This is consistent with the approach taken by ASIC, which has also stated the importance of ensuring that there are no selective disclosures to shareholders.

The company is only legally required by the Corporations Act and ASX Listing Rules to disclose shareholder engagement efforts if that information is materially price-sensitive to the value of its shares. In practice, listed companies in Australia do not usually make formal ASX announcement regarding their shareholder engagement efforts, on the basis that no new information is shared with the shareholders as part of such engagement.

Outside of the mandatory disclosure regime under the ASX Listing Rules, companies can and often do use various other advertising and media platforms to ventilate and relay news of the company that does not otherwise contain additional materially price-sensitive information to shareholders (which could include information around shareholder engagement efforts).

18 Do companies receive daily or periodic reports of proxy votes during the voting period?

During the voting period, all proxy votes come directly to the company or its share registry. Shareholders who wish to keep their votes confidential can elect to vote on the day of the meeting rather than lodging a proxy form. Companies will make note of the proxy votes as they come in and rarely try to change votes cast by shareholders.

19 Must shareholders disclose significant shareholdings?

Yes, disclosure for a shareholder of companies listed on the ASX is triggered when the shareholder:

- acquires a 'substantial holding' in the listed company;
- thereafter, makes any change of 1 per cent holding in the listed company; and
- ceases to have a substantial holding in the listed company.

Once the obligation is triggered, a shareholder with a substantial holding must disclose their stake within two business days to the stock exchange. Such disclosure must include details of any 'association' with other shareholders and all agreements and understandings that gave rise to them becoming a substantial shareholder in the company, including, for example, any acquisition agreement that gave effect to the acquisition of the substantial shareholding.

A shareholder will be deemed to have a substantial holding in the listed company if the shareholder and its associates together hold a relevant interest in the company of 5 per cent or more. Under the Corporations Act, a person will have a relevant interest in a share of the company if it is the registered holder of the share, or it has the power to control the voting rights attached to, or disposal of, the share. In addition, a person will also be deemed to have a relevant interest in the shares held by a downstream entity which the person either controls or has at least 20 per cent relevant interest in, subject to certain exceptions. Therefore, in some circumstances, having some measure of control over the rights attached to voting shares is enough to create a relevant interest.

'Associate' is defined very broadly under the Corporations Act, and includes the following groups of persons:

- corporate groups: the Corporations Act provides that the associates of a body corporate includes a body corporate it controls, a body corporate that controls it or a body corporate that is controlled by an entity that controls it. This means that an acquirer will not be able to avoid the application of the takeovers law by 'splitting' its shareholding across different subsidiaries or related entities;
- agreement relating to board composition or conduct of affairs: a person is deemed to be an associate of another person if the two have, or propose to enter into, a relevant agreement for the purpose of

controlling or influencing the composition of the company's board or the conduct of its affairs. The concept of 'relevant agreement' is defined very broadly under the Corporations Act and includes any agreement, arrangement or understanding and whether or not it is legally enforceable. The affairs of a company include, among other things, ownership of shares in the company, exercise of the voting rights or exercise of disposal or control over the disposal of shares; and

- persons acting in concert: a person will be deemed to be an associate of the acquirer if the person is acting, or proposing to act, in concert in relation to the company's affairs. This may include two entities jointly approaching a shareholder with a view to acquiring its shares, or joining together to spill the company's board.

Even if a person technically holds no 'relevant interest' in the shares of a listed company, the Takeovers Panel in Australia has previously used its broad powers to hold that some synthetic transactions which give the holder an economic exposure in the underlying shares is sufficient to trigger the substantial holding disclosure obligations. For example, the Takeovers Panel has issued a guidance note stating that a long position in equity derivatives may give rise to unacceptable circumstances if it is not disclosed to the market. Where there is a control transaction, the Takeovers Panel would expect that all long positions on equity derivatives are disclosed unless they are under a notional 5 per cent.

Civil and criminal penalties apply under the Corporations Act where this obligation has not been complied with. However, unless a non-disclosure was part of a contentious transaction (eg, a competitive bid process), these penalties are sometimes not strictly enforced by ASIC in practice. In rare circumstances, the Takeovers Panel may impose remedial orders to require divestiture of the substantial holding where entities have intentionally devised strategies to hide ownership arrangements. It is also possible for an aggrieved party to seek recourse in Australian courts to force compliance on lodgement of a substantial holding notice or the requisite documentation that is required to be attached to the notice.

Additional approvals such as antitrust (Australia does not have a compulsory notification regime for antitrust) and foreign ownership may apply once a shareholder acquires interests in the target company above a certain threshold.

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

There is no mandatory bid rule in Australia. Instead, under the Corporations Act, an investor is prohibited from acquiring a 'relevant interest' in a listed company (or an unlisted company with more than 50 members) if that investor's 'voting power' in the company were to increase beyond 20 per cent. Voting power is defined under the Corporations Act to include the relevant interest in voting shares held by the investor and its associates. The key aspects of the 'relevant interest' and 'associate' definition have been covered in question 19.

If an investor wishes to acquire voting power in a listed company above 20 per cent, it must only do so relying on one of the exceptions to the 20 per cent rule, including:

- a takeover offer made to all shareholders;
- an acquisition approved by resolution of shareholders not involved in the transaction;
- an allowance for shareholders to 'creep' its shareholding above the 20 per cent threshold by no more than 3 per cent every six months; and
- acquisitions made pursuant to a rights issue or acting as an underwriter to a rights issue.

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders?

The ASX Listing Rules are the primary rules relating to communications made by a company to its shareholders. As outlined in question 17, the ASX Listing Rules impose continuous disclosure obligations on listed companies. As such, once a company is or becomes aware of any information concerning it that a 'reasonable person' would expect to have a 'material' effect on the price or value of the entity's securities, the entity must immediately inform the ASX of that information, unless each of the following is satisfied in relation to the information:

- the information is confidential and the ASX has not formed the view that the information has ceased to be confidential (eg, because of market leaks or rumours);
- a reasonable person would not expect the information to be disclosed; and
- the information is insufficiently definite, concerns an incomplete proposal, is generated for internal management, is a trade secret or where breach would result in a breach of law.

In addition to continuous disclosure obligations, the ASX has also imposed various periodic disclosure requirements under the ASX Listing Rules. Periodic disclosure generally involves:

- annual disclosure;
- half-yearly disclosure;
- quarterly disclosure; and
- additional disclosure in connection with specific transactions such as takeovers or capital raisings.

All relevant information that is required to be disclosed under the ASX Listing Rules must be disclosed on the ASX platform. Subject to an exception for dual-listed entities, ASX generally requires the information be released on the ASX platform first before it is given to anyone else.

Outside of the mandatory disclosure regime under the ASX Listing Rules, companies can and often do use various other advertising and media methods to discuss and relay news of the company to shareholders, provided that information must first be made available through the ASX platform or does not otherwise contain additional materially price-sensitive information.

Shareholders, on the other hand, are not required to disclose to the public any information known to them, even if the information would have a material adverse effect on the price of the shares. Activists are therefore more likely to use social media platforms to seek to promote their views to shareholders, sell-side analysts and institutional investors. Having said that, communication from an activist is still required to comply with certain general sections of the Corporations Act. For example, shareholder activists must ensure that any information they provide or release does not contravene the insider trading or misleading and deceptive conduct prohibitions.

There are various tactics that can be used by a company to solicit votes from shareholders. There is no formal process prescribed by the Corporations Act or the ASX Listing Rules. The most common ways are for the company to meet directly with its largest shareholders in order to have an informed conversation with them, and to reach out to professional proxy advisers who are influential in recommending how institutional investors and managed and super funds should vote. Care must be taken during this process so as not to disclose additional price-sensitive information about the company that is not already known to the market.

Where a resolution to be put to shareholders is 'contentious' or complex, and votes may come down to a few percentage points either way, companies will try to reach out to as many smaller shareholders as possible by calling them directly. Given shareholders' addresses may not always be up to date in the members register and that some overseas shareholders may be difficult to reach by mail, conversations with those shareholders can be conducted by telephone. The making of phone calls to shareholders as a tool for soliciting favourable votes from shareholders is a commonly adopted strategy. These phone calls are usually done in a strategic way and investor relations experts are often engaged by the company to craft messages that resonate, by tailoring each message to the relevant class of shareholders or types of shareholders (eg, fund managers v retail shareholders). It is also important to ensure companies deliver a clear and consistent message when engaging in shareholder solicitations. In larger and strategic transactions, it is also not uncommon for the chairman of the company to present the views of the company board through a chairman's letter, which is sent to all shareholders via mail and also announced on the ASX.

22 Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

Companies are nowadays increasingly mindful of the necessity to engage with shareholders to ensure that their share price reflects the

value of the company. Organised shareholder engagement efforts are usually carried out following: the release of quarterly, half-yearly or annual results; announcement of entry into of a major transaction; or significant changes to, or disposal of, significant assets. Formal methods of engagement include shareholder engagement through company shareholder meetings, conducting shareholder briefings, analyst briefings and investor presentations. Informal shareholder engagement tends to involve reaching out to shareholders using the telephone or social media with the objective of having informed conversations with shareholders and using their feedback to prepare the company for any potential shareholder activism. The means of shareholder engagement (formal or informal) varies depending on the size and the resources available to the company for deployment on its shareholder engagement efforts.

23 Are directors commonly involved in shareholder engagement efforts?

Directors (rather than management) would usually be involved in shareholder engagement efforts to the extent the matter relates to a control transaction, as they are generally seen as the independent decision-makers in an Australian company. With respect to operational briefings, the CEO, together with the CFO and the communications team, would usually have key involvement with shareholders to ensure they are kept informed of the company's strategy and the value of the company as reflected from the financial results.

In the context of a shareholder activist matter, in Australia the shareholder engagements are usually conducted via the company chair in its capacity as an independent, non-associated director. Following the initial discussion with the chairperson, the chair may then involve other directors or the CEO to provide more information regarding the company's current strategy and listen to what the activist has to say. Non-executive directors are usually only involved if the matter requires any formal decision by the board.

Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

All actions of a director, including consideration of an activist proposal, are subject to a duty of due care, skill and diligence and to act in the best interest of the company as a whole. This duty is informed by equity and common law principles and is complemented by a statutory duty of care and diligence in the Corporations Act. The law applicable in Australia does not apply any different standard of care in the context of an activist or takeover proposal, compared to any other proposal. In particular, the directors are not permitted to act in a manner for the sole or dominant purpose of entrenching their own position. Any actions taken by the directors must be in the interest of the company as a whole. Precedents in Australia show that the courts are not likely to take a strict interpretation of that requirement, and the directors will be permitted to take into account the interest of other stakeholders (eg, its appointing shareholder) provided that it is not inconsistent with their duty to act in the best interests of the company as a whole.

Shareholders do not owe fiduciary duties to the company. They are taken to act in their own self-interest. Majority shareholders may expect that the company's affairs be conducted in a way beneficial to them, at the expense or even to the detriment of other shareholders. However, directors' duties are owed to all shareholders.

The Corporations Act provides far-reaching remedies for oppressed minority shareholders. These protections provide courts with wide-ranging powers to grant relief to a shareholder if the conduct of a company's affairs is either contrary to the interests of the shareholders as a whole; or oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a shareholder or shareholders whether in that capacity or in any other capacity.

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General

1 What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

The main source of law relating to shareholder activism and engagement is the Austrian Stock Corporation Act (AktG), including the fundamental principle of equal treatment of shareholders (in particular equal voting, dividend and information rights) (section 47a AktG) and a limited duty of loyalty of the shareholders with respect to the company's and the other shareholders' legitimate interests. The Austrian Stock Exchange Act and the Austrian Takeover Act provide provisions applying only to companies whose shares are admitted to stock exchange trading on regulated markets (section 3 AktG) and their shareholders.

The provisions governing shareholder actions are part of Austrian federal law, partially (particularly regarding listed companies) based on EU directives and regulations.

Shareholders can enforce their rights generally in front of the Austrian commercial courts. The competence of the Austrian commercial courts is binding and cannot be replaced by, for example, arbitrational proceedings. The management of the company is in general personally liable to the company but not to the shareholders if damage occurs owing to a violation or non-compliance with statutory law or the provisions of the articles of association (AoA). Regulations concerning listed companies are enforced by the competent supervisory body, the Austrian Financial Market Authority (FMA).

The breach of specific obligations of the management can be prosecuted as a statutory offence according to the Austrian Criminal Act, for example, inaccurate or incomplete information with respect to net assets, financial positions or results of operations in certain declarations, reports or disclosures.

Companies of certain sectors (eg, banking and insurance) are subject to additional regulations, compliance with which is supervised and enforced by the FMA or EU institutions.

2 What are the other primary sources of practices relating to shareholder activism and engagement?

Apart from statutory provisions, the Austrian Corporate Governance Code (CGK) includes 'comply or explain rules' as well as recommendations. The CGK becomes binding by declaration of commitment. If a company's shares are admitted on a regulated market in the EU or ECC or if companies' securities are admitted on a regulated market and its shares are traded on a multilateral trading facility, declarations on commitment or opt-out (in the latter case including reasoning) to a corporate governance code and comply or explain with respect to the rules of the corporate governance code, are mandatory. A prime market listing on the Vienna Stock Exchange excludes an opt-out declaration.

Proxy advisers addressing the European market have published formal voting guidelines and policies that form the basis of specific voting recommendations for agenda items of shareholders' meetings provided to their clients up front. It can be observed in particular that institutional shareholders are inclined to follow such recommendations, quite often as such recommendations are included by reference in voting guidelines of institutional investors. The influence of proxy advisers and their recommendations depends on the shareholder structure of the company. In particular, in companies without control by one shareholder or a group of shareholders or with a significant free float, proxy advisers are quite influential. They have an impact on the agenda, the motions proposed by the management and the votes in the shareholders' meeting and, as a consequence, on the corporate governance of companies and, to a certain extent, on their strategy.

3 How is shareholder activism generally viewed in your jurisdiction? Are some industries more or less prone to shareholder activism? Why?

Shareholder activism is not industry-specific. In general, shareholder activism has not played a very significant role in Austria due to the prevalence of listed companies being firmly controlled by one shareholder or a group of shareholders. In recent years in Austria real estate companies were somehow the focus of shareholder activism. In our view, however, that cannot be linked directly to the industry. Companies targeted by shareholder activist strategies include, for example:

- Flughafen Wien AG (Vienna Airport) (aviation);
- conwert Immobilien Invest SE (real estate);
- IMMOFINANZ AG (real estate);
- S IMMO AG (real estate);
- C.A.T. oil (oil field exploration); and
- BWT AG (water technology).

4 What are the typical characteristics of shareholder activists in your jurisdiction?

In public awareness, mainly hedge funds have been seen as activist shareholders in the rather rare cases in Austria. However, shareholders of listed companies have started to make more active use of their rights, resulting in higher numbers of opposing votes in the elections of supervisory board members and auditors and rejection of large volume share capital issuance authorities to the management board carrying a right to exclude subscription rights of the shareholders. Activist shareholders must be discerned from notorious claimants trying to leverage by blocking resolutions on structural measures.

It is expected that proxy advisers will increasingly support the strategies of activist shareholders in Austria, as seen in the proxy fight at conwert Immobilien Invest SE, where activist shareholders have been supported by proxy advisers. Thus the candidates proposed by activist shareholders successfully challenged the candidates proposed by the management for the board of directors. Activist shareholders can expect support from other shareholders, provided these can also benefit, and the proposals are reasonable with regard to the company.

5 What topics are the main operational, governance and sociopolitical activism areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

Activist shareholders in Austria tend to focus strictly on profitability and valuation of companies. Sociopolitical agendas are mainly the focus of non-government organisations, chambers and other organisations.

Shareholder activists focus specifically on:

- corporate structure, corporate strategy and restructuring measures;
- takeover bids (in particular, IMMOFINANZ AG, Flughafen Wien AG);
- management and supervisory board composition (conwert Immobilien Invest SE);

- return of value to shareholders (share buy-backs, additional dividend payments);
- divesture, acquisition, merger proposals; and
- opposing delisting attempts (BWT AG, Frauenthal Holding AG).

In particular, underperformance of the management and – in the case of listed companies – low stock prices (undervaluation) attract shareholder activists.

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

Shareholder proposals concerning items already on the agenda of a shareholders' meeting (counter proposals)

At shareholders' meetings every shareholder is entitled to speak, to ask questions and to propose motions directed against proposals of the management or the supervisory board regarding the items of the agenda. Shareholders are not required to notify the company in advance of such proposals. However, shareholders may use the company website in order to solicit support for their counter proposal. For that purpose shareholders representing 1 per cent of the company's share capital may (i) submit motions to agenda items, together with reasoning, up to a week prior to the meeting and (ii) request that the proposals (including reasons) and the names of the proposing shareholders shall be uploaded to the company's website (section 110 (1) AktG). Such proposal must be received by the company at least seven business days prior to date of the shareholders' meeting.

The management board of the company (or the supervisory board in case of board or auditor elections) may render a statement to the proposal to be published on the website accompanying the shareholder motion. The company's managing directors are liable for damages occurring to the shareholders if the motion is not uploaded on the website. A resolution passed may also be contested by the minority shareholders on that basis. Only in exceptional circumstances motions may not be considered by the company for publication, in particular if they lack a written reason, would be unlawful or if the proposal would be defamatory or offensive under criminal law.

Amendment of the agenda of a shareholder meeting

Shareholder proposals concerning subjects other than items on the agenda are only admissible if the agenda is amended accordingly. Only shareholders individually or collectively who have been shareholders for at least three months and represent in total 5 per cent of the company's share capital may, in written form, request that additional proposals are included on the agenda of a shareholder's meeting (section 109 (1) AktG). Such request must be received by the company 21 days prior to an ordinary or 19 days prior to the date of an extraordinary shareholders' meeting. An amended agenda has to be published in the same manner and form as the original agenda (for listed companies publication in the Federal Gazette, push forward media (eg, Bloomberg, Reuters or Newswire) as well as on the company's website. To pursue their rights shareholders may request the convening of an additional shareholders' meeting, which than can be enforced in court.

Ordinary subjects of shareholder resolution proposals are:

- counterproposals on profit distributions;
- alternative or additional supervisory board candidates;
- special audit by appointing a special auditor;
- the enforcement of certain compensation claims against board members or other persons; and
- the appointment of special representatives to enforce these claims.

The AktG provides mandatory competence of the shareholders' meeting on the following items. The shareholders' meeting is competent only as far as expressly provided for by corporate law or by the AoA.

- Approval of the annual accounts if the supervisory board did not approve or if the management board as well as the supervisory board decided to entrust the shareholders' meeting to resolve upon the issue (section 104 para 2 lit 1 AktG);
- appropriation of distributable profits (section 104 para 2 lit 2 AktG, please note that the profits shown in the balance sheet have to be fully distributed unless the AoA allows a full or partial retention by shareholder resolution);
- adjournment of the shareholders' meeting (section 104 para 2 lit 3 AktG);
- discharge of the members of the management board and supervisory board;
- appointment and removal of supervisory board members (section 87 AktG);
- compensation of the supervisory board members (section 98 AktG);
- appointment of the company auditor (section 270 para 1 Austrian Commercial Code);
- issuance and authorities for issuance of convertible or profit participating bonds (section 174 para 1 AktG) or participation rights (section 174 para 3 AktG);
- amendment of the AoA (section 145 para 2 AktG);
- capital measures, including authorisations to the management to increase the share capital;
- management matters brought to the shareholders' meeting by the management board or supervisory board (the latter as far as subject to supervisory board approval) (section 103 para 2 AktG);
- decisions of major importance for the company such as major divestments, drop-down acquisitions (based on adopted German case law known as the Holzmüller/Gelatine-doctrine);
- mergers, demergers and certain other corporate restructuring measures;
- squeeze-out;
- vote of no-confidence in respect of members of the management board (section 75 para 4 AktG);
- special audit and appointment of a special auditor (section 130 para 1 AktG);
- profit pooling agreements (section 238 para 1 AktG);
- delegation or lease of the operation of the company's commercial activities or the acceptance of such delegation or lease in respect of another company (section 238 para 2 AktG);
- transfer of the entire assets of the company (section 237 para 1 AktG);
- dissolution of the company (section 203 para 1 lit 2 AktG) and continuation of a dissolved company (section 215 AktG);
- appointment and removal of liquidators (section 206 AktG); and
- discharge of the liquidators (section 211 para 2 AktG).

7 What common strategies do activist shareholders use to pursue their objectives?

Activist shareholders in Austria apply well-known strategies to leverage their influence beyond their proportionate shareholding through informal measures such as issuing open letters to the management and campaigns publicly voicing their dissatisfaction with the management's strategy.

However, shareholders also increasingly take advantage of the possibilities provided to them by corporate law, such as to contest shareholder resolutions in court. However, in general, shareholder activists do not primarily intend to block resolutions in shareholders' meetings by using their minority shareholders' rights. As common practice the share exchange ratio of mergers and the squeeze-out compensation are examined in court, however, without blocking the transaction as such.

Depending on the approach and the quality of the proposals of activist shareholders, it is expected that the boards of listed companies are interested in a dialogue with activist shareholders making constructive proposals or who can be expected to gain substantial support from other shareholders.

Activist shareholders can also benefit from several legal measures that force companies to engage constructively with them, such as the right to request a shareholders' meeting or the right to include items on the agenda of the shareholders' meeting.

Shareholder minority rights, regardless of the number of shares held, include:

- attending and speaking at shareholders' meetings (section 111 and 112 AktG);
- exercising voting rights;
- asking questions and receiving answers at the shareholders' meetings in connection with items on the agenda (section 118 AktG); and
- the right to challenge a shareholder's resolution in court (section 196, 201 AktG).

Shareholders individually or collectively representing 1 per cent of the share capital may:
- submit motions (counter proposals) to agenda items (outlined under question 6); and
- request the review of the amount of consideration for a mandatory offer as well as for a voluntary offer aimed at gaining control with the Austrian Takeover Commission (section 26 para 5 and section 33 para 2 no. 4 Austrian Takeover Act).

Shareholders representing 5 per cent of the share capital may:
- call for a shareholder meeting (section 105 AktG), which can be enforced in court in case of non-compliance;
- request to amend items to the agenda (section 109 AktG);
- request an audit of the annual accounts by a different auditor for good cause (section 270 para 3 Austrian Commercial Code);
- request that certain claims are levied by the company against certain persons or deny a waiver or settlement regarding such claims, in connection with the establishment, post-formation acquisitions and management of the company, if the claims are based on certain reports; and
- call as shareholders of an acquiring company for a shareholder meeting during the course of a simplified merger, up to a month after the transferring company resolved upon the merger, where it is resolved upon if the merger shall be approved (section 231 Abs 3 AktG).

Shareholders representing 10 per cent of the share capital may:
- file for removal of a supervisory board member for good cause by the court (section 87 para 10 and section 88 para 4 AktG); and
- request that certain claims are levied by the company against certain persons or deny a waiver or settlement regarding such claims, in connection with the establishment, post-formation acquisitions and management of the company.

Shareholders representing 20 per cent of the share capital may:
- deny a waiver or settlement regarding certain claims against members of the management or supervisory board or founding shareholders (section 43, section 84 para 4 and section 99 AktG).

Shareholders representing more than 25 per cent of the share capital of the share capital present at the shareholders' meeting may (unless the majority requirement is reduced in the AoA):
- veto changes of the company's AoA, including capital measures, share-buy backs; and
- veto measures carrying exclusion of subscription rights of the shareholders.

Shareholders representing one-third of the share capital may:
- elect an additional member to the supervisory board in the case that three or more members of the supervisory board are elected in one shareholders' meeting and one candidate got at least one-third of the votes in all prior elections. In this case that candidate gets the last mandate without a further election.

8 May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

Request to call a shareholders' meeting: Shareholders who together hold at least 5 per cent of the share capital (or less if stated in the AoA) may require the company to call a shareholders' meeting (section 105(3) AktG). The request has to be addressed to the management board in writing and should state the objective and reasons together with an agenda and motions for each agenda item. Requesting shareholders must prove that they hold a sufficient number of shares (quorum) for the legally required minimum period of ownership of three months. The shareholding including holding period of three months may be evidenced by a deposit conformation (or in the case of registered shares by an entry in the share register).

Permission to call a shareholders' meeting at the company's expense: If the company fails to comply with a proper request to call a shareholders' meeting, requesting shareholders may apply to the court for an authorisation to call a shareholders' meeting at the company's expense (section 105 (4) AktG).

Shareholders' meeting required: Shareholders may not act by written consent in lieu of a shareholders' meeting.

9 May directors accept direct compensation from shareholders who nominate them?

Members of the supervisory board are elected by the shareholders in the shareholders' meeting or by delegation of shareholders in the case that registered shares (golden shares) of a company carry such delegation rights. Members of the supervisory board are usually compensated by the company. However, they may accept direct compensation from shareholders under certain circumstances.

Whatever the case all duties of the supervisory board are primarily owed to the company (and not to the shareholders), regardless of whether a member receives direct compensation from shareholders or not. Members of the supervisory board who are in breach of their duties may be held liable under civil and criminal law.

Members of the management board are appointed by the supervisory board, which includes the determination of the remuneration of the board member (also payments from shareholders, as the case may be, are subject to the approval of the supervisory board).

10 May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

If an item of the agenda in a shareholders' meeting, any shareholder (group of shareholders) representing 1 per cent of the share capital of a listed company, can propose candidates for election to the supervisory board. For that purpose the details of proposed candidates for the supervisory board have to be submitted (including a declaration of the candidate according to section 87 (4) AktG) requesting an upload to the company's website together with the names of the proposing shareholders (section 110 (1), (2) AktG). Such a proposal must be received by the company at least seven business days prior to date of the shareholders' meeting. The supervisory board may render a statement with respect to the proposal to be published on the website accompanying the shareholder proposal.

In the case of listed companies only candidates presented on the company's website on the fifth business day prior to the shareholders' meeting at the latest qualify for an election to the supervisory board. No candidates can be proposed ad hoc in the shareholders' meeting of a listed company (section 87 para 8 AktG).

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

Each shareholder may request at a shareholders' meeting to resolve upon an appointment of a special auditor investigating actions of the management. In case such resolution is not passed a shareholder (or group of shareholders) holding 10 per cent of the share capital (over the last three months) may request a special audit and appointment of a special auditor at court, provided that the shareholders are able to demonstrate evidence that the company has been harmed.

The assertion of damage claims by the company against shareholders, members of the management board or the supervisory board, can be requested by a shareholder (or a group of shareholders) holding 10 per cent of the share capital (over the last three months until the legal proceedings have been completed), if such claims are not manifestly unfounded. The threshold to request the assertion of damage claims by the company is reduced to 5 per cent of the share capital, if a report by special auditors reveals a potential basis of liability.

In Austria strike suits by professional plaintiffs seeking profits through litigation are not very common. The general idea is to block (delay) the registration of a shareholder resolution with the commercial register (eg, capital increases, merger, spin-off) as they become effective only upon registration with the commercial register. The commercial register court may decide to suspend the proceedings to register a shareholder resolution in the case of a pending challenge. However, the court would also have the discretion to register the shareholder resolution irrespective of the pending suit, if the interest of the company in the transaction outweighs the interest pursued by the claiming shareholder. The cost risk of litigation, however, often deters shareholders from raising such claims.

Further, the challenge of a shareholder resolution on restructurings (such as mergers) or a squeeze-out shall not be based on an alleged inadequate share exchange ratio of merger or squeeze-out compensation. Those may be examined in a special court procedure, which may lead to additional compensation payments (or the granting of additional shares in case of a merger) without, however, blocking the registration with the commercial register and delaying the transaction.

Austrian law does not provide for class actions. However, depending on the subject matter, models based on private law agreements have been developed, involving assignment of claims to claimant vehicles including financing by litigation finance providers.

Company response strategies

12 What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

Although shareholder activism has increased in recent years, it is still a rather new phenomenon in Austria and does not have the same impact as in other jurisdictions. To be prepared for shareholder activism companies should analyse their business model and their shareholder structure from the perspective of an activist shareholder.

The following defence measures should be considered:

- engage in an active dialogue with institutional shareholders on the company strategy in particular on potentially contentious measures;
- establish a process to supervise the media, rumours and the shareholder structure in order to be prepared for quick reactions;
- appoint an 'action team';
- prepare investor and public statements (response strategy) in particular on any items likely to be addressed by activist shareholders;
- implementation of a 'one voice policy';
- decrease the threshold for disclosures of significant shareholdings to 3 per cent (change of the AoA); and
- extend the suspension of voting rights attached to the shares on all voting rights of a shareholder infringing disclosure rules for significant shareholdings (change of the AoA).

13 What structural defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

Structural strategies preventing or hindering shareholder activism are:

- issue additional securities to increase the costs of a takeover offer; and
- stagger terms of members of the supervisory board.

Requiring a change to the articles of AoA or shareholder resolution:

- higher voting thresholds or additional voting requirements compared to the statutory voting requirements;
- right of certain shareholders (holders of registered shares) to nominate supervisory board members;
- decrease of the threshold for the attainment of a controlling interest leading to a mandatory takeover bid;
- voting caps; and
- issuing of dual-class stocks whereby a maximum of one-third of shares can be issued without voting rights (preference shares); and
- delisting.

Of course, such defences do not protect the company against the exercise of minority rights with the intent to levy pressure on the management. They, however, make the formation of minority shareholder groups or the accumulation of shares in the hands of the activist shareholders less likely.

Structural features making a company more likely to come under the influence or be targeted by activist shareholders are:

- a large number of free-floating shares;
- passive institutional shareholders;
- low attendance in shareholders' meetings;
- depressed or discounted stock price; and
- takeover or restructuring situations (supporting or rejecting takeover bids; blocking of shareholder resolutions).

In respect of takeover situations the board neutrality rule has to be observed. Once the target company gains knowledge of a bidder's intention to launch a bid ('relevant date'), the company must not take measures that could impair the shareholder's opportunity to make a free and informed decision on the offer and, further, the target company's management (as well as the supervisory board) must obtain the consent of the shareholders' meeting for any measures (other than seeking alternative bids) that could impair the takeover bid, such as issuing of securities that could prevent the bidder from acquiring control of the target company, sale of material assets ('crown jewels'), purchase of other companies or businesses or material changes to the financing structure. No shareholders' meeting consent is required for the implementation of board decisions (i) in the ordinary course of business that were taken prior to the relevant date, (ii) have been (at least partially) implemented by the relevant date or (iii) for any measures the board is already obliged to take at that time.

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14 May shareholders have designees appointed to boards?

It is not common and also legally restricted for the company to enter into agreements with activist shareholders regarding the appointment of supervisory board members. Members of the supervisory board are appointed and removed by the shareholder meeting. The management board is legally not in the position to grant rights to shareholders to appoint a designee to the supervisory board. However, the supervisory board may, under certain provisions, agree to use best efforts to nominate a designee for election.

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

A corporation must be registered with the commercial register. The AoA are on file with the commercial register and publicly available online by means of data providers. Listed companies publish their AoA on their website. The by-laws of a corporation are not available to the public.

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

In principle non-listed stock corporations may only issue registered shares and must maintain a share register. The share register shall not be made available to the public or to other shareholders due to privacy requirements (data protection legislation). Listed stock corporations generally issue bearer shares and cannot maintain a shareholder register.

However, access to the list of participants of a shareholders' meeting (including the number of shares present at the meeting) can be derived publicly from the commercial register. The participant list has to be attached to the minutes of a shareholders' meeting filed with the commercial register (section 117, 120 (3) AktG).

In Austria recently the Economic Owner Register Act has been enacted concerning the transparency of beneficial ownership of companies, other legal entities and trusts have to be registered in a register. This register, however, is not a public register. Only persons who may produce a legitimate interest concerning the prevention of money laundering and terrorist financing are allowed to inspect the register.

Recently, the EU Shareholders' Rights Directive (2017/828) has been amended providing the right of companies to have their shareholders identified, to register respective data and to address and communicate with shareholders (see 'Update and trends'). However, any such company date will not be accessible to (activist) shareholders.

17 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

Selective disclosure to particular shareholders by the company outside of a shareholders' meeting has to comply with the principle of equal treatment of all shareholders (section 47a AktG). The CGK also emphasises that institutional and individual investors have to be treated equally. Information disclosed outside of a shareholders'

Update and trends

There have been no recent (public) high-profile campaigns.

The EU Shareholders' Rights Directive (2017/828) has been amended to be transposed by June 2019, with principal amendments, inter alia, on:

- Right of companies to identify their shareholders in order to communicate with them directly with the view to facilitating the exercise of shareholder rights and shareholder engagement with the company.
- Institutional investors and asset managers shall (or publicly disclose a reasoned explanation on non-compliance):
  - develop and disclose an engagement policy (integrate shareholder engagement into investment strategy) and
  - on an annual basis, publicly disclose how the engagement policy has been implemented.
- Institutional investors shall disclose how the main elements of the equity investment strategy are consistent with the profile and duration of their liabilities.
- Asset managers annually disclose to their institutional investors, how the investment strategy contributes to the medium to long-term performance of the assets.
- Proxy advisers shall disclose reference to an applicable code of conduct (comply or explain).
- Companies shall establish a remuneration policy for directors and shareholders shall have the right to vote on the remuneration policy. The remuneration policy shall contribute to the company's business strategy and long-term interests and sustainability.
- Companies that enter into material transactions with related parties must publicly announce the transaction (at latest at the time the transaction is concluded), and provide specified information relating to the transaction.

meeting is only admissible if it is in the interest of the company and if there is no unjustifiable preferential treatment.

Any such disclosed information must not qualify as inside information or be of disadvantage to other shareholders.

18 Do companies receive daily or periodic reports of proxy votes during the voting period?

There is no statutory proxy voting outside the shareholders' meeting. Shareholders may participate in shareholders' meetings by way of electronic communication if the company's AoA provide for such participation. If a proxy voter is nominated, voting instructions given to such proxy voter are often kept confidential, and in general there is no exchange between management and shareholders on such instructions submitted prior to the shareholders' meeting.

19 Must shareholders disclose significant shareholdings?

Under the Austrian Stock Exchange Act, a shareholder must publicly disclose its shareholding to the Austrian Financial Market Authority, the Stock Exchange and the issuer, if it reaches, exceeds or falls below 4, 5, 10, 15, 20, 25, 30, 35, 40, 45, 50, 75 or 90 per cent of the voting rights of the company, either directly or indirectly (eg, via subsidiaries) or through financial instruments or derivatives through which voting shares can be acquired or instruments that have a similar economic effect. For the purpose of determining whether a threshold has been reached, voting rights from shares and instruments are aggregated. The AoA may include a further disclosure threshold at 3 per cent. A shareholder must make the disclosure immediately and in any event within two trading days, and each time its shareholding meets, exceeds or falls below a relevant threshold.

Shareholders acting in concert are aggregated for the purposes of compliance with disclosure thresholds.

Non-compliance with disclosure obligations results in an automatic suspension of voting rights attached to the shares not disclosed (the AoA may generally extend such suspension to all voting rights of the non-compliant shareholder). The voting rights can be exercised again after a period of six months following due disclosure of the shareholding.

A violation of disclosure obligations can result in an administrative fine of up to €2 million or twice the amount of the benefit derived from the violation, whichever amount is higher. Administrative fines are published online as part of 'naming and shaming'.

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

Under the Austrian Takeover Act, a group of shareholders acting in concert must launch a mandatory offer to acquire the remaining shares in a listed company upon obtaining control (ie, a shareholding representing, directly or indirectly, at least 30 per cent of the voting rights (or a lower threshold provided by the AoA)). Certain exemptions are applicable: for example, another shareholder (group of shareholders acting in concert) holds the same or a higher percentage of voting rights.

Shareholdings and voting rights of shareholders acting in concert are aggregated. 'Acting in concert' is defined as jointly seeking control of or exercising control over the company on the basis of an arrangement, not necessarily to be qualified as an enforceable agreement. A (rebuttable) presumption of acting in concert applies where the parties in question belong to the same group of companies or participate in arrangements regarding the election of supervisory board members.

Generally, the Austrian Takeover Commission closely scrutinises any contact between major shareholders on the appointment and removal of supervisory board members and other sensitive measures that are considered as 'control seeking', if the aggregated shareholding of the shareholders exceeds 30 per cent. In order to determine a group of shareholders acting in concert, a broad range of indicative behaviour is considered by the Austrian Takeover Commission. In particular, this concerns any communication (eg, written, oral, tacit) by a shareholder that can reasonably be expected to cause another shareholder to exercise its voting or other shareholder rights in a particular manner as an arrangement (irrespective of a binding effect). Recently, the Austrian Takeover Commission decided that an activist shareholder acting in concert with another (previously) non-controlling shareholder crossed the threshold of 30 per cent and violated its obligation to launch a mandatory offer.

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders?

Communication can be conducted by companies as well as activists via:

- open letters and campaigns;
- press conferences;
- website;
- letter;
- email;
- social media; and
- proxy fights via proxy advisers on motions for shareholder resolutions and contested director elections.

Recently, the EU Shareholders' Rights Directive (2017/828) has been amended providing the right of companies to have their shareholders identified, to register respective data and to address and communicate with shareholders (see 'Update and trends').

There are no special legal provisions in connection with the use of social media; however, the general rules against market abuse have to be observed. See question 20 on the obligation of shareholders acting in concert to launch a mandatory takeover offer, disclosure requirements on significant shareholdings (19) and the board neutrality rule to be observed in respect of takeover situations (13).

22 Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

To our knowledge such efforts have not taken place in a larger context.

23 Are directors commonly involved in shareholder engagement efforts?

No.

Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

Both, management board and supervisory board decisions regarding activist proposals are subject to the same standard of care as any other board decisions.

Each shareholder owes a general fiduciary duty to the company as well as towards other shareholders; such fiduciary duty is based on case law and imposes certain limits on the power of the majority as well as on minority rights. Shareholders who influence members of the management or supervisory board to act against the interests of the company may be held liable for damages.

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General

1 What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

The Brazilian Corporations Law and the rules issued by the Brazilian Securities Commission (CVM) form the main regulation and self-regulation related to shareholder activism and engagement in Brazil.

Compliance with the Brazilian Corporations Law and the CVM rules are monitored and enforced by the CVM. A failure to comply with the Brazilian Corporations Law and the CVM rules may lead to the imposition of administrative penalties by the CVM on the company's management and controlling shareholders, ranging from formal warnings to substantial fines and prohibition of holding offices in public companies in Brazil, in addition to civil liability towards minority shareholders.

2 What are the other primary sources of practices relating to shareholder activism and engagement?

In 2002, the Brazilian stock exchange B3 created the corporate governance listing segments Level 1, Level 2 and New Market to foster the adoption of higher standards of corporate governance by the listed companies. Since then, a great number of companies have moved from the traditional listing segment to one of the corporate governance listing segments, especially the New Market listing segment, which is the one with the highest standards. These listing segments have special rules that the companies abide through the execution of an agreement with B3. The rules of the New Market listing segment were updated last year and came into force as of 2 January 2018.

Self-regulatory provisions arising out of the listing segments rules are monitored and enforced by B3.

In addition to that, the Brazilian Institute of Corporate Governance, a non-profit organisation created in 1995, has fostered corporate governance practices through talks, lectures, forums and research and has been 'supporting sustainable development and influencing agents to drive greater transparency, fairness and responsibility' within the companies, as the Institute says.

Also, the National Association of Investors of the Capital Markets, another non-profit organisation, plays an important role in participating in public hearings related to the issuance of new regulations by presenting proposals to secure shareholders' rights, and also positioning itself in relation to matters of interest of shareholders in the market.

3 How is shareholder activism generally viewed in your jurisdiction? Are some industries more or less prone to shareholder activism? Why?

Shareholder activism is still not too strong in Brazil. We expect that with the increasing rules on enhancing of corporate governance obligations and facilitating the mechanisms for shareholder vote in shareholders' meetings, shareholder activism in Brazil will also increase.

Shareholder activism in Brazil seems not to be guided by, or more present in, specific industries. The existence or lack of a defined controlling shareholder and the level of trading liquidity of the companies play a more important role in shareholder activism in Brazil.

4 What are the typical characteristics of shareholder activists in your jurisdiction?

Shareholder activism in Brazil has been quite low in comparison to other jurisdictions, although it has shown a consistent increase in the past decade. There are no organised data about the matter in Brazil, but based on precedents of administrative and enforcement proceedings carried out by the CVM, it is fair to say that institutional investors, including hedge funds and some high-profile individuals, are typically the ones that exercise more closely the shareholders' rights towards listed companies, either bringing important matters to the attention of the management of the companies directly or through claims filed before the CVM.

5 What are the main operational, governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

Mainly through the active participation in the board of directors and fiscal council of the companies, shareholders in Brazil typically focus their efforts on measures to monitor and assure compliance with internal control policies, regularity of corporate restructurings and compliance with management compensation and related-party transactions policies. Sociopolitical activism, including environmental proposals and political lobbying is uncommon in Brazil. Nevertheless, we have recently experienced a higher level of activism towards listed companies controlled by the federal or state governments in lieu of situations of corrupt practices unveiled by more thorough and efficient investigations made by the federal police and public attorneys. In addition, in recent years we have also seen an increasing interference of minority shareholders in delisting tender offer procedures, especially in connection with the determination of the offer price, which is subject to independent appraisal. We have seen recently increasing actions taken by shareholders towards questioning the independent appraisal assumptions aiming at their review for an increased valuation of the company.

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

Shareholders owning more than a certain percentage of the corporate capital of the company may make proposals for the examination, discussion and voting at relevant shareholders' meetings, provided that they follow certain requirements. See question 8.

During a shareholders' meeting, any shareholder may make a proposal different from the one made by the management, controlling shareholders or other shareholders, as the case may be, as long as they are within the matter under discussion in the agenda.

In order to foster the participation of shareholders in the shareholders' meetings of the companies, especially the annual shareholders' meetings that are held to elect members of the board of directors and fiscal council and examine and approve the annual financial statements, the CVM has enacted a recent rule creating the distance vote procedure, through which the shareholder may deliver its vote to the company through a form of vote sent by the company in advance from the shareholders' meeting. When sending its vote to the company, the shareholder may also request the inclusion of new items to the agenda

of the shareholders' meeting, which may be included by the company or denied in case of a reasonable justification.

A shareholder or group of shareholders may also make use of the public request for proxies to gather votes for the shareholders' meeting.

7 What common strategies do activist shareholders use to pursue their objectives?

Activist shareholders in Brazil usually try and organise themselves in order to be able to appoint members to the board of directors and fiscal council of the companies. These management positions have an important level of authority assured by the Brazilian Corporations Law to monitor the management activities and decisions. When necessary, activist shareholders usually resort to the CVM by filing claims against specific managers or management decisions, relevant transactions approved by shareholders meetings, tender offers terms and conditions, and conflict of interest situations, so that the regulatory agency is asked to investigate the matter and potentially apply sanctions after a due administrative proceeding.

8 May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

Any shareholder or group of shareholders owning at least 5 per cent of the corporate capital of the company may request, based on a justifiable reason, the management to call a shareholders' meeting to resolve specific matters of interest. If the management does not attend the request in eight days, the shareholder or group of shareholders may directly publish the notice of the meeting.

In addition, if the company sends out the distance vote procedure form, the shareholder may ask for the inclusion of matters in the agenda of the shareholders' meeting, which may be included by the company or denied in the case of a reasonable justification.

Shareholders may only make a written resolution without holding a general shareholders' meeting if they have the participation of all the shareholders, in which case consent does not need to be unanimous. However, for practical reasons, this is very unlikely to occur in a listed company.

9 May directors accept direct compensation from shareholders who nominate them?

The standard situation is that the directors receive their compensation directly from the company and for performing their functions. Directors may, however, receive direct compensation from a shareholder who appointed them. In some cases, the director employed by the nominating shareholder has waived his or her compensation from the company.

In any event, any compensation paid by the controlling shareholder to one or more directors as well as any compensation paid for services other than the ones performed in the position of director (consulting services, for example) have to be fully disclosed in the disclosure document of the company.

10 May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

Any shareholder may indicate one or more candidates for the election of board of directors of a company in Brazil. The interested shareholder or group of shareholders may use the public proxy procedure for this, by gathering proxies and votes for its supported candidates, or through the distance vote procedure, where the shareholder may request that company include one or more candidates in the form of a vote to be sent out to all shareholders.

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

According to the Brazilian Corporations Law, a liability suit against one or more managers for losses caused to the company shall in principle be brought by the company itself upon approval by the shareholders' meeting. After the approval of the filing of the suit and if the company does not file it within three months from the relevant approval, any shareholder may file the liability suit. Other than that, any shareholder or group of shareholders owning at least 5 per cent of the company's corporate capital may also bring a suit regardless of prior approval by the shareholders' meeting.

Company response strategies

12 What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

Shareholder activism, although not very common in Brazil, has been increasing in recent years, specifically as a result of recent changes in the regulations that introduced the public requests for proxies and the distance vote procedure, which are helping shareholders to participate more and more in the companies' decisions.

The best approach towards strong shareholder activism is full transparency, consistent performance and solid governance practices. Keeping the shareholders and market constantly and fully aware of relevant events, adopting and applying transparent practices of related party transactions, strengthen internal controls and compliance policies, are examples of important measures to maintain shareholders' confidence in the management and supportive of management's and controlling shareholders' strategies, mitigating strong shareholder activism against management.

13 What structural defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

The legal framework applicable to listed companies in Brazil provides for the equal treatment of shareholders and the best interest of the company. As a result, directors have to discharge their fiduciary duties in a neutral role towards the shareholders and always for the benefit of the company.

A company may adopt a dual-class stock structure, provided that preferred non-voting shares are not more than 50 per cent of the total outstanding shares of the company, as well as other mechanisms to mitigate risks of shareholders activisms.

Experience shows that companies with dispersed ownership (ie, with no defined controlling shareholder owning more than 50 per cent of voting shares) are more subject to shareholder activism and they tend to be more cautious in their relationship with the shareholders. There are some companies that have in their by-laws some poison pill provisions in order to discourage a potential hostile takeover. Nevertheless, in Brazil, poison pill provisions have been applied with a different purpose by companies, which is to keep the share ownership dispersed. The most common 'poison pill' adopted by companies in Brazil determines that a mandatory tender offer must be launched by a shareholder whenever such shareholder acquires or becomes the holder of a determined equity stake in the company. Once the threshold stated by the by-laws is reached, the shareholder must launch a tender offer for the acquisition of the shares of all the other shareholders of the company at a price established in the by-laws, which, in some cases, may include a premium that may impose a heavy economic burden on the intended transaction.

14 May shareholders have designees appointed to boards?

Activist shareholders will have the same rights and procedures available as any other shareholder to appoint and elect members to the board of directors and fiscal council. Minority shareholders are basically ensured two ways under the Brazilian Corporations Law in which they can appoint members to the board of directors: by requesting the separate vote or the cumulative voting procedure at the relevant shareholders' meeting.

Shareholders or a group of shareholders holding at least 15 per cent of common voting shares or 10 per cent of preferred shares (in the case where the company has issued only common voting shares, the threshold is 10 per cent) have the right to request the separate vote procedure at the relevant shareholders' meeting to appoint a member to the board of directors.

In addition, any shareholder or group of shareholders holding at least 5 per cent of the companies voting shares may request the cumulative vote procedure at the relevant shareholders' meeting. Through this procedure, each voting share has the weight of as many board of directors seats as are being elected and such votes have to be allocated

by each shareholder (including the controlling shareholder) to each candidate for the board of directors. This system increases the ability of minority shareholders to elect one or more members to the board of directors by allocating all their votes for one specific candidate.

Finally, holders of at least 2 per cent of voting shares and holders of at least 1 per cent of non-voting shares may also request the installation of a fiscal council for any given fiscal year and one member of the fiscal council can be elected in a separate vote procedure by minority holders of common voting shares and one member can be elected by minority shareholders of preferred non-voting shares.

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

The main source of access to companies' corporate documents and information is the CVM's disclosure portal (IPE system), where any person may have access to the by-laws of the companies, minutes of their shareholders' meetings, minutes of their board of directors' meetings, shareholders' agreements, financial statements, press releases and relevant facts, in addition to the comprehensive companies' disclosure document called a reference form.

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

As long as it is in order to ensure the defence of rights or a clarification of situations of personal interest or the interest of the market, any person, whether a shareholder of a company or not, may ask the company for a list of registered shareholders, and if this is denied, the person may appeal to the CVM. If the request is not properly justified, the company may disregard it. The company may charge the person for the cost of the service.

17 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

There is no specific regulation on communication of shareholders with the board. However, CVM rules determine that any relevant information on the company and companies operations, which may include engagement efforts, have to be readily disclosed to the market so that all shareholders are treated equally and there is no selective information in the hands of selected persons.

18 Do companies receive daily or periodic reports of proxy votes during the voting period?

There is no periodic report of proxy votes in Brazil. However, the recently created distance vote procedure, which, as previously stated, will become mandatory from 2018, provides for the obligation on the custodian of the company' shares, which is the one responsible for gathering the forms of votes filled by the shareholders, to deliver to the company up to 48 hours ahead of the relevant shareholders' meeting, a comprehensive list of all the votes received, and the company has to immediately disclose such list in anticipation of the meeting.

19 Must shareholders disclose significant shareholdings?

The direct or indirect controlling shareholders, and shareholders who elect members of the board of directors or fiscal council, as well as any individual or group of individuals acting jointly or representing the same interest, that reach, direct or indirectly, an initial equity participation of 5 per cent or more (and any subsequent increase or decrease in multiples of 5 per cent) of any type or class of shares of a listed company, rights over such shares, or derivatives backed in the company's securities – with physical settlement or not – shall send to the company's investor relations officer a statement with information on the purchase or disposal of the securities, and the investor relations officer shall disclose it to the market by filing such statement with the CVM, through the IPE system.

When the acquisition mentioned above has been made with the purpose of changing the controlling block or management structure of the company, as well as in cases when the acquisition triggers the obligation to launch a tender offer, pursuant to applicable CVM rules, the acquirer must also publish a notice disclosing such information to the market.

Entities under the same control as well as funds under the same discretionary management are deemed to represent the same interest for the purposes of aggregate calculation of the ownership disclosure.

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

The Brazilian Corporations Law provides for the obligation on the buyer of the control of a company to launch a tag-along tender offer for the remaining voting shares of the company for the price of 80 per cent of the price paid to the seller of the control. The threshold is increased to 100 per cent if the company is listed in the Level 2 or New Market listing segments of B3.

Also, if a controlling shareholder acquires by means other than through a tender offer more than one-third of the free float of a company, such controlling shareholder is required to launch a tender offer for the remaining free float shares for the economic value of the company as appraised by an independent appraiser.

Minority shareholders either acting alone or in concert with other shareholders are not subject to bid requirements by force of any law. However, there are companies in Brazil whose by-laws determine that a mandatory tender offer must be launched whenever a shareholder or group of shareholders acting in concert acquire or become the holders of a determined equity stake in the company (30 per cent, for example).

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders?

The controlling shareholder, the management of the company and any shareholder may publicly request proxies from other shareholders to support them in the approval of any given matter subject to the general shareholders' meeting. The public request may be made through any public medium, such as internet, emails or newspapers, as long as they comply with certain requirements provided for in the relevant CVM rule, such as being accompanied by a proper power of attorney for the vote and detailed information on the matter to be voted on.

Another procedure to gather votes from shareholders that was recently adopted for listed companies is the distance vote procedure, by which companies have to provide to all shareholders, through their custodians or service providers, a form of vote for them to participate in and vote from distance in the relevant shareholders' meeting.

22 Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

It is still relatively uncommon to have organised shareholder engagement efforts in Brazil.

23 Are directors commonly involved in shareholder engagement efforts?

When there is a situation of shareholder activism in a company in Brazil, it is not uncommon to see members of the board of directors appointed by the activist minority shareholder or group of minority shareholders leading or supporting the efforts. This is not a requirement, however. In any event, because of the fiduciary duties of the relevant board member and the level of access that board members have to the company operations in order to effectively carry out their functions, the active participation of the relevant board member tends to bring more consistency and effectiveness to the activism efforts.

Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

As per the Brazilian Corporations Law, in performing their functions, the members of the board of directors must:

- exercise the care and diligence that a diligent and prudent person normally devotes to his or her own business;
- act in accordance with the law and the company's by-laws to attain the purposes and interests of the company;
- exercise loyalty and act at arm's length; and
- refrain from engaging in any transactions entailing a conflict of interests with the company.

In summary, pursuant to the Brazilian Corporations Law, in principle a director should not be personally liable for damages caused by acts performed in the normal course of business, in the best interest of the company, and pursuant to the provisions of law and of the by-laws. Therefore, if the director of a given company employed his or her own best efforts in the achievement of the corporate objectives, that is, by caring for the company's interests, and seeking the full attainment of corporate objectives, having accomplished all the legal diligence and loyalty duties, and being obligated to inform and never act outside of its powers, either for his or her own benefit or for that of third parties, then said manager cannot be held responsible for his or her acts, even if he or she has caused losses.

However, if the act performed by the director is not in keeping with such provisions, the director may be held personally liable for the damages caused to the company, to the shareholders and to third parties.

In terms of shareholder activism, there is no specific duty of care on the directors other than those general obligations above.

The controlling shareholder has the duty to use its control power to make the company perform its corporate objective and comply with its social functions and owe a fiduciary duty towards the other shareholders, the company's employees and the community served by the company. The controlling shareholder may be held liable for abuse of its power, especially in situations where the controlling shareholder may use its control power to approve decisions not in the interest of the company or its shareholders and for its own benefit or the exclusive benefit of third parties.

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General

1 What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

Canadian corporate statutes and provincial securities laws, rules and regulations contain requirements relating to shareholder activism and engagement in Canada. There is some overlap between the two.

Corporate laws

Corporations may be incorporated federally under the Canada Business Corporations Act (CBCA), or under one of the 10 provincial or three territorial corporate statutes. Similar to Canadian securities laws, there is distinct legislation for each, and while they are generally similar, there are important differences. The provincial and territorial courts (including applicable courts of appeal) enforce the corporate laws of their jurisdiction with appeals ultimately to the Supreme Court of Canada.

Canadian corporate laws regulate, among other things:

- director and officer fiduciary duties;
- shareholder meetings (including meeting requisitions);
- the election, appointment and removal of directors;
- proxy solicitation;
- shareholder proposals; and
- corporate remedies such as derivative actions and oppression claims.

Securities laws

Canadian securities law involves 13 statutory and regulatory regimes, with 13 distinct securities regulators – one for each of the 10 provinces and three territories of Canada. While the regimes are largely harmonised, there are enough differences to make compliance a matter of some complexity. There is currently an initiative to create a cooperative combined securities regulatory authority in Canada. However, its implementation and the timeline for such implementation remain uncertain.

Canadian securities laws regulate or govern, among other things:

- disclosure obligations of issuers;
- proxy solicitation;
- early warning reporting; and
- corporate governance practices and disclosures.

In addition to provincial and territorial securities laws, the Toronto Stock Exchange (TSX) and the Toronto Venture Exchange (TSX-V), the two most notable stock exchanges in Canada, also have stand-alone rules and regulations relating to governance and disclosure.

The following mainly focuses on provisions under the CBCA and securities laws applicable in the Province of Ontario.

2 What are the other primary sources of practices relating to shareholder activism and engagement?

Proxy advisory firms, such as Institutional Shareholder Services and Glass, Lewis & Co, have developed formal voting policies applicable to Canadian public companies, and provide voting recommendations to their clients in respect of contested and other shareholder meetings. Depending on the level of institutional shareholdings at the applicable company, voting recommendations by proxy advisory firms can have a meaningful impact on the outcome of shareholder meetings.

In addition, certain institutional shareholders, including Canadian pension funds, have adopted formal voting guidelines. Although historically viewed as passive investors, Canadian pension funds have become more involved in corporate governance and executive compensation matters, M&A transactions and contested shareholder meetings.

Lastly, some institutional shareholders are members of shareholder groups such as the Canadian Coalition for Good Governance, and the Shareholder Association for Research and Education. These groups advocate on behalf of their clients for good corporate governance practices and some seek to promote sustainable investment strategies.

3 How is shareholder activism generally viewed in your jurisdiction? Are some industries more or less prone to shareholder activism? Why?

Activism had historically been less common in Canada than in the United States, but is now an accepted practice in Canada. It is not uncommon to see Canadian institutional investors publicly supporting activist funds, or to see them participating directly in activism scenarios either as the lead shareholder or jointly with traditional activists.

Any industry in Canada is prone to shareholder activism. However, the TSX and the TSX-V are recognised as being a global hub for listed mining and energy companies, so a number of activist campaigns are seen in these sectors.

4 What are the typical characteristics of shareholder activists in your jurisdiction?

Activist shareholders in Canada range from well-capitalised activist funds to smaller boutique activist funds and include, in some instances (especially in the small-cap resource sector), individual shareholders (including former directors or senior executives). In recent years, Canadian public companies have increasingly been targeted by established US-based activist funds that see Canada as an 'activist friendly' jurisdiction. In addition, as noted above, activism is increasingly becoming more acceptable to Canadian institutional investors.

5 What are the main operational, governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

As in other jurisdictions, activist shareholders target companies for a variety of reasons including with respect to their strategic direction; for 'event-driven' reasons (eg, sale of the company; strategic reviews; divestitures and spin-offs; and increased dividends or share buy-backs); for operational improvements where the composition of the board or senior management is contested; for corporate governance reforms (including environmental and social considerations); and in respect of poor or misaligned executive compensation practices. In addition, announced M&A transactions have come under pressure from activist shareholders with more frequency in recent years (with success in certain instances).

With respect to shareholder proposals, given that the Canadian market is weighted heavily towards the resource sector, there has been an increase in environmental and social proposals (particularly in the oil and gas sector) with respect to, among other things, climate change,

pipelines, fracking and the impact of projects on aboriginal communities. Also, there is currently a gender diversity movement in Canada with respect to the representation of women on boards of directors and in senior management positions, and there has been an increase in shareholder proposals in this regard, which is expected to continue. Lastly, in 2017, proxy access proposals came to Canada with two of Canada's largest banks receiving proxy access proposals in advance of their 2017 annual general meetings. Following their respective meetings and engagement with their shareholders, the two banks voluntarily adopted proxy access proposals. It is anticipated that proxy access proposals will increase in Canada moving forward.

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

Under Canadian corporate statutes, shareholders are able to make proposals for inclusion in the company's proxy materials. Under the CBCA, a registered or beneficial shareholder is entitled to submit a shareholder proposal for consideration at a company's annual meeting if the shareholder holds, or is supported by shareholders who hold, the lesser of 1 per cent of the outstanding voting shares of the company and voting shares of the company whose fair market value is at least C$2,000. The shareholder or shareholders are required to have held such shares for a period of six months prior to the day on which the proposal is submitted. A proposal may include nominations for the election of directors if the proposal is signed by one or more holders of shares representing in aggregate not less than 5 per cent of the outstanding shares. A shareholder proposal under the CBCA must be submitted to the company at least 90 days before the anniversary date of the notice of meeting that was sent to shareholders in connection with the previous annual meeting. The shareholder is entitled to provide a supporting statement for the proposal, not exceeding 500 words.

Upon receiving a shareholder proposal, a company is able to request proof that the proponent meets the shareholding requirements. There are exemptions to a company being required to accept a proposal, including, among other things:

- it appears the primary purpose of the proposal is to enforce a personal grievance;
- the proposal does not relate in a significant way to the business or affairs of the company;
- the proposal mechanism is being abused to secure publicity; or
- substantially the same proposal was submitted to shareholders in preceding years and it did not receive the prescribed amount of support.

A valid proposal, including any supporting statement, is required to be included or attached to the company's proxy circular for the annual meeting.

Canadian public companies have received a wide range of shareholder proposals on topics including operational matters, disclosure matters, governance and compensation matters and environmental and social matters. It is anticipated that the number of environmental and social proposals, including gender diversity proposals, will continue to trend upwards in upcoming proxy seasons.

7 What common strategies do activist shareholders use to pursue their objectives?

Generally speaking, activist shareholders are now more sophisticated and committed and US activist funds are applying their tactics in the Canadian market.

The most common activist strategy continues to be accumulating a meaningful position prior to triggering 'early warning' reporting obligations (10 per cent if the company is not subject to US requirements) and approaching the company through a formal 'bear hug'-type letter or requesting meetings with management or the board. At this juncture, some activists prefer to exhaust private avenues before going public, while others seek the publicity that accompanies a public activist campaign. Often, the activist's position will be supported by a detailed presentation or a position paper. If the board or management of the target company does not engage, the activist may requisition a shareholder meeting, as discussed in more detail below, or may employ other common tactics to further their agenda including making the dispute public. The activist will also lobby for support from institutional (and other large) shareholders and, if the campaign is public, proxy advisory firms and the media.

8 May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

Under Canadian corporate statutes, shareholders are entitled to requisition meetings of shareholders in order to, among other things, replace directors. Under the CBCA, registered shareholders holding not less than 5 per cent of the outstanding shares of a corporation that carry the right to vote at a meeting may requisition a shareholder meeting. A requisition is required to state the business to be transacted at the meeting and must be sent to each director and to the registered office of the corporation.

A recent Ontario court decision has held that, where a requisition includes the removal and replacement of directors, the requisition must include sufficient detail to allow shareholders to make an informed decision about the business to be transacted at the meeting, which would include the names and qualifications of the proposed new directors.

Upon receiving a valid requisition, the directors of a CBCA company must call a meeting of shareholders within 21 days, failing which any shareholder who signed the requisition may call the meeting. The time frame for actually holding the meeting, as opposed to calling it, is generally within the discretion of the board of directors, subject to judicial challenge. The timing of the meeting is a matter that is litigated from time to time in Canada as a board of directors will frequently set the meeting date some months down the road. There are certain exceptions to the requirement for the board of directors to call a meeting of shareholders in response to a requisition, including where a record date for a meeting has already been set and notice of it has been given, or where the directors have already called a meeting of shareholders and notice of it has been given.

Shareholders under most corporate statutes can act by written consent in lieu of a meeting, however, it must be unanimous.

9 May directors accept direct compensation from shareholders who nominate them?

There is no prohibition on directors accepting direct compensation from shareholders who nominate them. However, activist shareholders have been criticised for employing this tactic in recent Canadian proxy contests as a result of independence concerns.

10 May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

As noted above, a shareholder proposal may include nominations for the election of directors if the proposal is signed by one or more holders of shares representing not less than 5 per cent of the outstanding shares. A valid proposal, including any supporting statement, is required to be included or attached to the company's proxy circular for the annual meeting. As a result, 'proxy access', or at least a form of proxy access, is already statutorily available to shareholders in Canada.

However, while a form of proxy access is statutorily available to shareholders in Canada, it does have certain limitations including:

- the proponent is restricted to a 500-word supporting statement for inclusion in the company's proxy circular while the company is not subject to similar limitations; and
- the proponent must either prepare a dissident proxy circular to solicit proxies in favour of its nominees (which can be costly) or rely on exemptions to the proxy solicitation rules (discussed in more detail below) to solicit proxies in favour of its nominees.

As such, proposals of this nature are not common.

Similar to the current experience in the United States, there is a movement towards enhanced proxy access in Canada led by certain shareholder groups. As noted above, two of Canada's largest banks received proxy access proposal in 2017 and following their shareholder meetings and engagement with shareholders each bank adopted proxy access policies.

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

Under Canadian corporate statutes, derivative actions are permitted and under Canadian securities laws, companies can be sued (including by way of class actions) for misrepresentations in their public disclosure.

In addition, Canadian shareholders and other stakeholders have a remedy that is somewhat unique. This is known as the 'oppression remedy' and it provides courts with a wide range of remedies (including damages, setting aside transactions and ordering shareholder meetings) when the business or affairs of the company have been carried out or the powers of the directors of the company have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interest of any shareholder or other stakeholder of the corporation. Often, a breach of fiduciary duty claim will be made in conjunction with an oppression remedy application.

Forum selection by-laws (which attempt to limit the initiation of certain shareholder actions against a company to a specific jurisdiction), while not common in Canada, have been adopted by certain public companies in Canada (most frequently by those who have recently undertaken an initial public offering).

Company response strategies

12 What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

Both shareholder activism and shareholder engagement are matters that are receiving heightened attention by boards of directors in Canada. Canadian companies are no longer immune to activism, including companies with large market capitalisations, and there is an increased focus on appropriate shareholder engagement.

The best defence to activism is strong performance and good governance practices. In addition, companies should:

- be aware of shareholder (and other stakeholder) composition and be attuned to their expectations and sentiment;
- communicate directly and proactively with key stakeholders. In this regard, a continuous and well-aligned shareholder engagement and investor or public relations strategy is essential; and
- monitor for warning signs of potential unrest or activism including share price performance; accumulation of shareholding positions or unusual trading activity; increased contact by concerned shareholders; or other signs of unrest (ie, negative publicity (analyst reports and press coverage) or rumours).

In addition, companies and their boards should understand their business and where they have potential vulnerabilities (ie, poor share price performance, large cash positions, non-core assets, etc). Where performance has been less than optimal, management and boards should consider alternatives and examine their strategic plan.

Experience has proven that preparedness can be a key to success when faced with an activism scenario. Many public companies have preparedness measures in place in case of an approach by a would-be activist so that a board and senior management can react appropriately, within tight timelines and in the best interests of the company.

13 What structural defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

There are generally fewer structural defences available to Canadian public companies than in other jurisdictions including the United States. For instance, there are generally no staggered boards in Canada, and individual director elections are required annually for TSX-listed companies. This permits the full board to be removed at a meeting of shareholders by a simple majority vote. In 2014, the TSX mandated majority voting for director elections, although many Canadian issuers had already adopted such policies in advance of this rule change. However, in practice, companies frequently have not accepted resignations where a director has failed to obtain approval of the majority.

In September 2016, the federal government introduced a bill to amend the CBCA including amendments that would enshrine majority voting and annual director elections under corporate law. If the amendments are adopted, majority voting in Canada would have more 'teeth' as directors would be prohibited from serving except in prescribed circumstances where they fail to receive majority approval and staggered boards, while uncommon, would effectively be prohibited.

Although shareholder rights plans are common in Canada, securities regulators are less deferential to defensive tactics than courts in the United States, and Canadian regulators have expressed an aversion to 'voting pills'. Recent amendments to the Canadian takeover bid regime effective since May 2016 have enshrined in securities legislation key features of 'permitted bid' provisions that historically were found in shareholder rights plans, including a requirement that a majority of 'independent' shareholders tender to the bid before any securities are taken-up and that the bid be extended for 10 days following a press release by the bidder announcing that the minimum tender condition has been satisfied. As a result of these amendments, commentators are of the view that rights plans may play a lesser role in the hostile bid context, and other defensive tactics, such as private placements, may become more common and will likely attract a high level of regulatory scrutiny.

In terms of 'company-friendly' features of the Canadian market, Canadian courts have strongly endorsed the business judgement rule in reviewing director conduct and Canadian securities regulators have been reluctant to interfere with private placements in the face of hostile takeover bids where there is evidence that the private placement was bona fide, non-defensive and was in line with an adopted business strategy of the target. In addition, advance notice by-laws are permissible and now quite common and proxy cut-off times (ie, deadlines for voting of up to 48 hours prior to a shareholders' meeting) are also common in Canada.

14 May shareholders have designees appointed to boards?

Investors may have designees appointed to a board. In the activism context, it is common practice for activists to have nominees appointed to a board when a company and activist settle a dispute. This type of arrangement is typically memorialised through a form of settlement agreement. Settlement agreements can also contain 'standstill' arrangements (regarding share purchases or solicitation activities), committee appointment rights and non-disparagement provisions. It would be common for the contents of any such agreement to be publicly disclosed in a press release in summary form, and such agreements are often publicly filed in their entirety.

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

A public company's constating documents (including articles and by-laws) are required to be filed and disclosed on the System for Electronic Document Analysis and Retrieval (www. sedar.com), which is the website where Canadian public company filings can be found. Also, a company's articles can generally be ordered from the applicable governmental corporate registrar. The TSX has also mandated (effective 1 April 2018) that a TSX-listed issuer must have its constating documents posted on its website.

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

Under most corporate statutes in Canada, any person is able to request a list of registered shareholders from a public company upon the payment of a reasonable fee and by providing an appropriate affidavit or statutory declaration. A company is required to provide the list within 10 days of receiving the request and the supporting affidavit or statutory declaration, as applicable.

Under National Instrument 54-101 – Communication with Beneficial Owners of Securities of a Reporting Issuer (NI 54-101), any person is able to request a list of non-objecting beneficial owners (NOBO list) of shares of a public company through a transfer agent upon the payment of a fee and by providing the prescribed form of undertaking. In addition, any person is able to request the most recently prepared NOBO list in a public company's possession by paying a fee

and providing the prescribed form of undertaking. The company must provide the list within 10 days of the request.

Lastly, under NI 54-101, any person may request a list of participants in the Canadian Depository for Securities (CDS) system. CDS is the main depository in Canada through which participants hold shares on behalf of their clients. Often, the Depository Trust Company will also hold securities on behalf of US participants.

17 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

Public companies in Canada are not strictly required to disclose shareholder engagement efforts or how shareholders may communicate directly with the board unless and until such matters become material. This being said, many large Canadian public companies do, as a matter of good corporate governance, disclose in their proxy circulars or on their website their shareholder engagement efforts and how shareholders may communicate with the board or, in some instances, particular committees of the board. Also, certain Canadian public companies have adopted formal shareholder engagement policies. Disclosures in annual proxy circulars and annual reports regarding shareholder engagement are becoming more prevalent although no particular format has been uniformly adopted by Canadian public companies.

Under Canadian securities laws, public companies are required to immediately disclose 'material changes'. Also, the rules of the TSX require immediate disclosure of undisclosed 'material information' (this encompasses both 'material changes' and 'material facts'). Certain exemptions to these rules exist where public disclosure may be unduly detrimental. Canadian securities laws impose secondary market liability for a failure to make timely disclosure of material changes. In addition, there are general prohibitions on trading while in possession of undisclosed material information and on informing third parties (tipping) of such information, other than in the necessary course of business, before it is generally disclosed. As a result, in Canada there is a general prohibition on selective disclosure.

18 Do companies receive daily or periodic reports of proxy votes during the voting period?

Most public companies set a proxy cut-off time for the deposit of proxies in advance of a shareholder meeting. A proxy cut-off can be up to 48 hours, excluding Saturdays, Sundays and holidays, in advance of the shareholder meeting. It is customary for companies to receive daily or even timelier reports of proxy votes during the voting period leading up to the proxy cut-off time.

19 Must shareholders disclose significant shareholdings?

A shareholder is required to promptly issue a news release, and within two business days file an early warning report, both in prescribed form, upon it (together with any joint actors) acquiring 10 per cent or more of an outstanding class of shares. Further disclosure is required (press release and early warning report) when an additional 2 per cent of the class of shares referred to above are acquired by a shareholder or its joint actors. A shareholder is also required to update its early warning report when there is a change in a material fact in the prior disclosure made by the shareholder. A shareholder or its joint actors may not acquire additional securities of the issuer for one business day after the above disclosures are made. If the issuer is dual-listed on a US exchange, shareholders may be subject to US reporting requirements, which are triggered at 5 per cent as opposed to 10 per cent.

Recently, Canadian regulators had been considering decreasing the early warning reporting threshold to 5 per cent. However, they ultimately chose to maintain the current 10 per cent threshold. In early 2016 Canadian securities regulators did implement some changes to the early warning reporting regime including requiring disclosure when a shareholder's ownership decreases by 2 per cent or falls below the 10 per cent threshold, and enhancing the disclosure requirements with respect to an investor's intentions and in respect of disclosure of 'related financial instruments' such as derivatives and securities lending arrangements.

As an alternative to the above early warning regime (which is similar to the 13D regime in the United States), certain eligible institutional investors (such as financial institutions, pension funds and mutual funds) are permitted to report 10 per cent shareholdings using the alternative monthly reporting system (similar to the 13G regime in the United States). Under this system, an eligible institutional investor is required to file reports within 10 days after the end of the month in which the investor crossed the 10 per cent threshold, and within 10 days after the end of a month when its shareholdings increased or decreased by 2.5 per cent or more from its shareholdings reported in its last report. An eligible institutional investor is required to begin using the early warning reporting system if the investor makes or intends to make a takeover bid or proposes or intends to propose a reorganisation, merger, arrangement or similar business combination with the issuer if such transaction would reasonably be expected to result in the investor controlling the issuer. The 2016 amendments noted above broadened the list of factors which would result in an eligible institutional investor being disqualified from being able to rely on the alternative monthly reporting system. Namely, where an eligible institutional investor solicits proxies from shareholders to elect non-management nominees to the board, in support of certain corporate transactions not supported by management or in opposition of certain corporate transactions supported by management, such an eligible institutional investor would be disqualified from being able to rely on the alternative reporting system.

In addition to early warning reports, shareholders holding 10 per cent or more are considered 'significant shareholders' and 'reporting insiders' for the purposes of Canadian insider reporting requirements. Generally speaking, a reporting insider is required to file an insider report within 10 days of becoming a reporting insider, and subsequent insider reports within five days following any change in its share ownership. These insider reporting requirements, in addition to applying to security holdings, also apply to certain 'related financial instruments' which include instruments the value, market price or payment obligations of which are derived from, referenced to or based on the value, market price or payment obligations of a security or an instrument that affects, directly or indirectly, a persons' economic interest in a security. There are certain exemptions from the insider reporting requirements for eligible institutional investors.

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

Under Canadian securities legislation, a takeover bid is defined as an offer to acquire outstanding voting or equity securities of the issuer where the securities subject to the offer to acquire, together with the offeror's securities, constitute in the aggregate 20 per cent or more of the outstanding securities of that class of securities. 'Offeror's securities' for these purposes include securities of the issuer beneficially owned or controlled by the offeror and by any person acting jointly or in concert with the offeror. As a result, absent an exemption from the

Update and trends

Although it appears that true public proxy fights in Canada have declined somewhat, public campaigns and private engagements with activists continue to persist in the Canadian market. As noted in our update and trends last year, activist interventions in transactional matters continue to be meaningful, while board-related engagements continue to represent the majority of activist interactions. Regarding M&A transactions, target companies and their advisers would be well advised to ensure that they clearly articulate the rationale for a friendly transaction, be prepared to support valuations and engage with shareholders upon announcement of a deal in an effort to pre-empt any potential for unrest.

Also, following the adoption of proxy access policies by two of Canada's largest banks following the 2017 proxy season, issuers should be prepared for an increase in proxy access proposals in 2018 notwithstanding the existence of a statutory right to include director nominees in shareholder proposals under Canadian corporate statutes. Issuers and their advisers are likely to struggle with these proposals in light of the smaller market capitalisations that are more prevalent in Canada and the fact that the structure of proxy access policies most frequently adopted in the United States (and the more lenient version supported by the Canadian Coalition for Good Governance with no holding period) may result in significant repercussions for director elections in Canada including at these smaller companies.

takeover bid requirements, where an offeror or its joint actors make an offer to acquire securities that would cross (or increase ownership if already above) the 20 per cent threshold, the mandatory takeover bid requirements would apply to such offer. This could require, among other things, that a formal takeover bid be made to all shareholders by way of a takeover bid circular.

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders?

Proxy solicitation rules under both corporate and securities laws generally govern communications by companies and activist and other shareholders. Generally speaking, absent an exemption, both companies and activist shareholders are required to send an information circular and form of proxy to registered shareholders whose proxies are being solicited. The materials, along with a voting instruction form or form of proxy, are sent on to beneficial shareholders either directly or indirectly through intermediaries.

The key exemptions to the proxy solicitation rules relied on by activists are:

- the '15 or fewer' exemption, which permits communications and the solicitation of proxies from not more than 15 shareholders; and
- the 'public broadcast' exemption, which permits proxy solicitations by way of public broadcast, speech or publication, provided that certain prescribed information is provided in such communications.

These exemptions are available in most Canadian jurisdictions by statute. However, exemptive relief may be required from the applicable provincial regulator in certain jurisdictions to rely on these exemptions.

In addition to the above-noted exemptions, in certain jurisdictions, publicly announcing how a shareholder intends to vote is not considered a 'solicitation' and this exception to the definition of 'solicit' combined with the exemptions to the proxy solicitation rules can be relied on for 'withhold' campaigns that, although not prevalent in Canada, have been seen in recent years.

The proxy solicitation rules in Canada are highly technical, can vary by jurisdiction and are a common subject of litigation in contentious activism campaigns.

Activist campaigns in Canada have become much more public and now garner, in certain situations, significant media attention. It is customary, especially in high-profile activist campaigns, for both sides to engage public relations and proxy solicitation firms and to use websites and social media to solicit support from shareholders.

22 Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

Outside of reporting obligations and earnings conference calls, it is becoming more common, especially for larger issuers, to have organised shareholder engagement efforts that can include analyst and shareholder meetings, presentations at conferences, the use of social media (including dedicated sites for analysts, investors and community relations) and interactive websites. Most public companies also generally provide shareholders (and analysts) with dedicated email addresses to communicate with the board and the company's investor relations department. Engagement efforts with stakeholders can become elevated when a company is faced with a crisis (including accounting scandals, environmental or community relations issues, short-sellers, etc) or elevated shareholder discontent (ie, poor say-on-pay voting results, other executive compensation issues, poor performance relative to peers, etc).

23 Are directors commonly involved in shareholder engagement efforts?

Board engagement with shareholders continues to be a popular topic in Canada among corporate governance groups and advocates of the shareholder democracy movement and a variety of approaches have been developed by Canadian public companies. However, best practices continue to evolve.

Certain shareholder advocacy groups have recommended regular engagement between boards (and compensation committees) and institutional shareholders, and have suggested that companies adopt formal board engagement policies. Even companies that have adopted such policies continue to stress that management, as opposed to the board of directors, is principally responsible for shareholder communications and that direct engagement with the board may be appropriate in certain circumstances, but mainly in relation to corporate governance and compensation matters.

Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

Directors of Canadian companies are subject to a statutory 'fiduciary' duty (a duty to act honestly and in good faith with a view to the best interests of the corporation) and a duty of care (a duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances).

In considering an activist proposal, directors are required to comply with their statutory duties, but, generally speaking, no such duties are owed by activists or other shareholders in Canada.

In reviewing director conduct, Canadian courts accord deference to business decisions made by a board of directors under the business judgement rule. Generally speaking, Canadian courts have been reluctant to substitute their own business judgement for that of the directors where the directors' decision is a reasonable one and it has been made honestly, prudently, free from conflict and in good faith, on the basis that the courts lack the necessary background, expertise and knowledge to do so.

Canadian securities regulators may take a 'public interest' approach in reviewing the adoption of defensive tactics by boards of directors.

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General

1 What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

The PRC Company Law and the PRC Securities Law, promulgated by the Standing Committee of the National People's Congress of China, are the principal legislation regulating shareholder activism and engagement of listed companies in China.

Other related rules and regulations include the Corporate Governance Rules of Listed Companies, the Guidelines for the Articles of Association of Listed Companies, the Rules on Shareholders' General Meetings of Listed Companies, each promulgated by the China Securities Regulatory Commission (CSRC), as well as the listing rules for the different boards (markets) of the Shanghai Stock Exchange and the Shenzhen Stock Exchange and the related explanatory and practice notes and guidelines issued by the stock exchanges from time to time.

The CSRC and the stock exchanges are the primary enforcement authorities of the above-listed laws, regulations and listing rules. In addition, China's company registration authority, the State Administration for Industry and Commerce, enforces the PRC Company Law when reviewing the incorporation documents.

Furthermore, for companies in the financial services sector, there are additional rules and regulations on corporate governance formulated by their relevant industry watchdog, which will have bearings on shareholder activists. For example:

- securities companies are subject to the Guidelines on Corporate Governance of Securities Companies and Rules on Supervision over Securities Companies promulgated by the CSRC;
- insurance companies are subject to the Notice on the Printing and Distribution of the Opinions on Standardising Articles of Association of Insurance Companies promulgated by the China Insurance Regulatory Commission; and
- commercial banks are subject to the Notice of the China Banking Regulatory Commission on the Promulgation of the Guidelines on Corporate Governance of Commercial Banks promulgated by the China Banking Regulatory Commission.

2 What are the other primary sources of practices relating to shareholder activism and engagement?

Generally, shareholder activism and engagement is not common in China (see question 12 regarding why this is the case in China), therefore there are currently no established sources of practices.

3 How is shareholder activism generally viewed in your jurisdiction? Are some industries more or less prone to shareholder activism? Why?

As stated above, shareholder activism is not common in China, there are no particular general views expressed about it, and there are no particular industries that are more or less prone to shareholder activism.

4 What are the typical characteristics of shareholder activists in your jurisdiction?

We have found very few cases of shareholder activism in China. Among these cases, the activists were mutual funds, hedge funds and principle investment arms of securities firms that are perceived to be long-term investors, at least with respect to the companies involved in these reported cases. In most of these reported cases, they opposed the proposals made by the controlling shareholder or the incumbent management out of their own commercial interests. Their views were purely commercially driven and did not entail any social value judgement. Their interests were adverse to the controlling shareholders who were backing up the proposal, and the activists sometimes won and sometimes lost depending on how much influence they could exert on the controlling shareholders by, for example, 'voting with their feet' (namely, dumping shares on the market to push down the share prices of the company).

5 What are the main operational, governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

In China, the activists predominantly focus on operational and governance topics out of their own commercial interests, and shareholder activism rarely concerns sociopolitical topics such as the environment, labour protection, etc. Operational matters include material transactions, profit distribution plans, issuance of new shares or bonds, and share buy-backs. Governance matters include nomination of directors of the board and senior management, and executive compensation. There is no particular factor that tends to attract shareholder activist attention.

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

Shareholders who solely or in aggregate hold more than 3 per cent of the total shareholding of a company may make a proposal in writing to the board of directors of the company to be voted on at a shareholders' meeting, at least 10 days prior to the scheduled meeting date. The proposal must fall within the matters reserved for the shareholders' decision, which include the following:

- deciding on the business plan and investment plan of the company;
- electing and replacing the directors and supervisors that are not designated by the employees; deciding on the remunerations of such directors and supervisors;
- examining and approving the board of directors' report;
- examining and approving the board of supervisors' report;
- examining and approving the annual financial budget plan and final settlement plan of the company;
- examining and approving the company's profit distribution plan and plan to recover the company's losses;
- adopting resolutions on increase or decrease in the company's registered capital;
- adopting resolutions on issuance of the company bonds;
- adopting resolutions on the merger, division, dissolution, liquidation or change of company type of the company;
- amending the company's articles of association;
- making resolutions on the appointment or dismissal by the company of an accounting firm;
- examining and approving the particulars of guarantees or provision of security interest by the company which exceeds the approval authority of the board;

- examining matters regarding the purchase and sales within one year by the company of major assets which exceed 30 per cent of the total assets of the company as determined by the most recent audit of the company;
- examining, approving and altering the usage of the funds raised by public offering or private placement;
- examining any equity incentive plan; and
- examining other matters that shall be decided by the shareholders' meetings according to the laws, administrative rules, or regulations.

The board must notify the shareholders of the proposal by way of public circular and submit it to the shareholders' meeting for approval at the expense of the company.

It is not common for small shareholders to make proposals to the company, and the usual topics of such proposals relate to nomination and replacement of directors and senior management, material asset transactions, adjustment to profit distribution plan, etc. Once adopted by the shareholders' meeting, the shareholder proposals are binding on the company and all the shareholders. The above-described procedures for shareholders to submit proposals apply to all shareholders.

7 What common strategies do activist shareholders use to pursue their objectives?

Common strategies include increasing ownership percentage in the company, seeking alliance with other shareholders and soliciting voting proxies. Activist shareholders may publicise letters on newspapers, websites and social media, organise seminars to be attended by experts to support their views, petition relevant government authorities to take regulatory actions, and seek support from other investors all with the purpose to exert pressure on the company, its management and directors to yield to their request or position.

8 May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

Shareholders who solely or in aggregate hold more than 10 per cent of the total share capital of the company for at least 90 consecutive days may call for a special shareholders' meeting. A public company in China must hold a shareholders' meeting at a physical meeting location as well as via the internet whereby shareholders can cast their votes online and shareholders are not allowed to act by written consent in lieu of a meeting.

9 May directors accept direct compensation from shareholders who nominate them?

A director may accept compensation from shareholders who nominate them, but if the director also acts as a senior manager, namely, an executive director, then such director may only accept compensation from the company, not from anyone else, including the nomination shareholder.

10 May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

Yes, shareholders usually nominate their candidates for director via proposal to the shareholders' meeting and, as stated above, the company must notify the other shareholders in the form of a shareholder circular and table a qualified proposal to be voted on at the shareholders' meeting at the company's expense.

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

In the event that the company's board of directors or the board of supervisors does not act to launch a litigation, or in the event of emergency whereby failure to bring actions immediately will render irreparable harm to the company, shareholders who hold solely or in aggregate more than 1 per cent of the total share capital of the company for a consecutive 180 days or more may bring a lawsuit against directors, supervisors or senior management who commit a violation of law or the articles of association of the company and cause losses to the company.

Further, in the event that a shareholder brings a civil lawsuit for recovery of monetary damages from the company based on securities misrepresentation or fraud, such lawsuit must be predicated on an administrative decision imposing penalties, or a court judgment imposing criminal liabilities on the perpetrators of such fraud or misrepresentation.

The requirements imposed on shareholders, such as the minimum shareholding size; holding period; the request to urge the company's board of directors or the board of supervisors to take actions first; and the predicament of an administrative sanctions or a criminal court judgment as described above; are all policy considerations by the lawmakers to prevent the abuse of strike lawsuits which are more commonly seen in the United States of America.

Company response strategies

12 What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

Generally, shareholder activism is not common in China. The following reasons probably explain why this is the case:

- most of the public companies in China have a controlling shareholder, being either the government or the founders and their families, which significantly impedes the efforts and enthusiasm of shareholder activists;
- the Chinese stock markets are known for having more participation by individual investors than any other major markets (institutional investors have a less prominent role in the Chinese market and their holdings tend to be more spread out, hence less incentivised to act out to oppose any action by the management or controlling shareholders of the company);
- there is no rule for compensating shareholder activists for costs incurred by their actions, while the benefits of any shareholder activism are shared by all minority shareholders; and
- the relevant laws and rules enabling shareholder activism are too general and lack operable details. For example, regarding shareholder derivative suits, there is already a higher threshold set for eligible shareholders in terms of size of stake held and the holding period, and there are no clear rules on whether a bond is required to be posted before launching the lawsuit and how the relevant court filing fee is calculated in a shareholder derivative suit.

Therefore, shareholder activism and engagement is not a matter of concern for most public companies in China. On the other hand, for those few companies who are prone to shareholder activism, our advice is that they engage in conversations with these dissenting shareholders well in advance of the scheduled shareholders' meeting to work out solutions and compromises.

13 What structural defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

A staggered board is a common structural defence adopted by public companies. A Chinese public company is only allowed to issue preferred shares upon special approval by the CSRC, hence dual-class stock is not common among public companies. Very rarely, companies have adopted anti-takeover mechanisms such as 'poison pills' or 'golden parachutes,' but the effectiveness and enforceability of these mechanisms remain to be tested by the regulator and the courts.

Generally, a company that has a relatively small market capitalisation and a more diversified and spread out shareholder base is structurally more prone to challenges or attacks from shareholder activists.

There has been no movement to limit the defences available to companies in mainland China.

14 May shareholders have designees appointed to boards?

A shareholder may appoint its designees to the board of directors or the board of supervisors. It is more commonly seen that in connection with a material asset transaction or a private placement by a public company whereby a long-term strategic investor is introduced to the company, certain board seats will be offered to be nominated by the new shareholder. Generally, in the relevant transaction document – an asset or

share purchase agreement or a share subscription agreement – there will be clauses dealing with this matter. However, it is less common to see controlling shareholders commit to vote their shares to support the appointment of the nominees proposed by the new shareholder. If there is any written agreement regarding the representation on the board by the new shareholder, such agreement will need to be disclosed.

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

Yes. The company shall designate at least one newspaper and a website from the CSRC's list of media channels as the disclosing platform in its charter and disclose its corporate charter, by-laws and announcements on such designated media channels. The public can also find the charter and by-laws of a company on the official website of the stock exchange where the company's shares are listed.

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

There is no implementation rule or guidance on how a shareholder may request the shareholders list. In practice, a shareholder can request such information when the company calls for a shareholders' meeting or issues its periodic reports. At other times, the company may require the requesting shareholder to pay the cost of the company to retrieve and reproduce the latest shareholders list from the securities registration or depositary company.

17 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

Companies in China are not required to disclose shareholder engagement efforts. The secretary of the board of directors of a company is in charge of communication with investors. Companies disclose the contacting phone and fax numbers and designate dedicated staff to answer shareholder enquiries during business hours. Companies also use other modern communication methods such as the internet to improve the shareholder communication experience. Shareholders may also communicate with the board via making proposals (see question 6).

Selective or unequal disclosure is forbidden by law and the listing rules of the stock exchanges in China. A company shall treat all shareholders equally and shall avoid selective disclosure. Companies may communicate one-on-one with investors, fund managers and analysts to discuss the operational and financial performance of the company, to answer questions and to seek advice. However, companies shall not violate disclosure rules to provide undisclosed information during such one-on-one sessions.

The official websites of almost all the public companies in China have an investor relation sector, which usually includes interim and annual financial reports of the company, announcements of significant matters and the contact information of the person in charge of communication with investors. Some companies may choose to disclose their shareholder engagement efforts under this sector to show their responsiveness to shareholder concerns although companies are not required to publicly disclose such information.

18 Do companies receive daily or periodic reports of proxy votes during the voting period?

The voting period is the period when the shareholders' meeting is in session, which generally lasts one day. Hence, companies are unlikely to receive any interim reports of proxy votes during the voting period until the final votes are publicly counted and disclosed at the shareholders' meeting. However, companies may request shareholders to confirm whether they are attending the shareholders' meeting in person or by proxy, and if so to provide identity cards, stock account cards and voting proxies (if applicable) before the scheduled meeting date. Hence, companies may have the chance to preview the proxy votes before the shareholders' meeting, and be afforded the chance to communicate with dissenting shareholders issuing voting proxies with the aim of changing their votes before the scheduled meeting. Companies are not required to disclose such proxy votes to the other shareholders, to afford them equal opportunity to lobby such shareholders issuing voting proxies to either stick to or change their voting proxies. Shareholders may vote their shares by attending the shareholders' meeting in person, by proxy or by voting at designated online facility. In the case of votes cast online, there is no way for the company to know the votes before they are cast online in real time.

19 Must shareholders disclose significant shareholdings?

Yes, shareholders must disclose significant shareholdings. If the shareholding of an investor and the parties acting in concert (the 'investor group') reaches 5 per cent of the total issued and outstanding shares of a listed company, they must prepare an equity change report within three days of reaching the 5 per cent shareholding, submit the report to both the CSRC and the stock exchange, notify the listed company and make an announcement. And they must halt trading the stock within the aforementioned three-day period.

The investor group shall submit a report and make an announcement in the same manner if its shareholding increases or decreases by 5 per cent. During the reporting period, and within two days upon the submission of such report and the making of the announcement, the investor group must cease trading the stock.

If the investor group is not the largest shareholder or the actual control person of a listed company, and holds between 5 per cent and 20 per cent of the total issued and outstanding shares of a listed company, they should prepare a simplified equity change report which includes the following information:

- basic information regarding the investor group;
- the type and quantity of the stock held;
- the purposes of acquiring and holding the stock;
- any intention to further increase shareholding in the next 12-month period;
- the exact time when their shareholding reaches 5 per cent or changes by 5 per cent and how it is achieved; and
- the trading history of the stock by the investor group for the six-month period prior to such reported equity change.

A detailed equity change report is required if the investor group acquires 20 per cent or more (but less than 30 per cent) of the total issued and outstanding shares of a listed company. In addition to all the information required to be included in the simplified report, such report should include the following:

- the controlling shareholders or actual control person of the investor group;
- the prices, sources of capital or other payment arrangements for acquiring the relevant shares;
- a competition analysis and any ongoing connected transactions between the investor group and the listed company;
- any plan to change the assets, business, personnel, organisational and governance structure or articles of association of the listed company in the following 12-month period; and
- any material transactions between the investor group and the listed company in the preceding 24-month period.

Parties acting in concert with an investor are broadly defined to include any party that controls, is controlled by or is under common control with the investor; that has an overlapping senior management with the investor; that is a significant shareholder of the investor or vice versa and can exert significant influence on the other; that provides financing other than a bank to the investor to acquire relevant shares in question; that is a partner of or enters into a cooperation or joint venture with the investor; that is a natural person holding 30 per cent or more equity stake in the investor and any of his or her relatives; and that is a director, supervisor or senior management of the investor as well as any of their relatives.

If any person or entity fails to meet the disclosure obligations, the CSRC may request such person or entity to correct, give a warning and impose a fine of between 0.3 million and 0.6 million yuan. The person in charge of such entity will be held liable, and may be given a warning and a fine of between 30,000 and 0.3 million yuan.

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

Yes, if a purchaser together with any party acting in concert with it acquires 30 per cent of the total issued and outstanding shares of the company and intends to further increase its shareholding in the company, it shall then make a general tender offer to buy all or a part of the shares held by all the shareholders.

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders?

There are no rules relating to communications made by companies or activists to obtain support from other shareholders, other than the mandatory notice and disclosure rules applicable to the company regarding the calling of a shareholders' meeting and announcement of the resolutions of the shareholders' meeting. In other words, other than the mandatory notice and disclosure requirements imposed on companies, companies and activists are free to use any media, including social media platforms, to communicate with other shareholders, subject only to the rule of no material misrepresentation or omission.

There is no specific regulation or guidance on using of media, including social media, to communicate with shareholders while social media has become an important channel for companies and activists to express their opinions and to obtain support. In a recent case, *China Vanke Co Ltd (Vanke)*, a public company listed on Shenzhen Stock Exchange and the Stock Exchange of Hong Kong Limited, signed a strategic cooperation memorandum with a third party in March 2016. Owing to the cooperation involving major asset reorganisation of Vanke, the transaction shall be subject to approval by the board and shareholders. The board approved the restructuring proposal in June 2016. Following the board meeting, two of the company's shareholders published a statement in newspapers explicitly opposing the transaction and stating they would vote against the proposal at the shareholders' meeting. Subsequently, China Resources Co, Limited (CRC), the then largest shareholder of the company, responded through its WeChat official account that it opposed the proposal and also sent letters to regulators in mainland China and Hong Kong to challenge the voting process and validity of the board resolutions. The company replied to inquiries regarding the restructuring from Shenzhen Stock Exchange and supplemented disclosure documents regarding this transaction. In July, CRC organised legal experts to attend a symposium discussing the validity of Vanke's board resolutions on restructuring, and those experts issued an expert opinion stating that the resolutions at issue are invalid. The parties have not reached a consensus on this matter and the company continues communicating with relevant parties.

Companies may communicate one-on-one with major shareholders to discuss the operational and financial performance of the company, to answer questions and to solicit support on specific resolutions. However, as discussed in question 17, companies shall comply with disclosure rules and shall not provide undisclosed information during such one-on-one sessions.

22 Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

It is not common to have organised shareholder engagement efforts by the company. For companies that are prone to shareholder activism (see question 13), they may identify major minority shareholders and engage informal conversations with them to address any concern they may have on any aspect of the company. So shareholder engagement efforts by the company tend to be informal and can take various forms, such as phone calls, social media, face-to-face meetings etc. Informal, unpublicised approach by shareholders to engage the company may have a better chance of success in driving company policy unless the shareholders believe that the sheer pressure on the company by a publicised campaign can force the company into complying with a specific proposal from the shareholders who do not have sufficient voting power to force through such a proposal at the shareholders' meeting.

23 Are directors commonly involved in shareholder engagement efforts?

Independent directors are required to be involved in shareholder engagement efforts when it comes to related party transactions. Chinese public companies are required to have independent directors who are not managers, and are not nominated or otherwise related to any shareholder. Any related-party transactions are required to be approved by independent and disinterested directors. If the related-party transaction exceeds the approval authority of the board, the independent directors may call for a special shareholders' meeting, solicit voting proxies and engage independent auditor and outside counsel, if necessary, at the cost of the company, to enable the independent directors to render to the other shareholders independent opinions on such related-party transactions and matters that, in their opinion, may harm the interest of the company and its minority shareholders.

Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

Directors are not obliged to exercise any different standard of care when considering an activist proposal as compared with other board decisions. In fact, under relevant Chinese law, there is no such different standard of care.

Controlling shareholders or actual persons who control a company owe fiduciary duties to the company and its shareholders, and should not take advantage of their controlling position to harm the interest of the company and other shareholders. Other than being the controlling shareholders or actual control persons, shareholder activists do not owe fiduciary duties to the company.

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General

1 What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

Being a civil law country with very close ties to the Nordic legal tradition, the main sources of law in Finland are the Constitution, the laws and the statutes passed by the legislator. In addition, since Finland is a member of the European Union, the legislation of the European Union plays a significant role. The role of legal praxis is to interpret the law rather than develop it.

The main statutes relating to shareholder activism are the Finnish Companies Act (624/2006, as amended) and the Finnish Securities Market Act (746/2012, as amended). Also, the Finnish Financial Supervisory Authority has published legally binding regulations and recommendatory guidelines and there is some self-regulation in place that the listed companies are obliged to comply with such as the Finnish Corporate Governance Code and the rules of the Helsinki Stock Exchange (NASDAQ OMX Helsinki Oy).

The ownership structure of the Finnish stock market differs significantly from that of countries such as the United Kingdom or the United States. While the majority of listed companies in those countries have a very diverse ownership structure, ownership in Finland is often concentrated to a single or small number of major shareholders, as is the case in many other continental European countries. However, as opposed to, for example, Sweden, shares with greater voting rights are not very common. Major shareholders often play an active ownership role and take particular responsibility for the company, for example through representation on the board. As to the nomination of the board members, the use of nomination boards (ie, consisting of representatives of the largest shareholders) is increasing in Finnish listed companies, gradually replacing nomination committees, which consist of board members and form a subcommittee to the board.

Major shareholders taking particular responsibility for companies by using seats on boards to actively influence governance is perceived as positive in Finland. At the same time, major holdings in companies must not be misused to the detriment of the company or the other shareholders. The Companies Act therefore contains a number of provisions that offer protection to minority shareholders, such as requiring qualified majorities for a range of decisions at shareholders' meetings.

2 What are the other primary sources of practices relating to shareholder activism and engagement?

Most of the Finnish institutional shareholders have guidelines and policies or codes of conduct on how to steer their investments and, on a more specific level, how to act as a shareholder of a listed company. Institutional investors, such as major pension insurance companies and Solidium Oy (an investment company wholly owned by the state of Finland), are significant operators in the Finnish market and hold strategic shareholdings in several listed companies. Due to their position in the Finnish market, these guidelines may have a notable effect on the outcome of shareholder activism and engagement cases. For example, it is common that significant Finnish institutional investors are obliged to participate in the general meetings of their major portfolio companies pursuant to their investor guidelines.

3 How is shareholder activism generally viewed in your jurisdiction? Are some industries more or less prone to shareholder activism? Why?

Shareholder activism has not been debated very much in Finland, probably mostly due to the low number of public cases. Consequently the general view is fairly neutral. It is quite difficult in practice to pinpoint industries more or less prone to shareholder activism in Finland. It seems that the shareholder base and trading liquidity of a company's share plays a more significant role than the operating field of the company.

4 What are the typical characteristics of shareholder activists in your jurisdiction?

Shareholder activism has been relatively uncommon in Finland compared to several other jurisdictions. There are probably many reasons for this, including the prevailing rules regarding the allocation of responsibilities between the board and the general meeting, the concentrated Finnish shareholding structure and, from a technical point of view, the absence of a proxy voting system. The major Finnish institutional investors are usually relatively active, or at least have become activated when provoked, and these institutional investors have been reluctant to support short-termism in the form of proposals or undertakings from activist investors.

When looking at recent activist cases, there have been activist engagements both from individuals through their investment companies and from hedge funds. Their long-termism or short-termism has been case-dependent. Some of the activist investors have publicly indicated intentions for a long-term commitment to the target company, and equally there have also been obvious short-term engagements.

Some activist shareholders have acquired their shareholdings in the listed target companies by using derivatives or through corporate acquisitions. For example, there have been cases in which an activist investor has played an active and promotive role in the combination of a company owned by the activist with a listed company by means of a share exchange.

5 What are the main operational, governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

Typical demands of an activist shareholder in Finland have, for example, related to the composition of the board and the request for the initiation of corporate processes such as maximising shareholder value through divestments and demergers. If the target company is partially owned by the state of Finland, the activists have often criticised the holdings of the state and requested total privatisation of the target company. Some activist shareholders have set their prime goal as getting a seat on the board in order to change the course of the target company that way.

Sociopolitical activism, such as environmental proposals and political lobbying, has been uncommon in Finland.

In general, governance concerns and underperformance have been important factors for shareholder activism in Finland. In some recent cases, shareholder activism has been driven by a desire to split the target company, in order to achieve higher aggregate value.

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

Each shareholder has the right to have a matter falling within the competence of the general meeting addressed at the general meeting (ie, the annual general meeting of shareholders or an extraordinary general meeting having already been convened). The shareholder must, however, present the request to the board of a public company well in advance of the general meeting. A period of four weeks is considered to be sufficient.

Shareholders representing at least one-tenth of all outstanding shares (or a smaller proportion as provided in the articles of association) may also request in writing that an extraordinary general meeting be held to deal with a specific matter.

According to the Finnish Corporate Governance Code, a listed company must disclose the time and place for the general meeting on its website as soon as this has been determined. Information regarding the deadline of a proposal from a shareholder to be received by the board for it to be included in the notice must also be stated.

The right to have a matter addressed at the general meeting is considered as a minority protection rule, and may not be limited by the articles of association or otherwise by the company. Due to the minority protection nature of the rule, there is no minimum ownership threshold. Even a shareholder owning only one share may invoke the said right. In other words, the type of shareholder submitting a proposal does not affect the right to submit a proposal. This right is limited to the matters belonging to the competence of the general meeting according to the Finnish Companies Act, and consequently a shareholder may, for example, not request matters relating to a single business decision to be addressed by the general meeting.

Nominee-registered shareholders may not exercise the above-discussed right unless their shares are transferred to a Finnish book-entry account and registered directly into the share and shareholder register of the company as owners of the shares.

Shareholders need, as a general rule, to be present (or represented by proxy) at the general meeting in order to vote. A small number of Finnish listed companies allow their shareholders to vote in advance on certain matters on the agenda through the company's website. The voting in advance does not, however, automatically mean that the shareholder may under all circumstances be able to exercise all his or her rights, especially if the underlying proposal is changed after the beginning of the advance voting period. Consequently, shareholders are requested to attend the general meeting under all circumstances.

7 What common strategies do activist shareholders use to pursue their objectives?

Activist shareholders often use a combination of private and public strategies to achieve their goals.

Private strategies usually consist of engaging in private negotiations with the target company and significant shareholders, either directly or through the nomination board or nomination committee, as the case may be.

Public activism efforts often include presenting public demands concerning the future of the company or publicly criticising the company itself or its management. It is not uncommon in Finland that activists also heavily criticise the investment policies of the institutional shareholders of the target company. In practice, however, shareholder activists have rarely engaged in public campaigns in the form of letters to the shareholders or other similar means aiming at obtaining investor support. Finally, activists have often endeavoured to engage with the nomination committee or nomination board, as the case may be, of the listed company concerned and sometimes request the summoning of an extraordinary general meeting for a particular reason or propose specific issues to be handled at the annual general meeting.

8 May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

Shareholders who alone or together hold at least one-tenth of all shares, or a smaller proportion as may be provided in the articles of association, may demand the summoning of an extraordinary general meeting. However, nominee-registered shareholders may not exercise their right to request the summoning of an extraordinary general meeting as far as they are not directly registered into the company's shareholder register.

According to the Finnish Companies Act, shareholders may make a written resolution in a matter within the competence of the general meeting without holding the general meeting, provided that all shareholders of the company are unanimous. For obvious reasons, this rule has no practical bearing on listed companies.

9 May directors accept direct compensation from shareholders who nominate them?

The basic rule is that directors receive remuneration from the company concerned. There are, however, no rules directly prohibiting a director from also accepting compensation from a shareholder, having nominated him or her. In practice the director may, for example, be employed by the nominating shareholder. In some cases, a director employed by the nominating shareholder has waived his or her remuneration from the company. Such arrangements should be factored in when determining whether the rules regarding disqualification of a director to decide on a specific matter involving such a nominating shareholder are applicable.

Also, the independence rules of the Finnish Corporate Governance Code must be taken into account. It is recommended that the majority of directors be independent of the company and the major shareholders.

10 May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

The Finnish Corporate Governance Code recommends that a listed company have a nomination committee. The function of the nomination committee is to promote the efficient preparation of matters relating to the nomination of directors. The nomination committee searches for suitable director candidates and prepares a proposal for the general meeting. If it is in the best interests of the company, the nomination committee may interact with the major shareholders of the company in order to find the most suitable candidates.

In addition to or instead of a nomination committee, a listed company may have a nomination board consisting of representatives for the largest shareholders of the company. The nomination board's function is to prepare for the election of the directors instead of or in addition to the nomination committee.

If not otherwise stipulated in the articles of association, the board of directors is elected by a majority decision at the general meeting. Finnish market practice has been that the board is elected as a whole by a single vote instead of having separate voting for each director. Electing the board by a single vote is not required by law, and some international institutional investors have demanded that listed Finnish companies should shift towards separate voting for each director.

Shareholders have a right to request certain matters to be addressed at the general meeting, and the nomination of a director falls under the scope of this right. If the proposal is presented to the board on time and in accordance with the Finnish Companies Act, the nomination proposal will be included with the invitation to the general meeting. In addition, at the general meeting a shareholder may make proposals in relation to the election of board members if such a matter is on the agenda.

The board does not act as proxy for intra-shareholder relationships, and therefore activist investors have to contact other shareholders directly, rather than the board, when promoting their initiatives.

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

Pursuant to the Finnish Companies Act, directors and managing directors of companies are liable for damages to the company that they, in violation of the duty of care, have deliberately or negligently caused. A director or managing director may also be liable for the loss he or she has caused to a shareholder or a third party but, in this case, a violation of other provisions of the Finnish Companies Act or the articles of association is required in addition to the breach of duty of care.

According to the Finnish Companies Act, the company may bring an action for damages against a member of the board or the managing

director for damage that said member of the management has caused in a violation of their duty of care.

If it is considered likely that the company will not make a claim for damages against the directors, shareholders who alone or together hold at least one-tenth of all shares have the right to bring an action in their own name for the collection of damages to the company. Every shareholder has the right to bring the said action if it is proven that the non-enforcement of the claim for damages would be contrary to the principle of equal treatment of shareholders.

In Finland, class actions are applicable only in consumer protection-related disputes. Since there is a risk for the claimant to have to compensate the defendant for legal and other costs in case the claimant does not prevail, and since alleged violation of the duty of care may only be primarily invoked by the company, legal actions by shareholders against the company and directors are fairly rare. Decisions of the board are, in practice, very difficult to appeal against in court. Finally, whereas decisions of the general meeting may be appealed against, it may take several years to reach a final non-appealable verdict. Consequently, strike suits and similar legal actions are not common in Finland.

Company response strategies

12 What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

Even if shareholder activism has historically been on a relatively low level in Finland, it is increasing worldwide. The boards of Finnish companies should, consequently, familiarise themselves with the strategies of the activists and how these are pursued in other countries. Companies need to take potential shareholder activism seriously. The short selling activity in Finland has been above the EU average, and the Finnish securities markets seem to gain interest from international hedge funds. This may indicate a future increase in shareholder activity in Finnish companies, and companies should at least acknowledge the existence of next-generation shareholder activist strategies. An activist might try to use certain investment strategies in order to gain voting rights significantly exceeding their economic exposure in the target company, or even reverse their risk position compared with the target company and other shareholders, and therefore pursue undertakings or decisions that may be harmful to the target company.

As part of good corporate governance, companies should further review their corporate governance statements and other corporate governance-related material on a regular basis.

In particular, companies with a diversified shareholder base and a relatively high trading liquidity of the company's share should take appropriate measures. These companies should at least monitor significant changes in the shareholdings of the company, even if the possibility of shareholder activism is low. Activism-related situations are usually instigated and escalated quickly. Good, transparent corporate governance, together with a solid strategy for the company, will lower the risk for uncontrolled shareholder activism.

13 What structural defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

Finnish corporate governance framework is guided by the principle of equal treatment of the shareholders and the benefit of the company. In general, the board needs to carefully analyse to what extent it may engage in defensive actions.

Owing to the principle of equal treatment of shareholders, the board must take a neutral role in relation to the shareholders and intra-shareholder relationships. Consequently, the board is prevented from actively interfering in or resisting proposals for the general meeting regarding, for example, possible changes in the composition of the board.

When dealing with shareholders' proposals, the board may, however, freely define the content and scope of company benefits on a case-specific level. The board may not pursue, or even investigate further, shareholders' initiatives if the said initiatives are not in accordance with the benefit of the company, or would breach the principle of equal treatment. In addition, if the board considers concrete measures of shareholder activists to be contrary to the interest of the company, it may take action in order to mitigate the adverse effects of such measures, while maintaining neutrality in intra-shareholder relationships.

It is possible to have dual-class stock, and different share series may grant variant voting and other rights as stipulated in the articles of association. The transformation from single-class stock to dual-class stock in a listed company can, however, be a laborious process and may require the consent of the shareholders whose rights would be deferred thereby.

Redemption clauses are recognised under the Finnish Companies Act. However, the rules of the Helsinki Stock Exchange require free tradability of the shares of a listed company, which narrows the possibility of using redemption clauses in a listed company.

It is possible to introduce staggered boards in Finnish companies. The articles of association may stipulate how, and by whom, at most half of the directors are elected. Only the party eligible to elect the director in question may terminate the services of said director during the term of office. It is also possible, in the articles of association, to provide for a longer term of office for the directors. Staggered boards are not typically used in Finland because they are not considered as being in line with good corporate governance, which assumes that directors are elected every year.

There has not been significant movement to limit or increase the takeover defences available to Finnish companies recently.

14 May shareholders have designees appointed to boards?

For the purposes of the election procedure, activist designees are comparable to any new board member. The matter is prepared by the nomination board of the company concerned, and resolved by the general meeting. Typically, the matter is not subject to any agreement but rather to the procedural rules of the company concerned regarding the election of board members.

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

The articles of association of Finnish companies are publicly available from the Trade Register, maintained by the Finnish Patent and Registration Office.

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

According to the Finnish Companies Act, the share and shareholder register must be accessible to everyone at the head office of the company. The right to access the shareholder information is limited to the share and shareholder register, and therefore companies are not required to provide more detailed information about the shareholders than the said register.

The Finnish companies listed on the Helsinki Stock Exchange are required to use the digital book entry securities system. The shares are listed as book entries in shareholders' book entry accounts, and company-specific share and shareholder registers are updated in the book entry system and electronically available from the company or relevant registrar.

The right to access the share and shareholder register is not limited to the shareholders of the company but concerns anybody presenting a request in this respect.

Failure to keep the share and shareholder register available is penalised in the Finnish Companies Act as a company law violation.

17 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

As a general rule, companies are not obliged to disclose contacts from shareholder activists, nor how shareholders may communicate directly with the board. However, under certain circumstances shareholder engagement efforts may trigger an obligation to disclose information under the Finnish Securities Market Act and Market Abuse Regulation (596/2014). For example, if the activist makes a proposal that requires concrete actions by the board and which is of such a nature that is likely

to have a material effect on the value of the company's shares or other security, then the disclosure obligation may be triggered.

Fair disclosure is governed by the Finnish Securities Market Act. Pursuant to the fair disclosure rule, if a listed company discloses to a third party any information that has not been publicly disclosed and that is likely to have a material effect on the value of a security, the information must be publicly disclosed simultaneously. If the disclosure to the third party is planned in advance, the disclosure to the public must be simultaneous and in the case of unplanned or accidental disclosure to the third party, the listed company must disclose the information to the public without delay.

Pursuant to the Finnish Securities Market Act, the information will be disclosed in a manner ensuring fast and non-discriminatory access to the information. The company shall disseminate the information to the key media and make the information available on its website. In addition, filing of the regulated information with the officially appointed mechanism appointed by the Finnish Ministry of Finance is required, as well as to the Finnish Financial Supervisory Authority and the operator of the regulated market in question. In addition to the disclosure rules of the Finnish Securities Market Act and Market Abuse Regulation, the board must consider the applicability of the Finnish Companies Act's principle of equal treatment of shareholders. The fact that the recipient is under a duty of confidentiality may create an exception to the fair disclosure rule.

18 Do companies receive daily or periodic reports of proxy votes during the voting period?

Not applicable in Finland.

19 Must shareholders disclose significant shareholdings?

The obligation to disclose major shareholdings and proportions of voting rights in a listed company is set in Chapter 9 of the Finnish Securities Market Act.

Shareholders are required to notify the company and the Finnish Financial Supervisory Authority when shareholder's holdings or voting rights exceed or fall below 5, 10, 15, 20, 25, 30, 50 or 90 per cent or two-thirds of the voting rights or the number of shares in the company. When the company receives said notification, it must publicly disclose the notification without unnecessary delay.

The notification obligation is primarily aimed towards, but not limited to, the shareholder. In certain situations, the notification obligation is also applied to a person comparable to a shareholder, such as a person who exercises control of the shareholder. Also, agreements and other arrangements, such as derivative instruments that entitle someone to ownership of shares or to the voting rights of shares, trigger the notification obligation.

Failure to disclose significant shareholdings may lead to warning from the Finnish Financial Supervisory Authority, and gross negligence or intentional failure to disclose is punishable under the Finnish Penal Code (19 December 1889/39, as amended).

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

Shareholders acting in concert are subject to mandatory bid requirements set in the Finnish Securities Market Act. Pursuant to the Finnish Securities Market Act, 'persons acting in concert' means natural or legal persons who cooperate with the shareholder, the offeror or the company by basis of an agreement or otherwise aim to acquire significant control in the company or to frustrate the successful outcome of a takeover bid. The applicable thresholds for the triggering of a mandatory bid obligation are 30 per cent and 50 per cent of the votes represented by all the company shares.

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders?

In all communications, the listed companies must comply with the disclosure duties and the principle of equal treatment of shareholders. Companies may not publish misleading information, and information materially affecting the value of the company's share must be published without undue delay. Given that the disclosure duties are complied with, companies may use any media platform. However, it is rare to use, for example, social media platforms in shareholder activity-related matters. Companies in Finland do not solicit votes from shareholders.

22 Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

It is uncommon to have organised shareholder engagement efforts relating to shareholder activism. Otherwise these efforts, such as roadshows (eg, when seeking new investors), are commonly used.

23 Are directors commonly involved in shareholder engagement efforts?

Directors are not usually involved in these engagement efforts.

Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

The board is bound to act with due care and promote the interests of the company, and it is obliged by the principle of equal treatment of shareholders. There is no different standard of care applicable to proposals from activists. The board is not allowed to make decisions or take any other measures that are conducive to conferring an undue benefit to a shareholder or another person at the expense of the company or another shareholder. Therefore, the board must carefully consider that it will not breach the duty of equal treatment if it decides to cooperate with the activist or oppose the activist.

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As a general rule, shareholders do not have any fiduciary duties towards the company or other shareholders. However, in some circumstances shareholders, especially a controlling shareholder, may be held liable for damages if a shareholder's contribution has led to an illegal resolution of the general meeting. In some rare cases, a controlling shareholder may also have a duty to redeem other shareholders' shares. The duty to redeem other shareholders' shares requires continuous and deliberate abuse of influence in the company by contributing to a decision contrary to the principle of equal treatment, or to other violations of the Finnish Companies Act or the articles of association.

France

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General

1 What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

Shareholder activism is not as widespread in France as it is in the United States. France has long considered itself immune to activism, but despite the rather unfriendly legal environment for activists, France has recently become one of the largest markets for shareholder activism in Europe (FTI Consulting, 'Global Activism On The Rise: A 2017 Update', 28 July 2017). Between 2010 and July 2017, there were approximately 34 shareholder activism campaigns in France. During the past two years, the most important and efficient campaigns included (i) Swedish Cevian Capital's campaign against Rexel, which resulted in the removal of Rexel's chief executive officer and most members of its executive committee (2016), (ii) the French Charity & Investment Merger Arbitrage Fund's campaign against the cash tender offer of Altice over SFR, which led the French stock market regulator (AMF) to refuse to grant a clearance to the transaction in 2016 and (iii) the UK/US Children Investment Fund (TCI)'s campaign against the takeover of Zodiac by Safran, which resulted in the renegotiation and restructuring of the transaction in 2017.

Over the past 20 years, French law has increased the rights of shareholders with respect to governance-related matters. French shareholder activism legislation began with the recognition of the right of investor associations to claim collective damages for expropriated shareholders. Shareholder activism was further strengthened by the right granted to investor associations mandated by expropriated shareholders to claim individual damages. Another significant step was taken by the law of 2 July 1996, which granted shareholders of listed companies the right to create associations aiming at representing their interests within the company, provided that they hold at least 5 per cent of the voting rights and can prove an ownership of registered shares for at least two years.

In addition, the New Economic Regulation Law of 2001 increased the rights of shareholders and in effect permitted proxy fights in France. This reform enabled shareholders to vote by mail, and reduced from 10 per cent to 5 per cent the percentage of voting rights required to propose a resolution at shareholders' meetings. Also, a 2006 decree further amended in 2014 provided that the record date for a shareholders' meeting must be set two days before the meeting, thereby permitting shareholder activists to continue to acquire shares until just a few days before the shareholders' meeting.

Finally, the implementation in the French Commercial Code in 2011 of Directive No. 2007/36/EU on the exercise of certain shareholder rights in listed companies (i) further increased shareholders' rights at general meetings by providing expanded information to shareholders and facilitating the addition of draft resolutions to a shareholders' meeting agenda by shareholders and (ii) created a legal framework for active proxy solicitation by requiring anyone who actively solicits proxies to announce his or her voting policy (see question 21). This Directive has recently been amended by Directive No. 2017/828 dated 17 May 2017, to promote long-term investments and increase the transparency between issuers and investors, in particular by (i) enabling issuers to discretionarily identify their shareholders, (ii) introducing a mandatory shareholder vote on the compensation of directors and corporate officers and (iii) requiring institutional investors to publish their shareholder engagement policy and proxy agencies to publish a code of conduct (see question 13). This Directive must be implemented by the EU member states by 10 June 2019.

In France, shareholder activism legislation and regulation are enforced by the courts.

2 What are the other primary sources of practices relating to shareholder activism and engagement?

Over the past few years, new practices relating to shareholder activism have emerged. In particular, governance codes (such as the AFEP-MEDEF, the MiddleNext and AFG codes), which recommend best practices for executive compensation and appointment of board representatives, offered a new source for shareholder activism.

The best example of the power of governance codes on shareholder activism was the introduction of the 'say-on-pay' by the AFEP-MEDEF corporate governance code in 2013, in the aftermath of several scandals concerning executive compensation. This rule has now been introduced into current French law by the Sapin Law of 9 December 2016, pursuant to which shareholders must vote (i) ex ante on the principles and rules determining the compensation of directors and corporate officers and (ii) ex post on the payment of variable and exceptional compensations to such persons.

In addition, proxy agencies also use their voting recommendations in favour of, or against, company resolutions to reduce information asymmetry between shareholders, thus potentially affecting the outcome of general meetings.

3 How is shareholder activism generally viewed in your jurisdiction? Are some industries more or less prone to shareholder activism? Why?

Shareholder activism has now become a source of concern for the directors and officers of French companies. Activist shareholders are often regarded by the French media as 'aggressive speculators' or 'short-term investors', especially because of the emerging 'short selling activists' who bet on the decline in the share prices of their targets. This happened when Muddy Waters published a report stating that the accounts of Casino were hiding declining activities and a high debt profile, resulting in a sharp fall of the share price (2015/2016). The AMF is currently investigating this complex matter for dissemination of false information.

In France, no industry leans more or less towards shareholder activism (see question 5).

4 What are the typical characteristics of shareholder activists in your jurisdiction?

Investor associations (such as the Association for the Defence of Minority Shareholders (ADAM), the National Association of French Shareholders and the association Regroupement PPlocal) have had a very significant role in French shareholder activism for more than two decades.

In 2017, ADAM has been very active in (i) joining forces with TCI in the campaign against the takeover of Zodiac by Safran (see question 5), (ii) challenging the reorganisation of the share capital of Crédit Agricole by launching claims against its regional banks (Crédit Agricole

Sud Rhône Alpes, Crédit Agricole Nord de France, Crédit Agricole Toulouse and Crédit Agricole Touraine Poitou) and (iii) obtaining the indictment of Natixis for misrepresentation and delivery of misleading financial information during the 2007 financial crisis.

However, even as the role of investor associations remains important, new actors, such as hedge funds and proxy agencies, are emerging in the French market. With the percentage of voting rights required to submit resolution proposals at a shareholders' meeting reduced to 5 per cent, investment entities and hedge funds have started targeting French companies and playing an important role in their governance. They typically hold minority shareholdings in undervalued companies and demand that they take governance and strategic actions to improve the share price.

Proxy agencies have also become major actors of shareholder activism in France because asset management companies rely principally on voting recommendations provided by proxy agencies. The most influential proxy agencies are: Proxinvest; Glass, Lewis & Co; PhiTrust Active Investors; the French Asset Management Association (AFG); and RiskMetrics. Proxy agencies analyse corporate governance practices and resolutions proposed at general meetings of listed firms and provide advisory services, including voting recommendations and solicitation services. Their principal objective is often viewed as promoting and encouraging better corporate governance practices generally rather than improving a company's share price.

5 What are the main operational and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

In France, shareholder activism focuses principally on (i) CEO and top management compensation, (ii) governance and (iii) mergers and acquisitions activities (including takeover bids and capital increases). This trend is consistent with the figures provided in 2016 by Activist Insight for Europe (*Option Droit & Affaires*, 'Les activistes: un mal necessaire?', October 2016) which show that European shareholder activism addresses particularly board-related matters (50.9 per cent), M&A-related issues (18.9 per cent), and compensation topics (9.4 per cent). As in Europe, French shareholder activism rarely focuses on environmental and political issues.

In particular, we have recently seen numerous and vigorous activist campaigns concerning M&A activities. For instance, Safran and Zodiac announced their combination in January 2017 by way of a cash tender offer (in which the family shareholders of Zodiac would not participate) followed by a merger of Zodiac with and into Safran. TCI (which at the time held a 4 per cent stake in Safran) immediately challenged the transaction, arguing, inter alia, that Zodiac was overvalued, that the shareholders were not consulted beforehand and that there was an unequal treatment between the family shareholders and the minority shareholders; TCI also applied strong public pressure by sending letters to the chairman of the board of Safran and to the AMF and by threatening claims against Safran's directors. Safran eventually renegotiated new financial conditions in the aftermath of yet another profit warning of Zodiac, including, in particular, a discount of circa €1 billion in the valuation of Zodiac.

In addition, shareholder activists in France often address executive compensation and golden parachute issues.

Executive compensation, governance concerns, M&A activities and/or structural underperformance, alone or combined, are the main factors attracting the attention of activist shareholders. In these contexts, activist shareholders find opportunities to apply pressure on the company to find alternative actions and strategies in order to enhance shareholder value. For instance, the acquisition by Corvex Management of 0.8 per cent of the share capital of Danone for an amount of US$400 million in July 2017 was expressly motivated by the fact that Danone was alleged to be undervalued.

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

Except with regard to the removal of one or more directors or supervisory board members and their replacement, the shareholders' meeting cannot make a decision that is not on the agenda.

One or more shareholders representing at least 5 per cent of the share capital of a company, or a recognised shareholders' association whose members hold together at least 5 per cent of the voting rights, is entitled to request the inclusion of items for discussion or draft resolutions in the agenda of a shareholders' meeting.

The request must be sent at least 25 days prior to the date of the meeting. Any such items and draft resolutions must be included in the agenda and sent to shareholders with all of the other documents relating to the meeting. Companies whose stock is listed on an exchange are also encouraged to include the names and addresses of the proposing shareholders (so that other shareholders can reach out to them) and, to the extent available, an explanation of the proposed resolutions.

In addition, French law allows one or more shareholders representing at least 5 per cent of the voting rights to make inquiries in writing to the chairman of the board of directors about management decisions. In the absence of a satisfactory response within one month, these shareholders may request that the French courts appoint an independent expert to inquire about these matters.

Furthermore, one or more shareholders representing at least 5 per cent of share capital may make written inquiries twice a year to the chairman of the board of directors about any matter likely to jeopardize the continued operation of the company. The chairman of the board must reply within one month and such response is communicated to the statutory auditors of the company.

7 What common strategies do activist shareholders use to pursue their objectives?

The activist shareholders' strategy is typically based on two stages.

The first stage is confidential and consists of private discussions between activist shareholders and management in order for activist shareholders to present their analysis and requests. If they cannot reach an agreement, then the second stage might begin.

The second stage is more hostile: activist shareholders and managers publicly confront the opposing positions. In addition to exercising their right to submit discussion items and resolution proposals, as discussed above, in order to pursue their objectives, shareholder activists mostly make use of their right to submit written questions prior to general meetings. In addition, they often use the public media (press releases, open letters, interviews, etc) to advertise their positions. In extreme cases, activist shareholders do not hesitate to bring the action before French commercial courts in order to add pressure on the target company and, in particular, file a claim for (i) the appointment by way of summary judgment of one or more experts to submit a report on one or more management transactions (see question 6), (ii) the appointment of a designee to convene a general meeting if the board of directors or the executive board failed to do so (see question 8) or (iii) mismanagement by directors and officers, as in the Safran/Zodiac campaign.

The board of directors of a French company is required to respond during a shareholders' meeting to written questions submitted by shareholders prior to the meeting.

Certain shareholder activists also write directly to the AMF to allege that certain practices of a target company are contrary to best corporate governance practices and shareholder rights. For instance, in 2015, Proxinvest submitted five written questions to the AMF and Alcatel concerning the information provided to Alcatel's shareholders regarding the golden parachute and the non-competition payment to be made to its departing CEO.

Also, shareholder activists in France often publicise their positions and use two principal means to achieve this goal: issuers' annual reports as well as press releases and media interviews. Proxy agencies publish annual reports on their websites. In these reports, proxy agencies present their analysis of the governance practices of listed companies, sometimes even using the 'name and shame' card to draw attention to what they believe are undeserving companies. They sometimes also provide advice to companies in order to improve their governance. More generally, activist investors in France use the media to spearhead their voting campaigns. For example, in 2014, proxy agencies went public to criticise the automatic allocation of double voting rights to shares held in the registered form for at least two years provided by French law and encouraged shareholders to vote against double voting rights. However, the use of social media by French activists remains in the early stages.

8 May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

First, shareholders' meetings may be called by a successful bidder who holds more than 50 per cent of the shares or voting rights of a company following a tender offer or the acquisition of a majority interest in the relevant issuer, if the board of directors of the issuer has failed to so convene a shareholders' meeting despite a request by the new majority shareholder. This provision enables successful bidders to quickly replace incumbent board members (and, as applicable, senior management) if they do not resign or no amicable arrangement is found for their replacement.

In addition, as a general French corporate law matter, if the board of directors or the executive board failed to do so, shareholders' meetings may be convened either:

- by any interested party in the event of an emergency; or
- by one or more shareholders who together hold more than 5 per cent of the share capital, including, with respect to listed companies, through an association of shareholders.

In order to call a shareholders' meeting, the applicant must file, at its expense, a request with the president of the commercial court acting in summary proceedings. The president of the court will verify that the request is in the interests of the company and does not relate solely to the private interests of the claimant. If the president of the commercial court grants the request, he or she then appoints a designee responsible for convening the meeting and determining the agenda.

In principle, general meetings of shareholders must be held physically. However, the Sapin Law authorised non-listed companies to hold general meetings by exclusive use of videoconferencing or telecommunication means. This possibility must nevertheless be provided for in the by-laws, and shareholders representing at least 5 per cent of the share capital may request the convening of a physical general meeting.

9 May directors accept direct compensation from shareholders who nominate them?

In their capacity as directors of a French corporation, directors are to be compensated by the company only and cannot receive any direct compensation from the shareholders who nominate them.

10 May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

Shareholders are entitled to request the inclusion of a draft resolution proposing the appointment of a director to the agenda of a shareholders' meeting, in which case the draft resolution must be circulated by the company to all shareholders. See question 6, concerning the right of shareholders to submit resolution proposals.

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

Officers and directors may be held liable, individually or jointly, as regards the company or third parties, as a result of mismanagement. The qualification of 'mismanagement' is left to the relatively broad interpretation of the court.

Company legal actions against a director or an officer are engaged through the company's corporate officers, failing which French law also allows any stockholder (or a group of stockholders under certain conditions) to initiate a derivative action known as the 'ut singuli' action against a director or officer in order to obtain compensation for damages suffered by the company as a result of a mismanagement by the company's CEO or members of the board. Any damages awarded are paid to the company despite the fact that the legal action is brought at the shareholders' expense. In addition, any stockholder may engage an action against a director or officer in order to have its personal damage compensated to the extent such damage is distinct from the damage caused to the company, although such cases are rare.

Shareholders are not entitled to bring class actions on behalf of all shareholders. The new class actions regime introduced into French law allows only consumer associations to bring class actions against companies, but only with respect to consumer goods.

French Law prohibits provisions of by-laws that limit director or officer liability.

Company response strategies

12 What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

Corporate boards are finding that offence may be the best defence when dealing with shareholder activism. To that end, it is imperative that companies be well prepared, and thus they try and identify the issues which could attract activists' attention. To this effect, executives should (i) regularly review corporate governance policies (composition of the board, appointment and removal of directors, executive compensation, etc.), (ii) evaluate strategic and transaction alternatives to improve the company's performance and (iii) pay attention to proxy agencies' recommendations in order to anticipate institutional investors' voting policy.

Companies might also consider establishing a White Paper listing ideas and suggestions for enhancing shareholder value. For instance, this paper could analyse the strategic initiatives to be undertaken by the company to maximise shareholder value and whether:

- management has recently become distracted by non-core businesses and needs a strengthened focus on the company's core business;
- executive compensation has been sufficiently correlated with the company's performance;
- executives are sufficiently motivated to enhance shareholder value; and
- the company has been proactive enough in publicly disclosing its recent successes and accomplishments.

In addition, executives should pay attention to their relationships with the company's main shareholders and maintain an ongoing dialogue with all shareholders to provide them with feedback on significant company issues (eg, by posting reports and videos on the company's website, platforms and social media). This communication will enable management to better understand the view of the market and help investors understand the business model of the company and its capital allocation decisions.

Finally, executives should be attentive to the policies and recommendations of institutional shareholders.

13 What structural defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

Structural defences available to French companies are very limited. Only a small minority of companies have adopted the equivalent of US poison pills.

Current structural defences used to fight shareholder activism include:

- the introduction of an article in the by-laws to require the disclosure of certain shareholdings thresholds that are lower than those provided for in the French Commerce Code (ie, between 0.5 per cent and 5 per cent; see question 19);
- the implementation of a double voting rights system to the benefit of long-term shareholders whose shares are held for at least two years;
- the capping of voting rights. For example, voting rights are capped at 30 per cent per shareholder at Pernod Ricard regardless of how many shares are held by such shareholder; and
- the stabilisation of the share capital of the company through the combination of the main shareholders into a joint holding company or the conclusion of a shareholders' agreement to organise their rights and obligations with respect to the governance and the share capital of the company.

Other companies have adopted the corporate form of a French *société en commandite par actions*; in other words, a partnership with general partners bearing unlimited liability and shareholders with limited liability, to protect the incumbent management (eg, Hermès, Lagardère, Michelin). The articles of association of this form of

company may include provisions that make it very difficult to replace management. In addition, certain French issuers include in their global portfolio regulated activities (eg, sensitive contracts with the French government) so that a change in their control may only occur with the prior approval of the French government or other regulatory authorities.

14 May shareholders have designees appointed to boards?

Significant shareholders often seek board representation rights with the issuer. If the situation is not hostile and the circumstances warrant it, companies are sometimes amenable to entering into an agreement providing for board representation rights. Pursuant to these agreements, which must be disclosed publicly, the issuer typically undertakes to propose and support the appointment of a designee of the large shareholder. In exchange, the large shareholder typically agrees to support the strategy of the company. As a matter of corporate law, any board member, whether appointed as a designee of a large shareholder or not, represents all of the shareholders and must act in the company's best interests.

While some of these agreements provide for a standstill obligation by the large shareholder (ie, an undertaking not to purchase shares of the company beyond an agreed threshold), standstill obligations are not always negotiated (and, when they are, they typically provide for customary exceptions; eg, if a third party acquires a significant interest in the company or launches a takeover bid).

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

The company by-laws are publicly available on the commercial register (at www.infogreffe.com). In addition, the AMF recommends that listed companies publish an updated version of their by-laws on their website.

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

The AMF recommends that listed companies provide in their annual reports a table setting out the allocation of their share capital and voting rights as of the end of the past three years. This ownership table should list shareholders in order of decreasing level of ownership and show the most important sub-categories of shareholders (eg, shareholders belonging to the same group of companies, family groups and shareholders acting in concert) and, as applicable, certain specific groups of shareholders (eg, employee shareholding and treasury shares). The ownership table may also provide an explanation of significant changes in share capital and voting rights over the last three years (including acquisitions, transfers, allocation of double voting rights) together with references to threshold-crossing notices and, if applicable, statements of intent (see question 19).

Moreover, companies must establish a list of their shareholders 16 days before the shareholders' meeting. The list must individually identify the shareholders holding their shares in the registered form and indicate the number of shares held and the shareholders holding their shares in the bearer form. Any shareholder of the company has the right to obtain the communication of this list at the head office of the company at any time during the 15 days preceding the meeting.

17 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

The AMF recommends that listed companies create a shareholder consultative committee in order to improve the quality of the company's communications with its individual shareholders (better organisation of the general meetings or studies to better address shareholder expectations). Listed companies usually disclose information on this committee either in their annual reports (eg, shareholder consultative committee's role, members, etc) or on their websites (eg, shareholder consultative committee's internal regulation, dates of meeting, minutes, materials of presentations and so on).

Companies also regularly interact with shareholders through different forms and tools ranging from the company website to the shareholder newsletter, the shareholder guide, the shareholder club, shareholder meetings, financing training courses, etc. Each company aims to choose the solutions that offer the best fit with its shareholder relations strategy.

Even if companies have closer relationships with certain shareholders (see question 22), they must make sure that all shareholders are provided with the same level of information. Equality of information is at the cornerstone of French securities and corporate laws.

18 Do companies receive daily or periodic reports of proxy votes during the voting period?

During the period of time that precedes a shareholders' meeting, companies receive written voting proxy forms from shareholders who cannot attend the meeting. These proxy forms must be:

- mailed to the company at least three days prior to the meeting, unless a shorter period has been provided by the by-laws; or
- electronically sent to the company by three o'clock in the afternoon on the day prior to the meeting, in the case of electronic voting proxy forms.

Moreover, as the authority responsible for monitoring the quality of information provided to investors in France, the AMF has issued a recommendation for proxy advisors addressing (i) the establishment and the implementation of voting policies, (ii) the issuance of voting recommendations, (iii) the communication channels with listed companies and (iv) the prevention of conflicts of interest. In this respect, the AMF recommends that proxy agencies send their reports on the proposed resolutions to the companies and their shareholders. In their reports, proxy agencies should provide their voting recommendations for each resolution, thereby allowing issuers to be aware of the likely position of those shareholders who follow proxy agencies reports.

19 Must shareholders disclose significant shareholdings?

Under French law, any person or legal entity who, acting alone or in concert, holds shares representing more than 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, one-third, 50 per cent, two-thirds, 90 per cent or 95 per cent of the capital or voting rights of a listed company must inform the company and the AMF of the total number of shares and voting rights so held within four trading days.

A failure to comply with this disclosure requirement:

- results in the cancellation of the voting rights attached to the shares exceeding the threshold for which notice has not been duly made for all shareholders' meetings held during a two-year period;
- may result in all or part of the shares held by the defaulting shareholder being deprived of voting rights for a maximum period of five years, if a competent commercial court so decides;
- may expose the defaulting shareholder (as well as its directors and executive officers) to administrative sanctions by the AMF; and
- may, after consultation of the AMF by the public prosecutor, expose the defaulting individuals, to a criminal fine of €18,000.

Update and trends

Shareholder activism is becoming a permanent and important feature in the French market.

In particular, recent reforms are likely to encourage shareholder activism in France, such as the 'Sapin law' dated 9 December 2016, which implemented a mandatory say-on-pay pursuant to which shareholders must vote on the principles determining directors' and corporate officers' compensation and the payment of variable and exceptional compensations to such persons or, the new Directive dated 17 May 2017, which aims to promote long-term investment and transparency between issuers and investors.

In addition, a noteworthy trend in the French market is the strengthening of shareholder activism in relation to M&A transactions, including the vigorous battle between TCI and Safran about the acquisition of Zodiac by Safran or the French Charity & Investment Merger Arbitrage Fund's campaign against the cash tender offer of Altice over SFR, which attracted public scrutiny and mass media attention.

In addition, upon crossing the thresholds of 10 per cent, 15 per cent, 20 per cent and 25 per cent of the capital or voting rights, the relevant shareholder must also inform the company and the AMF, within five trading days, of its objectives for the following six-month period, by stating:

- the means of financing the share purchases;
- whether it is acting alone or in concert;
- whether it intends to continue to purchase shares or not;
- whether it intends to take the control of the target;
- whether it intends to request the appointment of new board members;
- its strategy relating to the target and actions required to implement it;
- any temporary securities transfer agreement; and
- its intention with respect to the settlement of any equity or cash-settled derivatives it may own.

If the acquirer's stated objectives change during the following six-month period, it must file a new statement to run for a further six-month period.

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

Shareholders who, acting alone or in concert, cross the threshold of 30 per cent of the share capital or voting rights of a listed company, or, for those who hold between 30 per cent and 50 per cent of the share capital or voting rights of a listed company, increase their shares or voting rights by more than 1 per cent over a rolling 12-month period, must file a mandatory tender offer for the remainder of the share capital and voting rights of the company.

Under French law, persons acting in concert are those who have entered into an agreement to buy or sell or exercise voting rights in order to implement a common policy or to acquire the control of a company. The following persons are deemed to be acting in concert (which presumption may be rebutted if the facts so allow):

- a company, the chairman of its board of directors and its chief executive officer;
- a company and the companies it controls;
- companies controlled by the same person or people; and
- the shareholders of a simplified joint-stock company and the companies controlled by this company.

Shareholders acting in concert are jointly and severally bound by the obligations imposed on them by applicable laws and regulations, including the above-mentioned mandatory bid requirements and disclosure requirements (see question 19).

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders?

French law provides for a formal soliciting votes procedure. Anyone who actively solicits proxies, by proposing directly or indirectly to one or more shareholders, in any form and by any means whatsoever, to receive a proxy to represent them at the meeting of a company mentioned, must announce its voting policy on its website. That person can also announce its voting intentions on the draft resolutions presented to the shareholders. In that case, for any proxy received without voting instructions, the person must vote in a way that is consistent with the voting intentions announced. In practice, when the company sends to the shareholders the draft resolutions to be submitted to the general meeting, it informs them of the voting recommendations proposed by the board of directors of the company. As stated in question 7, the use of social media by French activists remains in the early stages.

22 Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

Over the past few years, French companies (such as Accor, Carrefour, LVMH, Vinci and Total) have tried to strengthen their relationships with individual shareholders by creating shareholders' clubs. These clubs not only offer minor perks to shareholders (eg, special discounts on company goods and services), but also develop an ongoing communication channel between companies and shareholders through newsletters, a dedicated information website, specific newspapers and private meetings with top management teams regarding strategic priorities, outlook, results and dividend policy.

23 Are directors commonly involved in shareholder engagement efforts?

Shareholder engagement efforts are typically led by the senior management of the company, and sometimes with the chairman of the board. However, it remains rare for individual directors to have a significant involvement with the implementation of shareholder engagement efforts.

Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

As a general matter, directors of French companies must consider activists' proposals with the same standard of care as that applied to other board decisions. In practice, given the potential strategic or governance impact of many activists' proposals, directors are likely to pay special attention to these proposals.

Activists who are significant or majority shareholders have a duty not to abuse their positions in a manner that is contrary to the interest of the issuer. Where an activist shareholder is in a position to appoint a board member, it must do so with a view to pursue the best interests of the company, for the benefit of all shareholders and not in a self-interested manner.

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General

1 What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

The primary source of law relating to shareholder activism and engagement is the German Stock Corporation Act (AktG), including the unwritten principle of shareholders' duty of loyalty with respect to the company's and the other shareholders' legitimate interests. Provisions applying only to listed companies (ie, companies the shares of which are admitted to stock exchange trading on regulated markets; section 3(2) AktG) and their shareholders can be found in particular in the EU Market Abuse Regulation (Regulation No. 596/2014/EU, including various accompanying level 2- and level-3 acts), the EU Regulation on Short Selling (Regulation No. 236/2012/EU), the German Securities Trading Act (WpHG) and the German Securities Acquisition and Takeover Act (WpÜG).

The primary sources of laws and regulations relevant for listed companies are either directly applicable EU regulations or are based on EU directives that aim to fully harmonise the capital market laws in all EU member states, such as the EU Transparency Directive (Directive 2013/50/EU amending Directive 2004/109/EC), the EU Market Abuse Directive (Directive 2014/57/EU) and the Shareholders' Rights Directive (Directive (EU) 2017/828 amending Directive 2007/36/EC). Accordingly, the relevant German federal laws, which are acts of parliament, are partially based on EU directives (also see 'Update and trends' for upcoming EU legislation aimed at encouraging long-term investment and shareholder engagement).

Shareholders can enforce their rights generally in front of the civil courts. The breach of specific obligations of the management (concerning, for example, the truthfulness of certain declarations and reports or information provided in shareholders' meetings) can also be prosecuted as a statutory offence (section 399 et seq AktG). Regulations concerning listed companies are enforced by the competent supervisory body (ie, the Federal Financial Supervisory Authority (BaFin)).

Certain industries (eg, banking and insurance) are subject to additional regulations that are supervised and enforced by BaFin or certain EU institutions, in particular the European Securities and Markets Authority (ESMA).

2 What are the other primary sources of practices relating to shareholder activism and engagement?

The legislative requirements are supplemented by the corporate governance rules set forth in the German Corporate Governance Code (DCGK) the non-statutory regulations that apply to listed companies only and operate on a comply or explain basis. The DCGK contains recommendations and suggestions aiming at implementing internationally accepted standards of good corporate governance, and is revised annually by a commission consisting of board representatives of German listed companies and other stakeholders, who are appointed by the German Federal Minister of Justice. Even though the DCGK is not mandatory, it is incorporated into German corporate law via the declaration of conformity ('comply or explain' declaration, see section 161 AktG), which listed companies have to publish on their website annually and which requires them to disclose and explain any deviations from recommendations of the DCGK. Thus, the recommendations of the DCGK are de facto widely accepted. Addressees of the regulations of the DCGK were so far only the company and its statutory bodies (ie, shareholders' meeting, management board and supervisory board). In 2017, a new guiding principle was added to the preamble of the DCGK, which states that institutional investors are of particular importance to companies. They are expected to exercise their ownership rights actively and responsibly, in accordance with transparent principles that also respect the concept of sustainability. However, there are no consequences in the case of non-compliance with these guidelines. Nonetheless, this addition to the preamble of the DCGK is an indication that institutional investors and other shareholders will be in the focus of the legislator when the principles of good corporate governance will be further developed in the near future.

Relevant guidelines can also be found in the Best Practice Principles for Shareholder Voting Research (http://bppgrp.info), which have been issued and adopted by a group of industry members, after public consultation and as a reaction to a report of ESMA on the role of the proxy advisory industry (ESMA/2013/84; follow-up report available at www.esma.europa.eu/sites/default/files/library/2015-1887.pdf).

Further, each year the German Investment Funds Association (BVI) issues analytical guidance notes for shareholders' meetings (www.bvi.de/fileadmin/user_upload/Regulierung/Branchenstandards/ALHV/ALHV_2017.pdf), and similarly the European Fund and Asset Management Association (EFAMA) has issued a Code for External Governance (www.efama.org/Publications/Public/Corporate_Governance/11-4035%20EFAMA%20ECG_final_6%20April%202011%20v2.pdf). Large institutional shareholders have their own guidelines (eg, Allianz Global Investors' Global Corporate Governance Guidelines).

3 How is shareholder activism generally viewed in your jurisdiction? Are some industries more or less prone to shareholder activism? Why?

Initially, the management and large shareholders in German companies were sceptical about activist shareholders. More recently, this perception has changed and became more differentiated, depending on the approach and the quality of the proposals of the activist shareholders. There is a clear tendency that the boards of large listed companies are interested in a dialogue with activist shareholders who make constructive proposals or who can be expected to gain substantial support from other shareholders.

Activist shareholders can expect support from other shareholders, provided these can benefit from the initiative taken by the activist shareholders as well and further provided the initiative is reasonable with regard to the companies' best interests. A rising number of initiatives taken by activist shareholders is aligned with ongoing public discussions about, inter alia, potential corporate governance issues, allegedly poor strategic planning or voluminous management remuneration plans and bonus payments.

The phenomenon seems to appear across all industries. The following prominent companies have been targeted by activists' campaigns in the past:

- Adidas AG (sports and lifestyle);
- Bilfinger SE (construction);
- Celesio AG (pharmaceuticals);
- CeWe Color AG (digital media);

- Conergy AG (solar power);
- Demag Cranes AG (engineering);
- Deutsche Börse AG (stock exchange);
- Deutsche Telekom AG (telecommunications);
- E.ON SE (energy);
- Gildemeister AG/DMG Mori (engineering);
- Hochtief AG (construction);
- Hypo Vereinsbank AG (finance);
- Infineon AG (semiconductors);
- IWKA AG (engineering);
- Kabel Deutschland Holding AG (cable provider);
- KUKA AG (engineering);
- Porsche Automobil Holding SE (car manufacturing);
- Röhn Klinikum AG (health);
- SLM Solutions AG (engineering);
- STADA Arzneimittel AG (pharmaceuticals);
- Ströer SE (digital media, advertisement);
- ThyssenKrupp AG (steel, engineering);
- Volkswagen AG (car manufacturing); and
- Wirecard AG (digital financial services).

4 What are the typical characteristics of shareholder activists in your jurisdiction?

Shareholder activists not only exercise their statutory rights as shareholders, but try to leverage their influence beyond their proportionate shareholding through informal measures (eg, letters to the management, public campaigns, etc). In the public awareness, mainly hedge funds have been viewed as activist shareholders. However, this has changed recently. Some investment funds or private equity investors have acquired substantial holdings and publicly adopted a medium-term or long-term strategy. Some of them have even acquired seats on the boards. Activist shareholders can expect support from other shareholders, provided these can benefit, too, and the proposals are reasonable with regard to the company.

Activist shareholders in this sense must be discerned from (i) shareholders trying to make a short-term profit from well prepared short sale attacks and (ii) notorious claimants who make use of statutory minority rights in order to block resolutions on structural measures adopted by the majority. Contrary to notorious claimants, activist shareholders are strongly interested in their proposals being implemented.

5 What are the main operational, governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

Shareholder activism mainly focuses on the following topics:

- corporate strategy and restructuring measures (eg, Bilfinger and ThyssenKrupp);
- takeover bids (eg, Deutsche Börse, Gildemeister, Kabel Deutschland Holding, Celesio and SLM Solutions);
- corporate governance, in particular changes in composition of management or supervisory board (eg, Infineon, KUKA, STADA and Volkswagen);
- return of value to shareholders (eg, ThyssenKrupp);
- short sale attacks (eg, Wirecard and Ströer);
- debt-for-equity swaps (eg, Conergy); and
- damages claims in Germany and in other jurisdictions (eg, Porsche Automobil Holding and Volkswagen).

Activist shareholders in Germany do not focus on sociopolitical activism (environmental, political, ethical, or gender discrimination). There are small non-profit organisations with typically very small shareholdings that use shareholders' meetings as a platform to bring forward their views on these topics.

Other factors that attract the attention of shareholder activists are:

- a high free float (in particular because of traditionally low attendance of free float at shareholders' meetings in Germany);
- a specific capital structure, for example, significant cash positions or defensive financial gearing or strong cash generation opportunities not being utilised;
- an unsatisfactory share price performance or a vague business strategy, which leads to poor business prospects;
- a conglomerate structure; and
- takeover and restructuring situations.

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

Shareholders' proposals concerning items of the agenda of a Shareholders' meeting (counter proposals)

At shareholders' meetings, every shareholder is entitled to speak, to ask questions (section 131 AktG) and to make proposals directed against proposals of the management or the supervisory board under specific items of the agenda (section 126 AktG). Shareholders are not required to notify the company in advance of such proposals, but if the company receives such a proposal including the shareholder's name and the reasons for the proposal in writing at least 14 days before the relevant meeting, the proposal (including shareholder's name and reasons) must be made accessible to other shareholders as well as to certain institutions and persons mentioned in section 125(1)-(3) AktG. This usually means that such proposals are published on the company website. For listed companies, publication on the company website is mandatory (section 126(1) AktG). Only in exceptional circumstances (such as section 126(2) AktG) would the company not need to make proposals accessible. If several shareholders present proposals in respect of the same subject, the management board may combine such proposals and respective statements of the reasons (section 126(3) AktG), without curtailing or corrupting the proposals.

Shareholders' proposals concerning other subjects

Shareholders' proposals concerning subjects other than items on the agenda are only admissible if the agenda is amended accordingly. Only shareholders individually or collectively holding shares representing at least 5 per cent or €0.5 million (or less if stated in the corporate charter) of the company's capital stock may request that additional items be placed on the agenda of a shareholders' meeting (section 122 (2) AktG). Requests, including the reasons or a draft resolution, must be addressed to the company's management board in writing and must be received by the company at least 24 days (in case of non-listed companies) or 30 days (in case of listed companies) prior to the shareholders' meeting. Requesting shareholders must prove that they have held the sufficient number of shares (quorum) for the legally required minimum period of ownership of 90 days, which has to be calculated from the date of receipt by the company.

As long as shareholders comply with the formal requirements, there are few reasons why a company may reject such request; for example, if the request is directed at a resolution which would be unlawful, or if the request constitutes an abuse of shareholder rights or conflicts with the shareholder's duty of loyalty.

Amendments to the agenda of non-listed companies must be made public in the Federal Gazette (or by registered mail to all shareholders if they are known to the company and the corporate charter does not stipulate differently; section 121(4) AktG), either upon calling the meeting or immediately following receipt of the request. Listed companies must publish amendments to the agenda on their website (section 124a AktG) and, if the company has issued bearer shares, forward the information to the media (section 121(4a) AktG).

If the company does not comply with such request, relevant shareholders may apply to the competent court (ie, the local court at the registered seat of the company) for authorisation to amend the agenda and to publish such amendment accordingly at the company's cost (sections 122(3) and (4) AktG).

Common shareholders' proposals

Naturally, the type of shareholders' proposals depends on the company involved, but common subjects are:

- counterproposals regarding profit distribution;
- proposals of supervisory board candidates;
- the appointment of special auditors (sections 119(1) No. 7 and 142 AktG);
- the enforcement of certain compensation claims against board members or other persons; and
- the appointment of special representatives to enforce these claims (section 147 AktG).

Mandatory voting rights
The shareholders' meeting is competent only as far as expressly provided for by corporate law or by the corporate charter. The following examples are particularly relevant:

- amendments of the corporate charter (sections 119(1) No. 5 and 179(1) AktG);
- appointment and removal of members of the supervisory board, as far as they are not appointed under the co-determination regime (sections 119(1) No. 1 and 103(1) AktG);
- allocation of distributable profits (section 119(1) No. 2 AktG);
- approval of the actions of the members of the management and supervisory board (section 119(1) No. 3 AktG);
- appointment of the company auditor (section 119(1) No. 4 AktG);
- capital increase or reduction (section 119(1) No. 6 AktG);
- management matters put before the shareholders' meeting by the management (section 119(2) AktG);
- decisions of major importance for the company such as major divestments or drop-downs (based on (controversial) case law known as the 'Holzmüller/Gelatine-doctrine');
- appointment of special auditors (sections 119(1) No. 7 and 142 AktG);
- enforcement of certain compensation claims against board members or other persons (section 147(1) AktG) and appointment of special representatives to enforce these claims (section 147(2) AktG);
- liquidation of the company (sections 119 (1) No. 8 and 262 No. 2 AktG) as well as the continuation of a liquidated company (section 274 AktG);
- transfer of substantially all of the company's assets (section 179a(1) AktG);
- issuing convertible, warrant or dividend bonds as well as participation rights (section 221 AktG);
- affiliation agreements (section 293(1),(2) AktG);
- integration of one stock corporation into another (section 319 AktG);
- squeeze-out (section 327a AktG); and
- restructuring measures (changes of the legal form, mergers, demergers under the Merger and Reorganisation Act (UmwG)).

7 What common strategies do activist shareholders use to pursue their objectives?

Although shareholder activism is still a rather new development in Germany, it is becoming increasingly common that activist shareholders apply pressure and vigorously pursue change in their respective 'target' company. When doing so, activist shareholders regularly seek to gain mainstream investor support.

Strategies based on minority shareholder rights
Most activist strategies are based on statutory minority shareholder rights, which, to some extent, depend on a minimum amount of capital stock held by the respective activists.

Basic minority rights are granted to each shareholder, regardless of the number of shares he or she owns. All shareholders are entitled to, for example:

- attend and speak at a shareholders' meeting;
- make counterproposals before or at a shareholders' meeting (section 126 AktG);
- request information at a shareholders' meeting. Every shareholder is entitled to ask questions in the shareholders' meeting (section 131(1) AktG) and request information that has been disclosed to other shareholders (section 131(4) AktG);
- use the shareholders' forum in the Federal Gazette (section 127a AktG);
- commence litigation against shareholders' resolutions (section 245 Nos. 1–3 AktG);
- pursue damages claims against controlling shareholders or against management or supervisory board members (section 309(4) and sections 317(4) and 318(4) AktG); and
- request the appointment of a supervisory board member by the court to fill a vacancy (section 104(1) AktG).

Other minority rights depend on the amount of capital stock the shareholders are holding. For example, shareholders holding:

- 1 per cent of the capital stock or €0.1 million nominal share value may:
  - request a special audit by a court-appointed auditor (section 142(2) AktG); or
  - request the permission of the court to pursue liability claims against members of the management or supervisory board (section 148 AktG);
- 5 per cent of the capital stock or €0.5 million nominal share value may:
  - request amendments to the agenda of a shareholders' meeting (section 122(2) No. 1 AktG). For example, a resolution to change the corporate charter, remove supervisory board members or pursue liability claims against the management or supervisory board members; or
  - request the permission of the court to make amendments to the agenda public (section 122(2), (3) AktG);
- 5 per cent of the capital stock may:
  - request the company to call a shareholders' meeting (section 122(1) No. 1 AktG); or
  - request the permission of the court to call a shareholders' meeting (section 122(2), (3) AktG);
- more than 5 per cent of the capital stock may block a squeeze-out of minority shareholders (section 327a AktG);
- 10 per cent of the capital stock or €1 million may:
  - request an individual vote on dismissal of management or supervisory board members (section 120(1) AktG); or
  - request a court-appointed representative to pursue liability claims against members of the management or supervisory board (section 147(2) AktG);
- 10 per cent of the capital stock (or less if capital stock is not fully represented in the shareholders' meeting) may nominate members of the supervisory board in a privileged way (section 137 AktG);
- more than 10 per cent of the capital stock may block a merger-related squeeze-out of minority shareholders (section 62(5) UmwG); and
- more than 25 per cent of the capital stock (or less if capital stock is not fully represented in the shareholders' meeting) may block amendments of the corporate charter and other major shareholder resolutions, for example, capital increases, corporate agreements, or transfer of substantially all of the assets (sections 179(2) and 179a(1) AktG).

Strategies based on majority shareholder rights
Those who hold majority shareholder rights may:

- initiate a vote of no confidence with respect to management board members (a simple majority at the shareholders' meeting; section 84(2), (3) AktG); or
- remove members of the supervisory board (a three-quarters majority at the shareholders' meeting; section 103(1) AktG).

Informal strategies
Informal activism is less common, although there are various informal strategies that activists may use to pursue their objectives. For example:

- a letter to the management or supervisory board;
- a request to meet the management or members of the supervisory board, in particular its chairman;
- public campaigns to encourage shareholders to vote in a certain way;
- publishing white papers or research reports;
- proxy solicitation;
- utilising proxy advisers who provide research, advice and recommendations on how to vote in shareholders' meetings;
- fast or hidden stakebuilding; and
- short-selling, sometimes after having published critical reports on the target company.

8 May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

Request to call a shareholders' meeting
Shareholders who together hold at least 5 per cent of the capital stock (or less if stated in the corporate charter) may require the company to call a shareholders' meeting (section 122(1) AktG). The request should

be addressed to the management board in writing and state the objective and reasons. Requesting shareholders must prove that they have held a sufficient number of shares (quorum) for the legally required minimum period of ownership of 90 days, such period being calculated from the date on which the company received the request.

Permission to call a shareholders' meeting at the company's expense

If the company fails to comply with a proper request to call a shareholders' meeting, the requesting shareholders may apply to the competent court (ie, the local court at the registered seat of the company) for authorisation to call a shareholders' meeting at the company's expense (section 122(3), (4) AktG).

Exercise of voting rights

Shareholders are entitled to exercise their voting rights in shareholders' meetings. They may not act by written consent without a meeting. However, there are various options for voting in a meeting:

- proxy voting (sections 134(3) and 135 AktG); and
- postal vote (section 118(2) AktG) or online participation (section 118(1) AktG), if the corporate charter provides for such way of voting.

9 May directors accept direct compensation from shareholders who nominate them?

Members of the supervisory board are elected by the shareholders, and members of the management board are appointed by the supervisory board.

Members of the supervisory board are usually compensated by the company. However, they may accept direct compensation from shareholders under certain circumstances.

Whatever the case, members of the supervisory board are not allowed to accept compensation from shareholders if conflicts of interest arise. All duties of the supervisory board are primarily owed to the company (and not the shareholders), regardless of whether a member receives direct compensation from shareholders or not. Members of the supervisory board who are in breach of their duties may be held liable under civil and criminal law.

In principle, members of the management board may not accept any compensation from third parties (eg, shareholders) owing to statutory restraints on competition.

10 May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

All shareholders are entitled to make proposals for the election of supervisory board members. Proposals do not need to include reasons, but should contain name, occupation and domicile of the proposed person. If a proper proposal is received by the company in writing at least 14 days before the respective meeting, it must be made available to other shareholders (or the public) on the company website (see also our comments in question 6).

Members of the management board cannot be proposed by shareholders (they are appointed by the supervisory board, usually following a selection process conducted by the chairman of the supervisory board to find suitable candidates).

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

Derivative actions

Shareholders who together hold at least 1 per cent of the capital stock or an amount of €0.1 million may request that the court allow them to pursue liability claims on behalf of the company against members of the management or supervisory board (section 148 AktG).

Class actions

German law does not provide for class actions. However, depending on the subject matter, model case proceedings are available under the Capital Investors Model Proceedings Act.

Strike suits

Strike suits by professional plaintiffs seeking profits through litigation have raised concerns in the past. The idea behind such suits was to block the registration of a shareholder resolution with the commercial register (eg, capital increases or squeeze-out) and thus prevent its effectiveness. The number of strike suits has, however, decreased since reforms were implemented. These reforms introduced a special release proceeding (section 246a AktG), through which companies can enforce the registration with the commercial register. Hence, shareholders are no longer easily able to block important restructuring measures until the end of the court proceedings.

Compensation settlement proceedings

Disputes over the amount of the compensation to be paid in case of a squeeze-out, enterprise agreement (eg, a domination or profit-and-loss transfer agreement), integration into another stock corporation or restructuring under the Merger and Reorganisation Act (UmwG) are to be dealt with in a special court procedure.

Company response strategies

12 What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

As a general measure, companies should identify potential vulnerabilities by analysing their business and strategy as an activist shareholder would do.

Following such analysis and risk-assessment, in particular, the following defence measures should be considered:

- preparing investor or public relations statements;
- implementing a 'one voice policy';
- appointing a rapid reaction team; and
- analysing the shareholder structure and other 'early warning signs' on a regular basis.

Shareholder activism has increased significantly in recent years. However, the phenomenon is still less common than in other jurisdictions. According to Perella Weinberg Partners, between January and September 2016 there were 88 campaigns of activist investors targeting listed companies in Europe, a significant number hereof being directed at targets in Germany.

13 What structural defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

Available structural defences are:

- the existence of majority shareholders;
- preference shares (non-voting shares);
- restricted transferability of registered shares;
- staggered terms of members of the supervisory board; and
- delisting.

Other factors that make a company more likely to be targeted are:

- a high free float (traditionally low attendance of free float at shareholders' meetings);
- a specific capital structure, eg, significant cash positions or defensive financial gearing or strong cash generation opportunities not being utilised;
- an unsatisfactory share price performance or a vague business strategy which leads to poor business prospects;
- a conglomerate structure; and
- takeover and restructuring situations.

New rules on delisting from regulated markets require that an unconditional tender offer be made to all shareholders (section 39 BörsG). This will result in a more complex and costly delisting process and presumably limit the role of delisting as a defence mechanism against activist shareholders.

Based on the new Shareholders' Rights Directive, companies will be entitled to identify their shareholders and to obtain information regarding shareholder identity from any intermediary in the chain that holds the information. The purpose is to facilitate the exercise

of shareholder rights and their engagement with the company. The member states may provide that companies are only allowed to request identification with respect to shareholders holding more than a certain percentage of shares or voting rights which will not exceed 0,5 per cent.

The new requirements aim to increase transparency and help the companies in their approach to shareholder engagement. Institutional investors and asset managers will either have to develop and publicly disclose a policy on shareholder engagement or explain why they have chosen not to do so.

Owing to the important influence on voting behaviour of investors, proxy advisors will also be subject to transparency requirements (eg, disclosure of methods and main sources of information) and a code of conduct.

Details remain to be seen since national implementation is not due before 10 June 2019.

14 May shareholders have designees appointed to boards?

Members of the supervisory board are appointed and removed by the shareholders' meeting (as far as they are not appointed under the co-determination regime (sections 119(1) No. 1 and 101(1) AktG). A shareholder may submit his own nominations (section 127 AktG) and may, in certain cases, even request a supplement to the agenda regarding the election of members of the supervisory board (section 122(2) AktG). The management board has no influence on the appointment of members of the supervisory board. This is why the appointment of a designee to the supervisory board is not feasible, unless the companies' articles of association provide a specific shareholder with a designation right (which in practice is rarely the case).

The members of the management board are appointed (section 84(1) AktG) and removed (section 84(3) AktG) by the supervisory board. Any influence on the composition of the management board can, therefore, only be exerted via the supervisory board. Furthermore, the supervisory board may revoke the appointment of a member of the management board or the appointment of a member as chairman of the management board only for cause (section 84(3) AktG). Any pressure on the company exerted by shareholders to remove certain or all members of the management board is, by itself, not a sufficient cause within the meaning of the law; a shareholder vote of no confidence (section 84(3) 2nd sentence AktG) would, however, provide such cause.

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

A stock corporation must be registered with the commercial register of the local court competent for its statutory seat. The corporate charter is on file with the commercial register, which is open to inspection by the public via the internet. Most listed companies publish their corporate charter voluntarily on their website. The by-laws of the corporation are are frequently published on company websites.

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

Stock corporations do not need to maintain a register of known holders of bearer shares.

Stock corporations with registered shares have to maintain a share register, but are not permitted to make the register available to the public or to other shareholders owing to privacy requirements (data protection legislation). Shareholders may only request information relating to their own shareholding. Hence, requests to provide a list of other registered shareholders by an activist shareholder can easily be (and in most cases should be) resisted. Recently, there have been efforts to entitle companies to have their shareholders identified and to allow further processing of the information in the share register in order to facilitate the exercise of shareholder rights and engagement with the company (see 'Update and trends').

However, each shareholder shall, upon request, be granted access to the list of participants of a shareholders' meeting for review until up to two years after the meeting (section 129(4) AktG). The list of participants states name and place of residence (in the case of par shares), the amount (in the case of non-par shares), the number, and the class of shares represented by each person present at the meeting.

17 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

Companies are not required to publicly disclose their shareholder engagement efforts.

Generally, selective or unequal disclosure of non-public information is not permitted. If a shareholder has received information from the management board outside a shareholders' meeting, such information shall, upon request, be provided to any other shareholder (section 131(4) AktG). However, selective disclosure on the basis of non-disclosure agreements is permitted if in line with the interests of the company (eg, due diligence in a friendly takeover scenario).

Listed companies are subject to restrictions on insider dealing and more general market abuse rules (eg, under the EU Market Abuse Regulation), which further restrict selective disclosure of non-public information to shareholders. Furthermore, the mere fact that information has been disclosed to an activist shareholder could qualify as inside information.

18 Do companies receive daily or periodic reports of proxy votes during the voting period?

There is no statutory proxy voting system outside the shareholders' meeting. The corporate charter may provide that shareholders vote in writing or by way of electronic communication. However, a vote made in such a way becomes binding only at the beginning of the voting procedure in the shareholders' meeting. Until then, any vote made in writing or by electronic communication may be rescinded by the shareholder.

In practice, votes cast outside the shareholders' meeting are kept confidential, and there is no exchange between management and shareholders on votes submitted before the shareholders' meeting.

19 Must shareholders disclose significant shareholdings?

Listed companies

Shareholdings in listed companies (see question 1) must be disclosed if the voting interest in the company (directly or indirectly by way of attribution) reaches, exceeds or falls below 3, 5, 10, 15, 20, 25, 30, 50 or 75 per cent (sections 21 and 22 WpHG). In this case, shareholders must notify the company and BaFin without undue delay (within four trading days at the latest).

Furthermore, shareholders whose voting rights exceed 10 per cent are required to inform the company within 20 trading days (section 27a WpHG):

- of the aims they pursue with the investment;
- whether they plan to acquire further voting rights within the next 12 months, to exert influence on the management's composition or to seek changes of the capital structure, including the company's dividend policy; and
- of the origin of the funds used for the investment.

Voting rights from shares held by subsidiaries are deemed equivalent to voting rights from shares held directly by the parent company (section 22(1) WpHG).

Shareholders must notify the commercial register if they have acquired all shares of the company (section 42 AktG).

Disclosure of derivative holdings

Positions in instruments (eg, transferable securities, options, forward purchases, swaps, interest adjustment options, contracts for difference) through which voting shares can be acquired or in instruments which have a similar economic effect are subject to the same disclosure requirements as shares, except for the minimum threshold for a disclosure being 5 per cent instead of 3 per cent (section 25 WpHG). A netting between short and long positions resulting from derivatives is not permitted. For the purpose of determining whether a threshold has been reached, voting rights from shares and instruments are aggregated (section 25a WpHG).

Acting in concert

Disclosure requirements also apply to shareholders acting in concert. The voting rights of parties that act in concert are attributed to each other.

Acting in concert requires joint conduct of shareholders in the form of an agreement or by other means:

- in respect of the exercise of their voting rights; or
- with the objective of permanently and substantially changing the company's business strategy (section 22(2) WpHG).

Sanctions for non-compliance

Failure to comply with disclosure requirements may lead to the loss of certain shareholder rights (section 28(1) WpHG). In case of wilfully or grossly negligent misconduct, the right to dividends will be lost.

Shareholders could be fined up to €2 million for non-compliance by BaFin. If the shareholder is a legal entity, the maximum fine rises (according to whichever is the highest) to:

- €10 million;
- 5 per cent of the legal entity's revenue in the past fiscal year; or
- twice as much as the legal entity's financial advantage (profits or avoided losses from misconduct).

Furthermore, offences will be made public on the internet by BaFin ('naming and shaming').

Non-listed companies

Shareholders of non-listed companies are subject to disclosure rules if they are enterprises. The term 'enterprise' covers all types of corporations and partnerships. Individuals may, under certain conditions, be deemed enterprises as defined by the AktG.

If an enterprise or a subsidiary of an enterprise holds (directly or indirectly by way of attribution) more than 25 per cent of the shares of a stock corporation (section 20(1) AktG) or a majority of the shares (section 20(4) AktG), it is required to promptly inform the stock corporation of this in writing. The stock corporation must also be informed if the holding of an enterprise falls below the level requiring disclosure.

For the purpose of determining whether a threshold has been reached, shares already held by the enterprise or its subsidiaries and shares whose transfer may be required, or shares that the enterprise or its subsidiaries are obligated to acquire, will be aggregated (section 20(2) AktG).

In case of non-compliance with the disclosure requirements, rights arising from shares may not be exercised (section 20(7) AktG).

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

If a shareholder acquires shares taking his or her aggregate amount of voting rights in a listed stock corporation to 30 per cent or more, he or she must disclose this fact and launch a mandatory offer for all shares of the stock corporation (including non-voting shares). The voting rights of parties acting in concert (see question 19) will be aggregated for this purpose.

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders?

Rules relating to selective disclosure of non-public information to shareholders are detailed in question 17.

Communication can be conducted by companies via:

- website;
- Federal Gazette;
- letter;
- email; and
- social media.

Communication can be conducted by activist shareholders via:

- the press;
- social media; and
- shareholders' forum in the Federal Gazette (section 127a AktG).

Companies may offer shareholders to authorise proxy agents appointed by the company (section 134(3) AktG). However, according to the prevailing opinion, the authorisation of a company proxy to vote at a shareholders' meeting requires that detailed voting instructions are given by the shareholder.

22 Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

With a view to the general legal obligations (i) to treat all shareholders equally in principle and to grant all shareholders access to the same information and (ii) to keep the company's affairs confidential and to not disseminate inside information, German listed companies in the past usually abstained from organised shareholder engagement efforts outside of the reporting obligations imposed by law and regulation. Exceptions have always been normal investor relation efforts such as regular analysts' conferences, meetings, calls, etc. However, listed companies in Germany have recently begun to put a stronger focus on communication with specific groups of shareholders or even a single shareholder. Such engagement can be legally permissible provided, in particular, that such 'exclusive' communication is in the best interests of the company and not only in the interests of the respective shareholders. The question if and to what extent a listed company may (or may not) engage with an activist shareholder very much depends on the individual case at hand and requires a careful analysis of all circumstances, in particular regarding the goals of the activist shareholder and the situation of the company. As a rule of thumb, the management board of the company will be more inclined (or even obliged) to engage in direct communication with an activist shareholder if the approach is well structured and presented in a way that can be viewed as being beneficial not only to the activist shareholder, but to the long-term interests of the company and its stakeholders as well.

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23 Are directors commonly involved in shareholder engagement efforts?

Save for very few exceptions, German-listed companies are represented as regards third parties, including its shareholders, exclusively by the management board (section 78 AktG). Therefore, if a company chooses to engage directly with activist shareholders, it is common practice that a managing director (often the CFO, in important cases also the CEO) is involved. Less common but increasing in number are cases in which the chairman of the supervisory board is involved in direct communication with activist shareholders. In light of the management board's exclusive right to run the business and operations of the company (section 76 (1) AktG), the chairman of the supervisory board may only discuss, subject to the general legal restrictions set forth under question 22, those topics with activist shareholders that are within the competence of the supervisory board, for example, the composition of the management board or its remuneration. In order to make the dialogue between institutional investors and supervisory boards as fruitful as possible, the initiative 'Developing Shareholder Communication' has formulated eight guiding principles which are addressed to investors and listed companies in Germany with a supervisory board. Direct communication between the investor and the supervisory board can create added value for both parties. Such a dialogue allows investors to get first-hand information on whether the supervisory board is properly staffed and works effectively. In turn, the supervisory board has the opportunity to explain to foreign investors the German two-tier system and the national characteristics of co-determination.

Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

Board decisions regarding activist proposals are subject to the same standard of care as other board decisions.

Each shareholder owes a general duty of loyalty to the company and to other shareholders. The duty of loyalty is based on case law and imposes limits on the power of the majority as well as on minority rights.

Shareholders who influence members of the management or supervisory board to act against the interests of the company may be held liable for damages (section 117 AktG).

Furthermore, German corporate law concerning groups of companies provides that a controlling shareholder (who has not entered into a domination agreement) is obliged to refrain from any act that is disadvantageous for the controlled company unless the disadvantage is compensated. Controlling shareholders may be held liable for uncompensated disadvantages (section 317 AktG).

India

Vandana Shroff and Paridhi Adani
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General

1 What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

The primary source of law relating to shareholder activism and engagement in India is the Companies Act 2013. This was enacted by the parliament of India in August 2013, and has updated Indian law to include modern shareholder activism and engagement provisions. The provisions of the enactment are enforced by the central government (through local functionaries), through a tribunal created under the enactment, and through the regular court system depending on the nature of the matter.

Additional requirements are applicable to companies whose securities are listed on a stock exchange. These are prescribed in the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, and are enforced by the Indian securities market regulator, the Securities and Exchange Board of India (SEBI). Appeals from an order of the regulator go to the Securities Appellate Tribunal, and finally to the Supreme Court of India. Additionally, the companies are governed as per the applicable regulations framed by the sectoral regulators depending upon the sector in which they operate, such as banking, insurance and telecommunications.

2 What are the other primary sources of practices relating to shareholder activism and engagement?

Outside of legal requirements, the primary sources of practices relating to shareholder activism and engagement are a handful of proxy advisory firms. These firms are required to be registered with SEBI and are regulated in terms of the regulatory framework governing research analysts. In practice, their recommendations, arrived at on an ad hoc basis, have proved to be influential in determining shareholder voting patterns. At an industry level, while there is ample discussion of the role and regulation of relevant market players, the insurance sector regulator in India (ie, Insurance Regulatory and Development Authority of India) has recently released the guidelines on stewardship code for insurers. These guidelines require insurers to formulate and implement a policy on discharge of their stewardship responsibilities and activities including monitoring and engaging with companies on matters such as strategy, performance, risk, capital structure and corporate governance.

Another source of practice relating to shareholder activism and engagement is the voting policies of institutional shareholders that hold large stakes in Indian public listed companies. In accordance with the regulations prescribed by the SEBI, shareholders such as mutual funds are required to exercise the voting rights on shares held by them in publicly listed companies, and to disclose the policy in accordance with which they do so. This has significantly increased institutional shareholder participation, but usually in a manner that does not challenge management (though there have been notable exceptions).

3 How is shareholder activism generally viewed in your jurisdiction? Are some industries more or less prone to shareholder activism? Why?

India is yet to witness the conventional shareholder activism which is spurred by the organised institutional investor base in other jurisdictions such as Europe, United Kingdom and the United States. The Indian companies, being largely promoter driven, have seen passive shareholders in the past. However, with the recent legal reforms giving teeth to protection of minority shareholders' interests and the advent of proxy advisory firms, the role and manner of shareholder participation has significantly increased. Taking a cue from this, the Indian corporate community, including the promoters, are moving towards a more conscious and cautioned approach towards governance issues. While from a governance standpoint, it is a right directional shift and much welcomed by the torch bearers of corporate governance, shareholder activism has also drawn the ire of companies, especially companies with concentrated ownership or heavy promoter or founder influence, as it may be seen to interfere with the company's strategic and growth priorities.

Given the infancy of shareholder activism in India, it is difficult to identify a pattern of industry specific activism trends. However, it is observed that typically active participation of shareholders is mostly restricted to blue-chip companies with a large presence of institutional investors. It can also be said that government-sector companies are least prone to shareholder activism. This is because of heavy regulation and governmental involvement in such companies. An example of this is the Children's Investment Fund's unsuccessful attempt to press Coal India Limited, a government-controlled company, to price coal at market levels.

The nature of the shareholder also affects the level of shareholder activism at another level. Closely held companies, whose securities are not listed on a stock exchange, are less prone to shareholder activism as most activist shareholders are institutional shareholders that tend to invest only in listed securities.

4 What are the typical characteristics of shareholder activists in your jurisdiction?

The typical activist shareholder in India is an institutional investor. Instances of activism by individual shareholders are rare.

Owing to legal requirements and the historically concentrated ownership structure of Indian companies, institutional investors typically hold minority stakes in Indian companies. While they are generally viewed as short-term investors, institutional shareholders are increasingly behaving as long-term investors on the issues they are taking up. This is a welcome development given the concentrated ownership structure in Indian companies (a single controlling shareholder and an absence of other large shareholders). As a result, the views of institutional investors are becoming increasingly mainstream, and are treated by both the general public and the securities market regulator as a counterweight to the dominance of the controlling shareholder.

5 What are the main operational, governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

As Indian law has only recently moved towards a regime that facilitates shareholder activism, the range of issues that shareholders have taken up, to date, is fairly limited.

Currently, the primary focus of activism by shareholders has been with respect to operational decisions such as divestitures, mergers, and acquisitions. In most cases, the opposition has been to transactions that involve an unfair element – where a company transacts with an entity related to its controlling shareholder in an unfairly prejudicial manner. This is a result of the law being particularly stringent with respect to such transactions – requiring an ordinary resolution of uninterested shareholders for a matter to be approved.

There have also been instances of activism related to governance issues. While these instances have covered the usual issues such as executive compensation and board compensation, they too have revolved around transactions with related parties – for example, the payment of royalties to a corporate parent.

There have been no instances of sociopolitical activism to date. However, given that directors are now statutorily required to take into account the impact of their decisions on various social and environmental constituencies, this is expected to change in the coming years.

In a nutshell, given that Indian corporate sector largely comprises of concentrated ownership structures, the 'Principal-Principal' problems inherent in such structures are at the focal point of any shareholder activism. As such, any potential and actual abuse in the relationship and dealings between a promoter and the company is likely to draw closer scrutiny from activist shareholders, business journalists and proxy advisory firms. The abuse typically manifests in self-dealings, related party transactions, misgovernance and undue influence on board composition and decision making. In terms of the incidents of shareholder activism that have taken place in India, it can be said that activist shareholders tend to pick up issues such as executive remuneration, company strategy and investments, related-party transactions and mergers and acquisitions.

In a merger between certain group companies, the shareholders actively participated and intervened as it was highlighted by certain proxy firms that the company with whom the merger was stipulated, had a balance sheet which was heavily debt oriented and also faced certain human rights issues. While the companies went ahead with the merger as the opposing votes were not sufficient, this case is one of the examples where shareholder activist's attention is being drawn owing to governance and operational related issues.

It is also expected that, in the coming years, the nature of activism will evolve to include opposition to management decisions not only in cases where there is a conflict of interest, but also in cases where shareholders simply disagree with the management.

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

Under Indian law, a number of matters are reserved for the approval of shareholders. These include:

- the amendment of the charter documents of a company;
- the appointment of directors of a company;
- related-party transactions;
- the sale of an undertaking of the company; and
- borrowings and investments beyond specified thresholds.

In addition to matters reserved for their approval, shareholders can also make proposals at shareholder meetings, subject to compliance with procedural requirements prescribed by law. Proposals made by shareholders are required to be considered at meetings provided that they are made by shareholders holding at least 10 per cent of the paid-up capital or voting power (as applicable) in the company, and are submitted to the company in time for them to be included in the notice calling the meeting. In the event that the company fails to include a shareholder proposal in the materials for the meeting, or to call a meeting to consider the proposal, shareholders are entitled to requisition a meeting of their own.

A shareholder proposal will be considered at a meeting in the same manner as any other proposal – requiring a majority or three-quarters (depending on the subject matter of the proposal) of voting shareholders to vote in favour of it for it to be approved.

However, it is not common for shareholder proposals to be made. Those that are made usually deal with the appointment and removal of directors. It is expected that the spectrum of shareholder proposals that are made will widen substantially as shareholders take advantage of the new legal regime to become more active in the coming years.

The Companies Act 2013 permits granting of different rights for different types or classes of shareholders, provided that the charter documents of the company provide for the same or if the terms of issue of such shares do not prohibit such variation and any such variation can be effected with the consent of no fewer than three-quarters of the shareholders to whom such class of shares are issued or if a special resolution is passed at a separate shareholders' meeting of such class.

Therefore, the process may be similar for different class of shareholders to submit a proposal. However, the eligibility condition applicable and rights vested in shareholders may vary.

7 What common strategies do activist shareholders use to pursue their objectives?

Typically, the basic strategy for an activist shareholder is to engage with management to persuade them to take, or refrain from taking, a particular course of action. To date, there have been no instances where shareholder activism has caused management to adopt a particular course of action away from the existing status quo. This is largely because shareholder activism in India has been largely reactive and not proactive. This is expected to change as a culture of activism takes hold among shareholders.

There have, however, been instances of reactive engagement with management to oppose a proposed course of action away from the status quo. This has succeeded in some notable instances – mostly, however, with respect to matters that management could not have undertaken without shareholder approval. In some such cases, shareholders have used their voting rights to defeat resolutions on matters they oppose. This opposition has been facilitated by the rise of proxy advisory firms, but has often lacked coordination between different groups of shareholders.

Other than engaging with management, shareholders have, in the past, also utilised statutory remedies such as approaching the courts (now the company law tribunal) to seek injunctions against actions claimed to be against the public interest or the interest of the company or its shareholders. Under the Companies Act 2013, a more robust class action regime has been introduced, which allows shareholders to seek not only injunctive relief but also damages. However, litigation may not be a highly tenable strategy to be adopted by the activists, as it proves to be an extremely expensive and time-consuming process in India. Another strategy that shareholders are showing some inclination towards is the appointment of a 'small shareholders director' as per the provisions of the Companies Act 2013, who represents the shareholders who have a comparatively smaller holding in the company. It is also not unusual for activist shareholders to write to the regulators seeking their intervention, which may result in the regulator looking into or investigating the matters more closely.

There have also been instances where shareholders, having been unable to change the course proposed by management, have sold their holding in the company, as the ramifications of mass dumping of shares in the market would ideally force a company to reconsider its decisions.

Further, there have been critical developments with respect to mainstream investor support. Fund houses conduct 'relationship investing' exercises, which involves the establishment of a long-term relationship between the investors and the company. Many have further resorted to seeking external advisory support in order to strengthen the investor support.

Given that the companies in India continue to have a significant promoter presence, shareholders generally resort to engagement and rapprochement with the management at large, to ensure that common ground can be reached. The power of promoters and founders even in professionally run companies has been witnessed recently in incidents with respect to change in leadership in prominent companies like the Tata group and Infosys. The reactive approach of shareholder activism comes to fore on failure of such engagement, as the option of

displacing the management in the first instance is a daunting alternative for the Indian scenario.

8 May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

Yes, shareholders may call a special shareholders' meeting if, on their request, the board fails to call a meeting. However, this right is only available if the request is supported by shareholders holding at least 10 per cent of the paid-up capital or voting power (as applicable) in the company, as on the date of the requisition. If the company does not cooperate with shareholders in the calling of the meeting, the shareholders may approach the company law tribunal for an order calling a meeting. Such meeting is subject to the same procedural requirements as any other meeting.

There is no provision permitting shareholders to act by written consent. They may, however, vote on resolutions moved at meetings by way of postal ballot or electronic voting.

9 May directors accept direct compensation from shareholders who nominate them?

To our knowledge, there is no instance of directors being directly compensated by nominating shareholders for their services as directors. Directors are compensated by the company in accordance with their terms of appointment. While there is admittedly no express bar against directors being compensated by shareholders directly, this is not foreseen by the law and will, in all probability, be opposed by the regulators.

A director may be compensated indirectly by a nominating shareholder – for example, for services rendered in a capacity other than that of a director. However, this will be considered a conflict of interest and is likely to impact the ability of the director to participate in decisions involving the nominating shareholder.

10 May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

Yes, shareholders are entitled to nominate directors for election to the board by using the company's shareholder circular infrastructure at the company's expense. However, they are required to pay a deposit (refundable if the nominee is elected or receives a certain percentage of votes) along with the form putting forth their nomination. For small shareholders of a listed companies, one method of acquiring representation on a board is by way of small shareholding that is defined as having nominal value not exceeding 20,000 Indian rupees. A small shareholder, with the support of 1,000 shareholders or one-tenth of the total number of shareholders, whichever is lower, can propose the election of a director.

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

The shareholders of a company may bring a derivative action on behalf of the company if the traditional common law requirements for such action are satisfied.

With respect to statutory remedies, like its predecessor, the Companies Act 2013 permits the shareholders (including on behalf of other shareholders) to file an application before the company law tribunal if the affairs of the company are conducted in a manner prejudicial to the public interest, to the company or the shareholders. In such cases, the tribunal is allowed a free rein as to possible remedies.

In addition to this right, the Companies Act 2013 permits shareholders (on behalf of all shareholders) to file a class action suit before the tribunal if they are of the opinion that the company's affairs are being managed or conducted in a manner prejudicial to the company or to them. In such suits, the tribunal is again empowered to order a wide range of remedies – most notably injunctive relief; and damages against directors, as well as third-party advisers such as consultants and auditors.

Both statutory remedies require a certain number of shareholders (ordinarily the lesser of 100 members or one-tenth the total number of members or members holding 10 per cent of the capital of the company) to join the action for it to be valid.

As such suits are not commonplace, there is no systemic policy to deal with them. Further, private settlements with specified shareholders are unheard of. The ordinary course of action is for management to appear in court and refute the allegations contained in the suit. As class action suits become more commonplace, it is expected that policies will develop – however, we expect that there will be regulatory pushback against any private settlement with a certain group of shareholders.

Company response strategies

12 What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

Shareholder activism and engagement is indeed a matter of heightened concern in the boardroom. There is a growing and swift wave of shareholder activism in India, and in recent years many instances have come to light where companies have faced opposition from shareholders. Given the potential impact of shareholder activism on management decisions, management continuity and company reputation, directors and senior management are now seriously considering the potential and impact of shareholder activism in taking management decisions.

We advise companies to adopt a proactive approach to preparing for shareholder activism. The starting point for companies is to take into account potential shareholder opposition in crafting the proposal itself. At the execution stage, we advise clients to meaningfully engage with shareholders – primarily through detailed explanations of actions in the notices calling for meetings. In particular, given the concentrated ownership structure in Indian companies, we advise clients to explain the potential implication on controlling shareholders with regard to minority shareholders. In the coming years, as proxy advisory firms take centre stage in the evaluation of corporate proposals, companies will also have to develop policies to engage with and secure the approval of such firms.

In addition to the above strategies, we also advise companies to be mindful of objections from various regulators on the grounds that a particular proposal is in opposition to general shareholders' interests. If we anticipate objections, we advise clients to avoid a reactionary approach by approaching and consulting with regulators before putting forward a particular corporate proposal.

13 What structural defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

The usual defences to shareholder activism, such as dual-class stock, staggered boards and poison pills, as well as less common 'stitching', are generally not available in India and there is, in theory, a reasonably free market for corporate control. In practice, however, it is very difficult for activist shareholders to mount an effective campaign against management. This is because of the concentrated ownership structure of Indian companies, coupled with the management comprising members of the controlling shareholder family.

However, several successful activist campaigns have been run by shareholders of companies with a large institutional shareholder base. Few have succeeded in companies with a more dispersed non-controller shareholding. Further, owing to recent legal changes, there is now a class of transactions over which an activist shareholder has considerably more say. These can be classified as transactions involving entities related to the controlling shareholder of the company. The law requires the controlling shareholder to refrain from voting on such transactions, enabling an activist shareholder to mount a campaign against such transactions.

Apart from the recent legislative reforms particularly with reference to shareholder rights, there are a number of other factors that have boosted the activist movement among shareholders in India. Public and regulatory scrutiny has increased and the depth and quality of investigations and queries raised by the shareholder class and regulators have made it difficult for companies to pass certain kinds of resolutions without adequate data and dialogue.

To facilitate provision of adequate information to shareholders, the SEBI mandated mutual funds (a significant constituent of public shareholders in listed companies) to actively participate in voting on resolutions of companies and to make its voting policies available for the public at large. Shareholders can now access such voting policies and derive benefits from the same.

Update and trends

Shareholder activism is still at a nascent stage in India, with the main thrust primarily being in blue-chip companies owing to the presence of large institutional shareholders. That said, the rise of proxy advisory firms and widespread regulatory changes have served to aggrandise the investors, with institutional shareholders such as mutual funds, portfolio managers and alternate investment funds taking the lead in raising governance concerns and strategy issues. Some recent instances would include firms resorting to the 'small shareholder director' provisions in order to participate in another company's decision-making process, and companies going to the National Company Law Tribunal to seek the removal of board for oppression and mismanagement of minority shareholders.

The year 2017 has witnessed a significant rise in shareholder activism in the wake of several alleged instances of misgovernance in large companies. While the issues arose in the context of influence of promoters or founders in some listed companies, these instances led to a wave of discourse on good governance and increased emphasis on shareholder activism in India. The proxy advisory firms also played a major role in accelerating shareholder awareness and participation in corporate decision making. The stewardship code for insurers was also mandated in 2017.

The sphere of influence of proxy advisory firms in India is less apparent but evolving rapidly. There have been instances where the company's strategic business decisions with respect to further growth and creation of separate entities have been affected and altered on account of shareholders' involvement, backed by proxy advisory firms. Certain proxy advisory firms also maintain a form of a corporate governance scorecard for listed companies in India, to highlight the current and probable corporate governance issues of the company, for the ease of investment management firms. However, it can be contended that the increased role of proxy advisory firms is not viewed favourably by many companies. For instance, recently a company filed a defamation suit against a proxy advisory firm for allegedly making 'defamatory' statements against the company and its directors. Regardless of this, even though there is insufficient empirical data to show how adverse recommendations may have influenced decision-making in Indian companies, it is clear that conceptually proxy advisory firms play a key role in promoting dialogues on governance, usually by getting companies to respond to negative voting recommendations.

In another significant development, SEBI formed a committee on corporate governance chaired by Mr Uday Kotak in June 2017, which released its report last month. The report has been viewed as an evolutionary approach to corporate governance reforms in India and is a welcome step with its wide-ranging recommendations and nuanced approach in setting the goal posts for the next level of mandatory governance standards for the Indian corporate sector. The committee has made several recommendations with respect to equity-listed companies in relation to, inter alia, enhancing the role of the stakeholders' relationship committee. This includes the requirement of proactive communication and engagement with stakeholders including engagement with institutional shareholders at least once a year, and identification of actionable points for implementation. The committee has also recommended shareholder approval in certain cases of brand or royalty payments and remuneration of directors, adoption of a stewardship code across the Indian financial sector based on global best practices, a leniency mechanism for SEBI and protection for whistleblowers. As the period open for public comments on the report ended on 4 November 2017, SEBI will now consider the recommendations along with the public comments received, with full discretion.

Such developments have served to create a robust regulatory environment with respect to shareholder rights and protections, which has been held to be fairly superior if compared globally, with India ranking fourth in terms of protection for minority shareholders in the World Bank's 'Ease of Doing Business Survey, 2018'.

Recently, Indian investors have taken to selling their stock or blocking proposals by companies, should the investors find the proposals unfavourable to them or they are not put forward with adequate information. In the case of *Maruti Suzuki*, minority shareholders blocked the proposal of the company, which was floated in 2014, to operate a new plant for sale of cars in the Indian market. Eventually, the proposal was cleared by the shareholders; however, the terms of the proposal were modified to make them more favourable to the shareholders. In another case, a company proposed to invest, through its subsidiary, in a wind energy project in the United States, which was an unrelated business for the company. Consequently, the investors dumped their shares in the company, resulting in a drop in the share price. The company was forced to take back its proposal to invest in such unrelated businesses.

Apart from the options exercised by shareholders to offload their respective shares and block companies' proposals, the most crucial right that a shareholder has is the right to elect and remove directors on the boards of a certain class of companies. This enables them to have a remedy in a situation where the shareholders are dissatisfied with the management of the affairs of the company. In such a case, the shareholders may, by a simple resolution, remove the director.

14 May shareholders have designees appointed to boards?

Under Indian law, an activist shareholder may appoint a designee, or nominee, onto the board. In practice, however, nominee directors are appointed by lenders and significant shareholders as a precondition of lending and investing in a company. Such nominations have not resulted from shareholder activism.

The terms of any such agreement are ordinarily reflected in the facility or shareholders' agreement (to which the company is party), as well as the charter documents of the company. The key provisions vary depending on whether the nominee is acting on behalf of a lender or a shareholder. In both cases, they are aimed at safeguarding the interests of the designator by restricting the ability of the company to give effect to transactions that have a material financial or management outcome without the prior approval of the designator.

These agreements must, ordinarily, be disclosed in the public domain. If the provisions of the agreement are incorporated into the charter documents, they become publicly available documents.

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

Yes, the charter documents of a company are publicly available on the website of the Ministry of Corporate Affairs upon the payment of a nominal fee. A shareholder may also obtain a copy of the charter documents directly from the company upon the payment of a fee.

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

There is no general obligation on a company to furnish a list of registered shareholders or beneficial owners of its share capital to any person, including to its shareholders. However, on the request of any person, whether or not a shareholder, the company is required by law to furnish the aforesaid information for inspection or for the purpose of making a copy. Depending on the nature of the request, as well as on whether the person making the request is a shareholder, a fee may be payable.

Additionally, with respect to companies whose securities are listed on a stock exchange, a broad summary of the shareholding pattern of the company is publicly available on the website of the relevant stock exchanges, as well as on the website of the company itself. This disclosure is updated on a quarterly basis.

17 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

There is no requirement for companies to disclose shareholder engagement efforts or to disclose how shareholders may communicate directly with the board. This is largely because such engagement and communication is at a nascent stage. It is expected that this will change as shareholder activism becomes more commonplace in India. A common mode of communication today is through the stock exchanges' complaints redressal platform, which enables shareholders to lodge complaints or concerns with a company, and requires the company to respond within a specified time period. Having said that, companies have started to

use various methods to actively engage with their investors, using the media, brochures, press releases, presentations, periodical meetings, video and audio conferences and emails in lieu of making announcements and responding to queries. Companies now also disclose their efforts through annual and quarterly reports that are published in local newspapers and are also posted on their respective websites. Some companies, as an effect of shareholder activism, have also constituted grievance committees for shareholders.

While there is no obligation on a company to avoid selective or unequal disclosure of information to key shareholders or activists, this is considered to be bad governance and is generally avoided by companies. However, companies routinely disclose information selectively to the controlling shareholder (who is normally also on the board), as well as to key investors in terms of information rights contained in shareholders' agreements. That being said, under the insider trading regulations there is a legal obligation on companies not to make selective disclosures of unpublished price-sensitive information (not all information) – they must either disclose such information publicly to all persons or not make a disclosure at all (unless such disclosure is in furtherance of legitimate purposes, performance of duties or discharge of legal obligations).

18 Do companies receive daily or periodic reports of proxy votes during the voting period?

Companies do not receive daily or periodic reports of proxy votes during the voting period. Voting occurs through a combination of methods – at a general meeting, by mail or electronically. The board receives a report of the voting tally for each of these methods only after the expiry of the relevant voting period. As such, a company cannot review votes as they are submitted, and is not in a position to engage with shareholders in an effort to change votes cast in opposition to management.

19 Must shareholders disclose significant shareholdings?

A listed company and its shareholders are under an obligation to disclose details of significant shareholding, as well as details of any change in the shareholding of such shareholders under the takeover and insider trading regulations, between two and 15 days of a transaction or quarter ending (depending on the nature of the disclosure). A failure to make disclosures typically leads to sanctions from the Indian securities market regulator, the SEBI. There are watered-down disclosure obligations with respect to unlisted companies.

The obligations under the takeover regulations require the shareholder to aggregate a concert party's shareholding with its own in computing and making the aforesaid disclosures. A concert party is defined broadly as an entity with a common objective of acquisition of shares or control, and deemed to include entities in certain relationships such as holding and subsidiary companies. However, the disclosure obligations do not extend to derivative holdings.

There are also other rules and regulations, such as competition, foreign investment and merger regulations, which may require a disclosure of shareholder ownership in the event that certain transactions are undertaken.

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

Every person, whether or not an existing shareholder, is subject to a mandatory tender offer requirement in the event that he or she either:

- acquires or agrees to acquire 25 per cent or more of the voting capital of a company; or
- acquires or agrees to acquire control of a company.

There is also an obligation to make a mandatory tender offer if an existing shareholder, holding 25 per cent or more of the voting capital of a company, acquires more than a further 5 per cent of the voting capital in a single financial year. For the purposes of determining whether a person is under an obligation to make a mandatory tender offer, its shareholding is aggregated with that of persons acting in concert with it.

If a person triggers an obligation to make a mandatory tender offer, it must offer to purchase at least 26 per cent of the voting capital of the company from the other shareholders of the company at the price, and in the manner, set out in the takeover regulations prescribed by the SEBI.

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders?

Other than the notice calling a meeting (which contains a statutorily prescribed description of the matters to be discussed) mailed by the company to its shareholders, there are no regulations governing communications involved in a typical shareholder engagement process between a company and its shareholders, or between the shareholders. A notice can be sent via email or as a notification, providing a link for accessing such notice. While communication between shareholders has been on an ad hoc basis, based on the preferences of the parties involved, communication between the company and its shareholders has tended to be through the stock exchange platform.

Resolutions are put to vote for a shareholder by various methods, such as a show of hand, postal ballots, polls, proxy voting and e-voting. After the introduction of laws assimilating shareholder activism and to secure more participation from shareholders, it was made mandatory for listed companies having 1,000 or more members to provide e-voting facilities in respect of all resolutions in general meetings.

22 Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

It is not common to have organised shareholder engagement efforts outside of the reporting obligations imposed by law. Outreach efforts have typically been in response to opposition from shareholders, and have typically been restricted to communicating modifications or explanations of proposals through the stock exchange platform. While there are insufficient data points available to clearly establish a trend, it is uncommon for proposals to be blocked in toto. With modifications and adequate information supporting such proposals put forth by

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companies, most investors tend to favourably consider the proposals by the companies.

23 Are directors commonly involved in shareholder engagement efforts?

It is not common to have organised shareholder engagement efforts outside of the reporting obligations imposed by law. In the limited instances in which a company has engaged with shareholders, directors have typically not been involved. The face of the company has generally been its senior management, which often includes the controlling shareholder (who is also a director). However, there are no regulations precluding directors from being involved in such efforts and, with the increasing emphasis on the role of independent directors, it is expected that directors will lead such efforts going forward. In so far as redressal of security holders' grievances is concerned, a 'stakeholders relationship committee' is required to be constituted by specified companies under the Companies Act 2013 and SEBI regulations governing listed companies.

Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

Directors are not under an obligation to consider an activist proposal under a different standard of care compared with other board decisions. They are subject to the same common law and statutory duties in considering activist proposals as they are in considering any other matter. While the directors have fiduciary duties to members as a whole, the company, its employees, the shareholders, the community and the environment under the Companies Act 2013, there is a lack of clarity on duties vested in the board in case of a conflict between interests of the promoters and minority shareholders.

Shareholders (including majority or significant shareholders) do not typically owe fiduciary duties to the company. However, they cannot act in a manner that oppresses the company's minority shareholders. Minority shareholders are provided with statutory remedies to guard themselves against such behaviour by the controlling shareholder. Further, the Companies Act 2013 carves out a set of transactions with respect to which a controlling shareholder does owe a fiduciary duty. Under this construct, controlling shareholders are precluded from voting on related-party transactions on the ground that such transactions pose a conflict of interest where the controlling shareholder may be acting in the interest not of the company but of the counterparty.

Ireland

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General

1 What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

The Companies Act 2014 (the Companies Act) applies to all Irish incorporated companies and became effective on 1 June 2015. The Office of Director of Corporate Enforcement was established under the Company Law Enforcement Act 2001 to enforce and encourage compliance with company law. The Companies Registration Office is the body responsible, for among other things, the incorporation of companies, registration of business names, filing obligations and ensuring certain information is publicly available.

The Irish Takeover Rules are made by the Irish Takeover Panel under the powers granted to it by the Takeover Panel 1997 Act and by the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006, as amended. They apply to public companies incorporated in Ireland whose shares are, or have in the previous five years been, traded on the Irish Stock Exchange (ISE), the London Stock Exchange, the New York Stock Exchange or the NASDAQ. The Irish Takeover Panel is responsible for ensuring compliance with the Irish Takeover Rules.

Companies with primary listings on the Main Securities Market (MSM) of the ISE are subject to continuing obligations under the MSM Listing Rules, which regulate matters such as disclosure of information, shareholder approval of significant transactions, shareholder approval of related-party transactions, and terms and conduct of capital raisings.

Companies with a primary listing on the MSM are also subject to the continuing obligations set out in the Transparency (Directive 2004/109/EC) Regulations 2007 (as amended) (Transparency Regulations) concerning the disclosure of financial information and significant shareholders. The Central Bank of Ireland is the administrative authority for the purpose of these regulations.

These companies must also comply with the UK Corporate Governance Code issued by the Financial Reporting Council (the Code) and the Irish Corporate Governance Annex (the Irish CG Annex), or explain in their annual reports why they have not done so.

Companies with a secondary listing on the MSM are subject to very few continuing obligations. These are largely related to disclosure of capital changes and maintaining free float requirements.

Regulation (EU) 596/2014 on market abuse applies to companies listed on the MSM and the Enterprise Securities Market (ESM). It principally regulates insider dealing, disclosure of inside information, dealings by directors and market conduct.

The ESM Rules apply to companies listed on the ESM – the Irish equivalent of the AIM market. The continuing obligations under the ESM Rules are more limited than the MSM. For example, shareholder approval of transactions is not required unless they constitute a fundamental change of business.

2 What are the other primary sources of practices relating to shareholder activism and engagement?

Similar to the UK, corporate governance best practice and investor protection committees, which represent the interests of large institutional shareholders, have a key influence on shareholder activism and engagement.

The ISE recognises that the Code has set the standard for corporate governance internationally. Since the 1995 Irish Stock Exchange Act, the MSM Listing Rules have required every company listed on the MSM to 'comply or explain'. The ISE's current intention is to retain the provisions of the Code, but given the particular focus on corporate governance in the Irish market after the financial crisis, the ISE also adopted nine recommendations arising from the report commissioned by the ISE and the Irish Association of Investment Managers (IAIM). These largely relate to board and reporting matters. The Irish CG Annex is addressed to companies with a primary equity listing on the MSM. Irish companies are also expected to provide meaningful descriptions of how they apply the provisions of the Irish CG Annex.

The UK Stewardship Code is complementary to the Code and sets out additional principles to promote effective engagement from institutional shareholders. There is an onus on institutional shareholders to give weight to all relevant factors when evaluating a company's governance arrangements and to take responsibility to make considered use of their voting rights. Institutional shareholders are also advised to apply the principles set out in the Institutional Shareholders' Committee's Code on The Responsibilities of Institutional Investors.

Proxy advisory services such as Institutional Shareholder Services and Glass Lewis are playing an increasingly major role in proxy solicitations and ordinarily favour activists over management. They have issued proxy voting guidelines for the UK and Ireland.

The IAIM is the representative body for institutional investment managers in Ireland. IAIM aims to ensure that best practice standards are adopted throughout the industry and has issued guidelines for corporate governance best practice. While these guidelines are not legally binding, they reflect the requirements of institutional investors in Ireland and are typically observed by listed companies.

Many of the larger institutional investors such as Blackrock, Fidelity and State Street have established proxy departments and it is therefore important for Irish companies to be aware of their voting policies and guidelines.

3 How is shareholder activism generally viewed in your jurisdiction? Are some industries more or less prone to shareholder activism? Why?

At an Irish macro level there is still a general market perception that shareholder activism is comprised predominantly of hostile and agitating corporate raiders whose primary goal is to cause disruption for short-term gain.

However with the growing number of high-profile international and domestic examples of activism, it has increasingly become an issue for consideration by Irish executives over the past few years. While activism in Ireland (and Europe more generally) is still well behind the US, there is now a greater understanding that no public company is completely immune or insulated from activist campaigns.

At boardroom level there has also been a growing awareness and acceptance of the potential benefits of activism as demands for increased returns continue. There appears to be a wider recognition that activism can manifest itself in many different forms and involve many different categories of activists. There is also a growing appreciation of the constructive role that activists can sometimes play in effecting corporate change.

Examples of shareholder activism in Ireland have not been confined to particular industries. It is usually influenced by key vulnerability factors such as (i) companies experiencing significant change, (ii) board composition or remuneration issues, (iii) earnings underperformance, or (iv) undervalued companies.

However one group that is worth flagging are the smaller Irish companies listed on the ESM. Given the relative smaller size of a number of companies listed on the ESM, they are clearly more susceptible to activist influence and demands. There are also a group of Irish companies listed on NYSE and NASDAQ. Shareholder activism for those Irish companies tends to be aligned with activism activities and behaviour in the US rather than Ireland or the UK.

4 What are the typical characteristics of shareholder activists in your jurisdiction?

In recent years the Irish market has seen a broad variety of activists ranging from individual shareholders to hedge funds and from proxy advisory firms to the Irish government itself through their shareholdings in the Irish banks.

However the majority of activist campaigns have originated from hedge funds and private individuals. There is no specific time horizon attached to their shareholding, but very often their views have been considered more marginal and they have struggled to gain the support of traditional shareholders. With the growing presence and influence of the proxy advisory firms, institutional investors are expected to be more vocal over the coming years particularly in relation to 'say on pay' (see question 6).

As regards the Irish companies listed on the NYSE or NASDAQ, activists tend to be based in the US or in other international jurisdictions.

5 What are the main operational, governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention

Shareholder activism has focused primarily on board composition and remuneration. Corporate governance issues, underperformance by management and inflated executive pay are generally perceived to be the main drivers for unseating board members. This was evident in the activist campaigns relating to Elan Corporation plc, Kingspan plc and Independent News & Media plc.

Irish companies are therefore scrutinising board composition and carrying out self-assessment checks more regularly.

Some other corporate changes that activists have sought in Ireland include demanding strategic change such as the sale or spin-off of a business division or financial change in the form of dividends or share buybacks. One notable recent high-profile example of an activist promoting corporate change was Orange Capital LLC's attempt to persuade C&C Group plc to divest itself of its US interests. It is reported that Orange Capital initially approached C&C privately with a presentation on their proposals before the proposal entered the public domain.

Actavis plc acquired Irish company, Allergan plc, in 2015. This deal came about following a long-running hostile takeover campaign related to Allergan led by Valeant Pharmaceuticals and Bill Ackman.

The most high-profile example of socio-political activism relates to the Irish banks that were recapitalised by the Irish government during the financial crisis. The boards of AIB, Bank of Ireland and Permanent TSB have all been the subject of some degree of public scrutiny and protest at their AGMs given the public interest in the banks. While sociopolitical activist campaigns are not yet widespread, Irish companies are increasingly aware of corporate social responsibility (CSR) issues and the majority of Irish public companies proactively provide information on their CSR policies and initiatives to shareholders.

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

The Companies Act reserves various decisions for the approval of shareholders. An ordinary resolution is passed by a simple majority of the shareholders and a special resolution is passed by at least 75 per cent of the shareholders. As is the case in the UK, these thresholds are determined by reference to those shareholders who vote at the meeting so often can be passed by a far smaller percentage of the aggregate shareholder base.

Ordinary resolutions are usually required to carry out routine, less contentious, business. This includes matters such as authorising directors to allot shares and ratifying board decisions. In contrast, special resolutions are required for more significant matters such as altering a company's constitution, disapplying pre-emption rights, varying share capital or reducing share capital.

If a shareholder wishes to make a proposal, it can requisition an extraordinary general meeting (EGM) if at least 5 per cent of the shareholders with voting rights approve such proposal. Where shareholders hold 3 per cent or more of the total voting rights, there is now also a statutory right to put forward items on the agenda for consideration and approval at general meetings. There are, however, a number of important conditions that must be satisfied in order to permit shareholders to exercise these rights. These include (i) a justification for the inclusion of the item or a draft resolution to be adopted at the general meeting, and (ii) circulation in sufficient time to ensure the relevant matter is received by the company at least 42 days before the meeting to which it relates.

Under Irish law, shareholders of a listed company currently have no 'say on pay' right to vote on the directors' remuneration report or remuneration policy unless such right is provided for in the particular company's constitution. However once the Shareholders' Rights Directive (which came into force on 9 June 2017) is transposed into Irish law, shareholders will be able to vote on director remuneration where the company is listed on an EU regulated market. Firstly, they will be entitled to vote on the remuneration policy and secondly, they will be entitled to vote on the remuneration report. The vote on the remuneration policy is likely to be binding. The vote on the remuneration report will be advisory.

A number of companies on the MSM proposed resolutions to approve a remuneration policy in 2017. Each of those companies classified the resolution as a non-binding advisory resolution only. The vast majority of Irish companies on the MSM proposed resolutions to approve a remuneration report in 2017. Each of those companies also classified the resolution as a non-binding advisory resolution only.

7 What common strategies do activist shareholders use to pursue their objectives?

No matter what form of activism is used, the final goal is to effect change, whether at a management, operational or strategic level. Activism in Ireland often takes the form of private informal intervention in the pursuit of corporate change. Often the most successful activist campaigns are fought and won in a more subtle private engagement with the board. There is certainly a view among many activists that the most successful campaigns are the ones you never read about.

There is also a clear cost:benefit to engaging in a round of meetings and telephone calls rather than a costly and protracted proxy solicitation campaign. Moreover, boardrooms are increasingly aware of the importance, both legally and optically, in listening to the views of shareholders. There is also awareness that maintaining dialogue between activists and boardrooms is key and that often compromise is the best form of defence to a particular activist. Usually it is only when the board reacts negatively to a request or a series of requests, that the situation becomes more confrontational.

Clearly an effective tool for an activist is the use of the public domain as a forum for trying to initiate change. That can take the form of PR battles, open letters or press releases but more often consists of requisitioning general meetings, proposing resolutions at the annual general meeting or voting against resolutions.

In contrast to the US, litigation is not generally regarded as a key tool for activist campaigns in the Irish market given the costly and relatively unpredictable nature of litigation proceedings. One exception to this was Petroceltic International plc's largest shareholder, Worldview Capital Management, initiating legal proceedings against it before it went into examinership. A further example related to Conroy Gold and Natural Resources plc is further discussed in Update and Trends below.

8 May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

All general meetings, other than the annual general meeting of shareholders (AGM), are deemed to be an EGM. Notice must be given of each general meeting to every shareholder, director and the secretary

of the company. The different categories of resolutions are referred to in question 6.

In respect of traded companies, shareholders holding 5 per cent or more of the company's share capital have the power to compel the directors to convene an EGM. The requisition must state the business to be transacted at the meeting. Where an EGM has been validly requisitioned, the directors must convene that EGM within 21 days to be held within two months of the requisition. Where the board of directors fails to convene the EGM within 21 days, the persons who have requisitioned the EGM may convene the meeting themselves.

Shareholders may also act by consent in writing without holding a general meeting. A unanimous resolution, signed by all the shareholders of a company, will have the same effect as an ordinary or special resolution passed at a meeting. A unanimous resolution shall be deemed to have been passed at a meeting on the date at which it was signed by the last shareholder. A majority written resolution can be used to pass either an ordinary or a special resolution where the requisite majority of shareholders are available to sign. The majority written resolution is not as attractive as the unanimous written resolution procedure as there is a delayed effect period of 7 or 21 days. However in practical terms this option is not one that can realistically be used by a listed company given the number of shareholders involved.

9 May directors accept direct compensation from shareholders who nominate them?

A director may be separately remunerated by a shareholder who nominates or designates them but it would be unusual for an Irish listed company. In a situation where directors are also employed by a shareholder they need to be particularly mindful of their director's duties and the need to avoid any conflicts of interest.

Directors of Irish listed companies are remunerated for their services by the company. Best practice for listed companies under the Code is to establish a remuneration committee to determine directors' remuneration. The Code recommends that a non-executive director's remuneration package should not include the granting of share options. In exceptional cases where the remuneration package does include options, advance shareholder approval must be obtained and where these options are exercised, the non-executive director must hold the shares for at least one year after leaving the board.

10 May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

Shareholders may nominate directors for election to the board by requisitioning the directors of that company to convene an EGM for that purpose or by tabling a resolution for consideration at the AGM. The procedure for doing this is set out at questions 6 and 8.

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

Under Irish law, duties that relate to the conduct of a company's affairs, such as director duties, are generally owed to the company itself rather than to individual shareholders. Shareholders are therefore not generally permitted to bring an action on behalf of the company as the proper plaintiff in an action in respect of an alleged wrong done to a company is the company (ie, the Irish courts apply the rule in *Foss v Harbottle*).

There are a limited number of exceptions to that principle and where such exceptions can be relied upon, shareholders may be permitted to institute a derivative action. It is important to remember that, much like the UK, a derivative action is not an action by a shareholder in its own capacity but rather on behalf of all the other shareholders.

The ability to bring a derivative action is dependent on the company itself having a claim and obtaining the leave of the Irish courts to commence the derivative action. In making a determination, the court is likely to consider whether the action should be brought by the shareholder personally and to seek the views of the other shareholders. These requirements effectively serve as defence measures to reduce the likelihood and frequency of derivative actions.

The wrongdoing will usually have to relate to (i) an act that is illegal or ultra vires, (ii) an irregularity in the passing of a resolution, (iii) an act purporting to abridge or abolish the individual shareholder's rights, or (iv) an act that constitutes fraud against the majority, and the wrongdoers are themselves in control of the company.

There is also an onus on the plaintiff shareholder to demonstrate they have a realistic prospect of success in establishing that the company was entitled to the remedy and that they fell within one of the four exceptions noted above.

There is no framework in Ireland to formally facilitate class actions. The closest procedures under Irish law to class actions or multiparty law suits are 'representative actions' or 'test cases'. A representative action is where one claimant or defendant, with the same (as opposed to similar) interest as a group of claimants or defendants in a particular action, institutes or defends proceedings on behalf of that group. Any relevant judgment or order will usually bind all claimants or defendants represented.

The more common option in Ireland for multiparty litigation is usually a test case. A test case can arise where numerous separate claims arise out of the same circumstances. For example, in 2008 the Irish Commercial Court was faced with more than 65 separate claims related to the fraudulent investment operations run by Bernie Madoff. The Irish Commercial Court decided to take forward two cases from individual shareholders and two by fund shareholders and stayed the remaining cases pending resolution of the four test cases.

There is no such action as a strike suit under Irish law but minority shareholders are afforded protection under section 212 of the Companies Act. Under this provision, a shareholder may apply to the court by petition for relief where the affairs of the company are being conducted, or the powers of the directors are being exercised, in a manner that is oppressive to the shareholder or in disregard of the shareholder's interests. If the court is of the opinion that the shareholder's action is well founded, it may make such orders as it sees fit, including (i) directing or prohibiting any act or cancelling or varying any transaction, (ii) the purchase of the shares of any shareholders by other shareholders or by the company itself, or (iii) compensation. The court may also grant interlocutory relief. The nature of conduct required for conduct to be held oppressive or in disregard of the shareholder's interests will be judged by objective standards and there is no requirement to prove bad faith. It is also possible under section 569(f) of the Companies Act for a shareholder to apply to the court for the winding up of the company for the same reasons as above (ie, where the affairs of the company are being conducted, or the powers of the directors are being exercised, in a manner that is oppressive to the shareholder or in disregard of the shareholder's interests).

Company response strategies

12 What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

We advise that it is more important than ever for Irish boards to be ready to deal with shareholder activism. While activism along with issues such as cybersecurity, regulatory challenges and reputation risk are occupying the minds of Irish boardrooms, the time invested by boards in considering and preparing for it varies widely.

Responding effectively to activist shareholders requires advance preparation and active investor engagement on issues of importance to investors. It is no longer sustainable for companies to 'just say no' to an activist campaign. While some activist attention can be unwanted, our advice is that companies and their boards should not automatically dismiss activist proposals.

We recommend that companies focus carefully on regular shareholder communications and are prepared to respond to activist campaigns by assessing, on an annual basis, how susceptible the company is to an activist campaign, by whom and in what particular areas. We also recommend that companies focus on communicating a consistent and clear corporate strategy and proactively deal with earnings shortfalls or other adverse developments. Shareholder engagement on an ongoing basis can help lay the vital groundwork for investor decision making.

Other advice includes monitoring the share register, adhering to corporate governance best practice, maintaining a unified board consensus and being prepared for all eventualities at the AGM.

13 What structural defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

Structural defences are not common in Ireland. A target board must ensure at all times they observe their fiduciary duties to act in the best interests of the company. The Irish Takeover Rules dictate that directors of a relevant target must act only in their capacity as directors and not have regard to their personal interests. At any time during the course of an offer, or when the board has reason to believe that an offer may be imminent, the Irish Takeover Rules (General Principle 3 and Rule 21) prohibit companies from taking any action that would or might frustrate an offer or deprive shareholders from the opportunity of considering an offer. Unless the consent of the Irish Takeover Panel is obtained (and, in some circumstances, shareholder approved), putting in place structural defences such as poison pills during the offer period is not permitted under the Irish Takeover Rules as they could be deemed to constitute frustrating actions. Frustrating actions include issuing new shares or options, disposing or acquiring material assets, or entering into non-ordinary course contractual arrangements.

A number of Irish holding companies with listings in the US have however adopted automatic shareholder rights plans that, in general terms, work by imposing a significant penalty upon any person or group that acquires 10 per cent or more of the outstanding ordinary shares of the company without the prior approval of the board of directors.

Staggered boards are not a feature of Irish companies. Directors of Irish companies can be removed by an ordinary resolution under section 146(1) of the Companies Act. As noted above, the Code also applies to companies listed on the MSM and provides that directors of relevant companies should be elected or re-elected annually.

14 May shareholders have designees appointed to boards?

Best practice in relation to the composition of the board is set out at section B of the Code as adopted by the Irish CG Annex. Fundamentally the main principle is that a board should have the appropriate balance of skills, experience, independence and knowledge to enable them to discharge their respective duties and responsibilities. The composition of the board should have an appropriate combination of independent executive and non-executive directors such that no individual or small group of individuals can dominate the board's decision making.

Regarding the appointment of new directors to the board, there should be a formal, rigorous and transparent procedure. The search for board candidates should be conducted, and appointments made, on merit. There should be a nomination committee that should lead the process for board appointments and make recommendations to the board. The nomination committee should evaluate the balance of skills, experience, independence and knowledge of the board and, in light of this evaluation, prepare a description of the role and capabilities required for a particular appointment. Where a company has directors who have been nominated by shareholders, they should include in the annual report a reasoned explanation for such appointments, including a description of the skills and expertise directors bring to the board.

In circumstances where a shareholder appoints designees to the board, the company may seek to put in place a relationship agreement between the company and a shareholder. A relationship agreement typically governs the relationship between the shareholder and the company and requires the shareholder to acknowledge the independence of the management of the company and procures compliance with corporate governance rules. They usually also include non-compete, non-solicitation and confidentiality obligations on the shareholder and confirm the shareholders' right to appoint a director.

Pursuant to the MSM Listing Rules, companies with controlling shareholders who wish to list on the MSM must be able to operate independently of those shareholders, and a relationship agreement is required to ensure that all dealings are on arm's-length terms. A 'controlling shareholder' includes any group of persons acting in concert who together control 30 per cent or more of the voting rights attached to the company's shares.

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

The company's constitution is publicly available in the Companies Registration Office. A constitution is a formal document that sets out the rules governing a company. It also defines the relationship between the company, shareholders and officers.

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

Every company is required to keep up-to-date statutory registers with details of the legal owners of the shares in the company. The shareholders have a statutory right to inspect and receive copies of the statutory registers kept by the company. As regards other persons such as creditors, employees or members of the public, the register of members is open to inspection on the payment of a fee.

Although companies do not have to recognise the beneficial holders of shares, under section 66 of the Companies Act there is nothing precluding a company from requiring a member or a transferee of shares to furnish the company with information as to the beneficial ownership of any share when such information is reasonably required by the company. The beneficial interest may also be required to be disclosed on foot of a court order.

Even though beneficial interests are not being recorded in the register of members, a company may not ignore beneficial interests of which it has actual notice. These interests must be disclosed and recorded in a register, known as a 'register of interests'. Under section 261 of the Companies Act, directors and secretaries must notify the company in writing of their interests in shares or debentures of the company. When a company receives information from a director or secretary, it must within three days enter that information in the register of interests.

Separately, the European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 came into effect on 15 November 2016 meaning that Irish companies, except listed companies on the MSM and ESM, must gather and maintain information on individuals described as their ultimate beneficial owner.

17 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

Similar to the UK, an Irish-listed company must not ordinarily selectively disclose information to shareholders. Under the Market Abuse Regulation (MAR), an Irish-listed company is expected to disclose 'Inside information' to the market as soon as possible. Inside information includes specific or precise unpublished information relating to a particular issuer or particular securities that, if made public, would have a significant effect on the price of any securities.

MAR recognises that inside information can be legitimately disclosed to a shareholder or a potential shareholder for market sounding purposes in order to measure interest in a potential transaction, its size or pricing. However, there are onerous requirements, including the need to obtain the shareholder's consent and the need for the company to keep detailed records of the market soundings.

MAR provides that companies may legitimately delay disclosure of inside information to the public provided all of the following conditions are met: (i) immediate disclosure is likely to prejudice the company's legitimate interests, (ii) delay of disclosure is not likely to mislead the public, and (iii) the issuer is able to ensure the confidentiality of the information. Selective disclosure is also permitted to a shareholder if the shareholder owes the company a duty of confidentiality and requires the information to perform their functions.

There is in any event an obligation on companies to maintain insider lists for deal-specific or event-specific matters.

Update and trends

One relatively new development has been the increased activist activity on the part of proxy advisory firms. ISS and Glass Lewis have both recently been actively engaged with Kingspan plc. Glass Lewis, which has its European headquarters in Ireland, opposed the appointment of two new directors citing concerns in relation to their independence. They instead advocated the appointment of 'independent-on-appointment non-executive directors'. Glass-Lewis published a report expressing this view prior to Kingspan's most recent AGM.

Similarly, ISS opposed Kingspan's proposed management share bonus scheme. It released a report stating the scheme was excessive and made it too easy for management to get shares in the company. Interestingly, Glass Lewis opposed this view and endorsed the scheme. This demonstrates an interesting example of two separate proxy advisory firms pursuing differing, opposing goals in relation to the same company.

Another development this year has been the use of the Irish courts as a means of activist investors advancing their interests. This was evident in the dispute between the board of Conroy Gold and Natural Resources plc and a 28 per cent shareholder, Patrick O'Sullivan. Mr O'Sullivan held a 28 per cent stake in Conroy Gold and had concerns regarding the size and remuneration of the board. He also claimed the company was not developing the company's resource discoveries quickly enough. Acting on speculation that the company was planning to allot new shares, Mr O'Sullivan called for an EGM, moving to replace three directors with his own nominees. The replacements were blocked by the chairman on the grounds that in making his nominations, Mr O'Sullivan did not follow correct procedures as prescribed in the company's constitution. On this point, Mr O'Sullivan unsuccessfully took the company to court claiming that the chairman had abused his power.

There has been some commentary that Brexit could create new opportunities for activists, and Steven Balet, head of corporate governance and activist engagement at FTI Consulting's strategic communications arm, has said some activist firms were currently eyeing Ireland, which had a 'permissive' regulatory environment that could favour their strategies.

18 Do companies receive daily or periodic reports of proxy votes during the voting period?

The registrars of Irish companies have the ability to provide daily proxy update reports to the company ahead of any general meeting. As a large number of proxy votes tend to be made in the week leading up to the general meeting, daily updates reports are more common during this period.

Prior to proxy votes being cast, companies may engage with shareholders, and in particular institutional shareholders or investor protection committees, to seek them to vote in favour of resolutions.

Proxy votes are typically granted in favour of the company chairman and are confidential in the lead-up to the general meeting.

19 Must shareholders disclose significant shareholdings?

Shareholders with interests in Irish public companies listed on an EU regulated market such as the MSM and the main market of the LSE are required to comply with the Transparency Regulations. Under the Transparency Regulations, a person is obliged to notify a listed company where the percentage of voting rights that it holds reaches, exceeds or falls below 3 per cent and each 1 per cent threshold thereafter. The notification to the company must be made as soon as possible, and within two trading days for an Irish company.

Shareholders with interests in Irish public companies, not listed on an EU regulated market, such as the ESM, AIM, NYSE and NASDAQ, must comply with the disclosure requirements under the Companies Act. The statutory disclosure regime requires notification of interests in, and changes to interests in, 3 per cent or more of the 'relevant share capital' or of any class of 'relevant share capital'. The obligation arises where a person knowingly acquires an interest, or knowingly ceases to be interested, in shares or becomes aware that he has acquired an interest, or ceased to be interested, in shares. The notification must be made in writing to the company, in a prescribed form, within five days.

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

Under the Irish Takeover Rules, a shareholder is required to make a mandatory offer (under Rule 9) in the following circumstances: (i) the shareholder, or any persons deemed to be acting in concert with it, acquires 30 per cent or more of the voting rights in the company, or (ii) the shareholder's holding, or any persons deemed to be acting in concert with it, is 30 per cent or more of the voting rights in the company, but less than 50 per cent of the voting rights, and increases by more than 0.05 per cent of the aggregate percentage voting rights in that company in any 12-month period.

The Irish Takeover Rules do state that the action of shareholders voting together on particular resolutions may not of itself lead to a mandatory offer obligation but the Irish Takeover Panel may, in certain circumstances, hold that such joint action indicates that there is a group acting in concert with the result that purchases by any member of the group could give rise to such an obligation. The Irish Takeover Rules do not however elaborate, in the same manner as the UK Takeover Code, on whether shareholders who propose a 'board control-seeking' resolution will be presumed to be acting in concert.

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders?

Selective communications by a company to a discreet number of shareholders often fall within the meaning of 'inside information'. Shareholders are prohibited from dealing on the basis of such information under the MAR. Larger institutional shareholders usually have appropriate wall-crossing procedures in place to ensure that inside information can be received by a small number of relevant people within the organisation without restricting the dealing teams. Companies also need to be aware that where there is media speculation or market rumour regarding a company, they are required to assess whether a disclosure or announcement obligation arises.

Companies are increasingly turning to proxy solicitation and investor relations specialists to provide shareholder analysis reports, monitor trading movements and competitor analysis.

The use of social media platforms by activists in Ireland is still not common.

22 Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

Organised shareholder engagement has increased over the past few years, but does tend to vary quite considerably from company to company.

As referenced in question 23, ongoing dialogue with shareholders is a core principle of the Code. The UK Stewardship Code also promotes effective engagement from institutional shareholders in dealing with companies.

As noted at question 7, activists ordinarily prefer to engage on a more private and informal amicable basis. While companies are increasingly willing to engage with shareholders, they are not usually minded to yield to requests for board seats and other corporate changes.

23 Are directors commonly involved in shareholder engagement efforts?

Ongoing dialogue by the board with shareholders is a core component of the Code. The main principle of this is that shareholder dialogue should be based on the mutual understanding of objectives. The Code sets out that 'the board should keep in touch with shareholder opinion in whatever ways are most practical and efficient'.

Very often most shareholder engagement takes place via the chairman, CEO or CFO. In order to ensure the board is sufficiently engaged, the board must state in the annual report the steps taken to ensure that the directors, especially the non-executive directors, have engaged with shareholders. The Code, in particular, promotes engagement by the chairman and non-executive directors with shareholders. For example, the chairman is expected to discuss governance and strategy issues with major shareholders.

As noted at question 3, the Code encourages active board engagement with shareholders, and the UK Stewardship Code promotes active engagement by institutional shareholders with the board.

Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

Directors are not required to consider an activist proposal in a different manner to other board decisions.

The Companies Act sets out the fiduciary duties that directors owe to the company. These duties include a duty to act in good faith and in the interest of the company, to act honestly and responsibly, and to avoid conflicts of interest. These duties are owed to the company and the company alone. Directors appointed by shareholders may in the performance of their duties have regard to the interests of the shareholder but this will be subject always to the overriding fiduciary duties owed to the company. In contrast with directors' duties, shareholder activists do not owe any fiduciary duties to the company.

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General

1 What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

In Italy, the legislative framework governing shareholder activism and engagement mainly consists of:

- the Italian Civil Code concerning the rights of the shareholders of joint stock companies;
- Legislative Decree No. 58 of 24 February 1998 concerning the rights of the shareholders of listed companies (the Italian Securities Act);
- Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies (Shareholders' Rights Directive), as implemented under national laws and regulations. In June 2017, Directive 2017/828/EU – amending the Shareholders' Rights Directive – came into force as part of the European Commission's response to the shortcomings identified in listed companies' corporate governance. The amendments, which must be implemented into national law by EU member states by June 2019, focus on encouraging long-term shareholder engagement and enhancing transparency between investors and companies; and
- the Italian Stock Exchange Commission (Consob) Regulation on listed companies No. 11971 of 14 May 1999 as amended from time to time (the Issuers Regulation).

The national bodies competent to enact laws and regulations concerning this area are the legislative bodies (ie, the parliament and the government) and Consob. Laws and regulations governing issuers and capital markets, including those concerning shareholder activism, are enforced either by the competent courts or by Consob. Consob's decisions may be challenged before the competent court.

In addition, Italian financial intermediaries (mutual funds, hedge funds, etc) are also governed and supervised by the national central bank (the Bank of Italy), and their investments and actions are regulated by, among other provisions, the Regulation on collective investment management adopted by the Bank of Italy on 19 January 2015.

2 What are the other primary sources of practices relating to shareholder activism and engagement?

The investor community has issued several non-binding guidelines and codes of best practice (increasingly influential among practitioners) in this area, and the principles issued by the Italian Asset Managers Associations are particularly noteworthy in such regard. The principles are as follows:

- the Italian Stewardship Principles 'for the exercise of administrative and voting rights in listed companies' by financial intermediaries, which provides a set of high-level best practices designed to promote discussion and cooperation between financial intermediaries and listed issuers; and
- the Principles 'for the selection of candidates for corporate bodies of listed companies'.

In addition, major proxy advisory firms have developed proxy voting guidelines regarding Italian listed companies, which set forth voting recommendations on particular issues to be voted on in the context of shareholders' meetings. These guidelines are based on what such firms believe to be the best practice, and are becoming increasingly influential among institutional investors. In this regard, please note that during the 2017 proxy season, 21 issuers that were a part of the FTSE MIB index (ie, the primary benchmark index for the Italian equity markets, capturing approximately 80 per cent of the domestic market capitalisation) received at least one against or abstain recommendation from ISS (for a total of 32 resolutions) and 16 FTSE MIB issuers received at least one against or abstain recommendation from Glass Lewis (for a total of 30 resolutions).

Finally, institutional investors – and in particular major asset managers – are adopting corporate governance guidelines and principles to inform investors on how they intend to engage with target companies in order to better pursue the interests of their stakeholders.

3 How is shareholder activism generally viewed in your jurisdiction? Are some industries more or less prone to shareholder activism? Why?

Shareholder activism is generally viewed with a certain degree of scepticism since its benefits for the companies and all the shareholders are still deemed to be demonstrated on the long term.

In the past, the concentrated ownership structure of a significant percentage of Italian companies has given rise to a less than favourable environment for shareholder activists. However, shareholder activism has risen in recent years and we expect this trend to continue.

Market research shows that there is no specific nexus between industry sector and influence of activist shareholders on target companies. On the contrary, such research shows that the presence of activist shareholders in listed companies tends to be inversely proportional to the shareholding held by the controlling shareholders, regardless of the business sector of the issuer. In addition, where the concentrated ownership is almost the same, the participation of institutional investors in the issuer tends to be lower where control is exercised through a coalition of shareholders rather than by a single shareholder.

4 What are the typical characteristics of shareholder activists in your jurisdiction?

Shareholder activists are mainly foreign institutional investors. Traditionally, activist shareholders have mainly been represented by foreign hedge funds. However, in recent years we have seen rising engagement and activism on the part of foreign traditional institutional investors – such as mutual and pension funds as well as sovereign investment funds – and this trend looks likely to continue. This trend is shifting the horizon of investments from pure short-term to medium and long-term.

5 What are the main operational, governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

Activists tend to be first attracted by the valuation of companies (shares traded at a discount to peers are often the target of activists' attentions), operating underperformance and extraordinary transactions which involve target companies, such as mergers, demergers and public tender offers.

Hedge funds and other activist institutional investors tend to focus on governance structure and board composition, remuneration policies, incentive plans, corporate governance monitoring and extraordinary transactions.

In particular, shareholder activism is aimed at making changes in the composition of the board of directors or the board of statutory auditors. In certain circumstances, such changes in board composition are aimed at supporting further requests by activist shareholders. In this regard, the 2017 proxy season shows that more than 78 per cent of minority shareholders voted in favour of the slate(s) (lists of candidates) submitted by minority shareholders, generally supported by Assogestioni. In relation to the remuneration of directors and managers, data illustrate that a significant quota of minority shareholders voted against remuneration policies (around 32 per cent): monetary incentive plans and stock incentive plans have also been highly contested.

Governance questions highlighted by activist shareholders also include the presence of independent directors, with the aim of increasing the supervisory role of such directors within the board, as well as access, completeness and accuracy of corporate information.

Activist shareholders have also led campaigns pursuing higher dividends (than those historically distributed or announced by the issuers) or other shareholders returns, often seeking a change to the business plan.

More recently, activist shareholders:

- in the context of shares conversions, have pushed to have preference shares converted into common shares at a premium;
- in the context of public tender offers, have pushed bidders to increase the consideration offered; and
- in the context of mergers and demergers, have pushed the companies to change the exchange rate.

In most cases, activist shareholders have argued that the consideration offered or the exchange ratio did not reflect the fair value of the shares, and have started engagement initiatives with the management of the companies involved.

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

Under the provision of the Italian Securities Act, shareholders who, individually or jointly, represent at least 2.5 per cent of the issuer share capital may, within 10 days (or for certain specific items five days) from publication of the notice calling the shareholders' meeting:

- request one or more items to be included in the agenda of the shareholders' meeting; or
- submit new resolution proposals on items already on the agenda.

Shareholders may not request to put on the agenda of the shareholders' meeting items that can only be submitted by the directors of the company, by operation of law, such as annual reports, mergers and demergers and capital increases against contributions in kind. In addition, shareholders requesting the supplementation of the agenda or submitting new resolution proposals should prepare a report that explains the reasons underlying the proposed resolutions on the new items, or the reasons underlying additional resolution proposals on items that were already placed on the agenda. Such report must be sent to the board of directors, which must make the shareholders' report available to the market together with a report containing their evaluations, if any, by publishing them inter alia on the company's website. However, any single shareholders, including activists, may freely intervene during the shareholders' meeting to discuss the agenda.

7 What common strategies do activist shareholders use to pursue their objectives?

Activist shareholders tend to use shareholders' rights granted by Italian law to minority shareholders. In particular, in the election of the boards of directors of Italian listed companies, activist shareholders can file a slate for the election of directors that is reserved for minority shareholders benefiting from the mandatory application of the voting list system. Furthermore, subject to certain exceptions, activist campaigns aiming at minority board representation are led without clamour, mainly by institutional investors (other than hedge funds), which usually submit their slate of candidates (supported by Assogestioni) after having approached other shareholders (including controlling shareholders). In this regard, press news analysis suggests that in Italy activist shareholders conduct their business by establishing strategic alliances (even with target companies) rather than using the more aggressive techniques pursued, for example, in the United States.

Nevertheless, some campaigns give evidence that activist shareholders may pursue their strategies and objectives through, initially, private discussions and negotiations with the management of the target company and, if the first phase is not successful, by publicising private engagement or carrying out other public actions (such as open letters) that are often fully covered by the media. In similar circumstances, activist shareholders tend to use stock loans and derivatives and other devices to increase voting power, as well as to obtain support from other shareholders in order to achieve an adequate interest to support their claims.

8 May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

Shareholders representing at least 5 per cent of the share capital of listed company (or the lower participation indicated in the by-laws) are entitled to request the board of directors to call ordinary or extraordinary shareholders' meetings, indicating the items to be submitted to such shareholders' meetings. In such scenario, the board of directors must call the relevant shareholders' meeting without delay. As mentioned above, shareholders may not request that shareholders' meetings be called to resolve items that can only be submitted by companies' directors, by operation of law, such as annual reports, mergers and demergers and capital increases against contribution in kind.

In order to attend shareholders' meetings and to exercise voting rights, shareholders must ask their intermediaries to confirm (by means of a statement) to the issuer, in accordance with intermediary accounting records, the shareholders' entitlement to attend the meeting. In addition, shareholders requesting the board of directors to call a shareholders' meeting should prepare a report on the items on the agenda. Such report must be sent to the board of directors, which must make the shareholders' report available to the market together with a report containing their evaluations, if any.

By law, shareholders of listed companies cannot act by written consent.

9 May directors accept direct compensation from shareholders who nominate them?

A company has the obligation to pay the directors' compensation. A shareholder or a third party may pay, in whole or in part, the compensation of a director. Agreements pursuant to which a third party undertakes to pay director's compensation are considered valid as long as the director has no obligation to follow the instructions of the party obliged to pay its compensation. However, such agreements would prejudice the independence of the director, as set forth in the Corporate Governance Code adopted by Italy's main stock exchange, Borsa Italiana SpA.

10 May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

The slate voting system provides that members of the board of directors and the board of statutory auditors of listed companies must be appointed on the basis of slates of candidates submitted by qualified shareholders (ie, those holding a minimum shareholding ranging between 0.5 per cent and 4.5 per cent, depending on the company's market cap). Such slates must be filed with the issuer no later than the 25th day prior to the date of the meeting called to resolve the appointment of the members. In addition, no later than the 21st day prior to the shareholders' meeting the company makes the slate available to the public at the company's registered office, on the company's website and in any other ways envisaged by Consob.

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

Shareholders representing at least 2.5 per cent of the share capital of listed companies (or such lower percentage as may be provided under the corporate by-laws) may bring derivative actions on behalf of the company for directors' liability, in order to seek compensation for damages caused by the directors to the company due to their breach of the law, the company's by-laws, or their general duties. Such actions may be brought no later than five years from the termination date of the director's office. In such circumstances, should the court acknowledge the directors' liability, the company must reimburse any costs incurred by shareholders exercising the action. The company's directors' liability action may also be brought upon resolution of the general shareholders' meeting, with the ordinary majorities (generally, the simple majority of shareholders attending the meeting).

Company response strategies

12 What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

The encouragement of investor engagement at both the European (see Directive 2017/828/EU of the European Parliament and of the Council amending Directive 2007/36/EC regarding the encouragement of long-term shareholder engagement) and the national levels (mainly through voluntary codes and other soft-pressure tools) seems likely to foster shareholder activism. It will become a stable element of the corporate background, and should be taken into account by the boardroom and companies in general.

Issuers need to consider two main different sets of activities in order to be in the best position to respond to shareholders' activism.

First of all, issuers should work in areas of investor relations and board preparedness before possible approaches by activist shareholders. Such preliminary preparation should be based on the maintenance of adequate relations with institutional investors (for example, by implementing a dedicated team to understand their investment, engagement and voting policies or guidelines), as well as on appropriate inductions of the board of directors in order to deal with activists. Such inductions should provide the board with an in-depth understanding of the activists' environment and encourage independent directors to develop and maintain stable relationships with institutional investors.

Secondly, issuers should be prepared to respond, on a case-by-case basis, when shareholders' approaches and campaigns arise. For this purpose, it is essential to establish a dedicated team (consisting of managers and advisers) to assess private requests from institutional investors. Should activists' approaches become public, a meeting of the board of directors should be called to evaluate appropriate responses to activists' claims, including whether or not to meet with the activists or to call a general shareholders' meeting to adopt defensive measures.

13 What structural defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

The first structural defence is, of course, having a constant dialogue with institutional investors and an active investor relator team that engages with the company's shareholders base to deliver value.

The list below illustrates certain structural defences available under the Italian legal framework, which may be adopted, and even combined together, by companies in order to contrast or eradicate shareholder activism. The effectiveness of such actions should be carefully assessed on a case-by-case basis. In addition, certain actions should be put in place in advance of an IPO.

Multiple voting shares and loyalty shares

Introduced by Law No. 116 of 2014, multiple voting shares and loyalty shares are designed to make corporate law more flexible, creating incentives to corporations to go public. Specifically, it is now possible for closely held corporations to issue shares with a maximum of three votes per share (listed companies cannot issue multiple voting shares, but companies that go public can keep outstanding multiple voting shares previously issued). In addition, both listed and non-listed companies can issue loyalty shares, which entitle beneficial owners holding the shares for a minimum period of 24 months to exercise two votes per share. The adoption of such shares – strengthening the voting rights for controlling and long-term shareholders – constitutes a measure to safeguard companies against aggressive forms of shareholders activism promoted by short-term investors.

Issuance of special classes of shares

The issuance of special classes of shares, such as non-voting shares, shares with voting rights limited to certain decisions and conditional voting rights may also be used to alter the proportionality between ownership of and control over the company.

Statutory limits on voting rights or shares ownership

A different device to curb shareholders activism consists of limitations on the maximum number of votes that a single shareholder may cast. Such limitations must be contained in the corporate by-laws and aim to alter the proportionality between voting and cash flow rights. Similarly, corporate by-laws may introduce certain limitations on shares ownership.

However, please note that – unless otherwise provided by their articles of association – target companies of (hostile) tender offers shall abstain from actions or transactions that might frustrate the offer (a defensive measure) unless such measures are approved by the ordinary or extraordinary shareholders' meeting.

14 May shareholders have designees appointed to boards?

The slate voting system, which is mandatory for Italian listed companies, grants non-controlling shareholders holding a minimum interest (see question 7) minimum representation on both the board of directors and the board of statutory auditors. Slates may also be submitted by the board of directors.

If the majority shareholder or the board of directors decides to cooperate with an activist shareholder, by agreeing to include one or more of its designees in the slate of candidates to be submitted and to vote for such slate, this agreement must be considered as a shareholders' agreement (see question 19). Shareholders' agreements are subject to disclosure obligations, which require:

- the transmission of the agreement to Consob and the company;
- the filing of the agreement with the company's registrar of the city where the target company has its registered office; and
- the publication of an excerpt of the agreement in a national newspaper and on the company's website.

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

Corporate articles of association and by-laws of Italian companies must be filed with the local companies' registrar, and thus be available to the public. In addition, by-laws, corporate governance information and price-sensitive press releases of Italy-listed companies must be published on a dedicated section of their websites.

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

Italian companies should make available at their registered offices, among other things, the shareholders' ledger, which must set forth the number of outstanding shares, the shareholders holding registered shares (ie, not bearer shares) as well as transfers and constraints relating thereto. Any shareholder has the right to inspect, and to obtain an excerpt of, the shareholders' ledger.

Under the Italian Securities Act, companies with shares held through the centralised clearing system (dematerialised shares) must update the shareholders' ledger when the entity organising and managing such centralised clearing system – or different authorised intermediaries – transmit communications in order to permit shareholders to exercise their prerogatives (ie, economic and voting rights). However, because most of these communications are transmitted around the time of the shareholders' meeting date, in relation to dematerialised shares, updated data on the shareholders' ledger will be available (in

Update and trends

In terms of legislation, on 16 October 2017, Law-Decree No. 148 setting out 'urgent provisions on financial matters and for undeferrable matters' entered into force, introducing the 'early-warning provision', which requires purchasers of a shareholding equal to, or exceeding, 10, 20 and 25 per cent of the listed company's share capital to publish a statement regarding the objectives it will pursue in the next six months with the acquisition.

Such statement must indicate, among other things: (i) the terms of financing of the acquisition; (ii) whether the investor is acting alone or in concert; (iii) whether the investor intends to purchase additional shares in the target or to acquire control of the company; and (iv) whether the purchaser intends to make changes in the composition of the board of directors or the board of statutory auditors of the target company. The goal of the 'early-warning' provision is to improve transparency and safeguard the proper functioning of the market, increasing the level of information of the stakeholders in corporate M&A transactions.

In addition, 2017 has witnessed two high-profile activist campaigns run by Amber Capital at Mediaset SpA (a blue chip media company), and Parmalat SpA (a dairy group). Amber Capital acquired a 2.5 per cent stake in Mediaset and, during the annual general meeting, publicly criticised the company's management for mismanagement, inviting the board of directors to look for new strategic alliances. In addition, Amber Capital, which owned approximately 4 per cent of Parmalat, led a push by minority shareholders against its majority owner, Sofil SaS, a French company of the Lactalis group that had launched a takeover to acquire all of the outstanding shares in order to delist the company, arguing for a higher bid price. As a result of this campaign, Lactalis failed to buy out the remaining minority shareholders of Parmalat.

most cases) well after the annual general meeting, thus frustrating the disclosure function of the shareholders' ledger.

In addition, if envisaged in the corporate by-laws, Italian listed companies can ask, at any time and at their own expense, intermediaries (through a central depository) to provide data identifying shareholders together with the number of shares registered on accounts in their names. In addition, if the corporate by-laws provide such option, the company should activate the identification procedure when shareholders representing 2.5 per cent of the issuer share capital (or such other percentage as may be determined by Consob) so request. In both cases, single shareholders may deny their consent to such disclosure and refuse to communicate the number of owned shares.

The same request to intermediaries to provide data identifying shareholders together with the number of shares registered on accounts in their names can be advanced by promoters of proxy solicitation.

17 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

Issuers have no duty to engage with activist shareholders; however, companies may enter into private discussions with hedge funds or other institutional investors, provided that the non-selective disclosure rules are complied with. Under such rules, listed companies must promptly disclose to the market any price sensitive information, thus avoiding the selective disclosure of such information only to certain parties. Under certain conditions, exceptions to the selective disclosure rules may be available (for example, certain information can be selectively disclosed to controlling or significant shareholders in the context of transactions which require their consent).

Issuers tend to keep shareholder engagement activities confidential rather than disclose them to the public. However, depending on circumstances, issuers might deem opportune to disclose engagement efforts by ad hoc press releases, press interviews or in the context of meetings between management and the investor community.

18 Do companies receive daily or periodic reports of proxy votes during the voting period?

Promoters of proxy solicitation should act with diligence, correctness and transparency and must keep the results of the solicitation secret, thus preventing the company from gathering information on the shareholders concerned during the proxy season. After the shareholders' meeting, the promoter must communicate, through a press release, how it voted, the reasons behind any vote exercised differently from what had been proposed and the voting results. However, the company itself may promote a proxy solicitation and, therefore, receive the proxy votes expressed by company's shareholders.

19 Must shareholders disclose significant shareholdings?

Shareholders of a listed company have the obligation to disclose significant shareholdings to the issuer and to the market. In particular, shareholders must notify to company and Consob:

- when their shareholdings exceed the threshold of 3 per cent of the target's voting share capital;
- when the thresholds of 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, 50 per cent, 66.6 per cent and 90 per cent are reached or exceeded; or
- when the shareholdings fall below the thresholds mentioned in the above points.

The 3 per cent threshold does not apply for shareholdings held in small and medium companies.

Similarly to the above, the obligation to disclose information to Consob and the listed company is triggered also when:

- financial instruments interests, reach, exceed or fall below the thresholds of 5, 10, 15, 20, 25, 30, 50 and 66.6 per cent of the voting share capital of the listed company; or
- aggregate interests reach, exceed or fall below the thresholds of 10, 20, 30, 50 and 66.6 per cent of the voting share capital of the listed company.

In this regard, financial instrument interests means the aggregate of the 'potential interest' and the 'other long positions'. Potential interests refer to the shares comprising the underlying of derivative financial instruments, other financial instrument or contract, which, by virtue of a legally binding agreement, attributes to the holder, at its exclusive initiative, the unconditional right to purchase, by physical delivery, the underlying shares or the discretion to buy, by means of physical delivery, the underlying shares. 'Other long position' means the shares underlying derivative financial instruments, which give the holder a financial interest, positively linked to the trend of the underlying shares.

The aggregate interests means the aggregate of the shareholding and the 'financial instruments interests' held by the same person.

In addition, investors representing less than 3 per cent of the issuer share capital who are also parties to shareholders' agreements concerning the exercise of voting rights in listed companies or their controlling companies, for the purposes of the disclosure obligations related to the above thresholds, must also take into account the voting rights of the shares conferred to the shareholders' agreement by the other parties to the same. In particular, investors who are party to a shareholders' agreement involving shares that overall reach, exceed or fall below the thresholds of 5, 10, 15, 20, 25, 30, 50 and 66.6 per cent must indicate:

- the voting rights relating to all the shares conferred to the agreement;
- their own voting rights relating to the shares conferred to the agreement; and
- their other voting rights relating to the shares not conferred to the agreement.

For the purpose of the above, the notion of shareholders' agreement also includes those agreements that aim at:

- creating obligations of consultation prior to the exercise of voting rights;
- imposing limits on the transfer of the shares or the purchase of shares or financial instruments;
- having as their object or effect the exercise, jointly or otherwise, of a dominant influence; or
- encouraging or frustrating a takeover bid or exchange tender offer.

Compliance with the above-mentioned disclosure obligations is not required if the shareholders' agreement has been made public in accordance with the rules on disclosure of shareholders' agreements set forth in the Italian Securities Act (for more information about these rules, see question 14).

Disclosure notification must be made promptly and, in any case, no later than the fourth business day from the execution of the transaction triggering the obligation, using the relevant form provided by Consob. Consob will disclose such information to the market, publishing the investors' shareholding on its website.

Investors who do not comply with the above-mentioned disclosure obligations are subject to a fine ranging from €5,000 to €1.5 million.

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

Shareholders acting in concert are those investors cooperating together on the basis of an agreement (which may be express or tacit, oral or written), even if invalid or unenforceable, for the purpose of acquiring, maintaining or strengthening control over an issuer or frustrating hostile takeover bids or hostile exchange tender offerings.

Shareholders acting in concert are jointly obliged to launch a mandatory takeover bid when, as a result of purchases made even by only one of the parties, they come into possession of a total shareholding exceeding the 25 per cent of the share capital of the issuer (or 30 per cent for small and medium companies). Such obligation is triggered only if the purchases exceeding the relevant threshold have been carried out in the 12-month period preceding the date of execution of the shareholders' agreement.

As a result of the above, should the shareholders acting in concert jointly represent more than 25 per cent of the issuer' share capital, and should one of them purchase even one single share of the issuer, then such investors will be required to launch a mandatory takeover bid over the issuer.

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders?

There are no specific rules regulating the communications made by activist shareholders or companies in order to obtain support from other shareholders. Assogestioni may constitute a centre of interest aggregation for institutional investors, aiming to concentrate the voting power of its associates to support shared resolutions or candidates.

In the past few years, we have seen an increasing number of companies communicating with both consumers and shareholders through social media, and we expect this trend to continue in the future.

Promoters, including issuers, may solicit the shareholders' votes through proxy solicitations. The Italian Securities Act and the Issuers Regulation set forth an articulate procedure to carry out proxy solicitations, which requires the publication of (i) a notice to the shareholders, containing information regarding the promoter of the solicitation, the target company, the date of the shareholders' meeting as well as the relevant resolution for which the proxy is required, (ii) a proxy prospectus, containing, inter alia, a detailed description of the reasons underlying the voting proposes, and (iii) a proxy form. Promoters shall keep confidential the results of such solicitations.

22 Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

Historically, Italian-listed companies have not engaged directly with shareholders, since the general meeting and the shareholders vote are the primary mechanisms for shareholder communications with the company (ie, votes cast in director elections have traditionally served as an efficient and satisfactory tool to express shareholder preferences).

In recent years, however, shareholders of Italian-listed companies have increasingly sought to attain a dialogue with management, sometimes even demanding personal interaction with directors. This trend is part of a new pattern in the shareholders' activism (and corporate governance) landscape.

Shareholder engagement strategies are, in general, implemented by management and, if appropriate, by members of the board of directors. In particular, engagement with shareholders (if any) is usually led by management or other representatives of the company (such as the general counsel, the corporate secretary, investor relator or the chief executive officer). Usually, shareholder engagement seeks to involve the largest minority or institutional shareholders of the company.

Issuers' tend to engage with shareholders on an informal basis, mainly via the investor relations department or external proxy advisers. In particular, shareholder engagement is developed through periodic meetings with investors and communications on specific issues, which become more frequent during the annual proxy season (February–May). However, depending on the approach used by activists, issuers may consider carrying out formal engagement activities and, therefore, use formal channels of communication, such as press releases, open letters and other public actions.

On the other hand, issuers tend to permit shareholders to contact the companies via mail, email or fax, through the investor relations department, which directs the communications to the managers, directors or committee responsible for the relevant issue.

23 Are directors commonly involved in shareholder engagement efforts?

In general, shareholder engagement is led by executive management or by executive directors. Non-executive and independent directors are less frequently involved in shareholders' engagement. If activists' campaigns become hostile, the board of directors in its entirely shall be called to evaluate appropriate responses to activists' claims; in these cases, internal committees led or composed by independent directors may also be involved.

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Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

Directors have no binding obligation to consider activist shareholders' proposals under a different standard of care. However, in practice, activists' proposals may draw the attention of stakeholders and public authorities on specific issues, thus requiring special attention from the directors in analysing such matters. Similarly, activist shareholders owe no fiduciary duties to the company, regardless of whether they own majority or minority shareholdings. The prevention of abuse of a majority holding constitutes the only 'fiduciary duty' on the part of majority shareholders to the company (and the company's shareholders), and requires controlling shareholders to avoid reaching resolution on decisions that do not coincide with the company's best interests and that cause prejudice to other shareholders.

On the contrary, under applicable Italian law, institutional investors (such as mutual, pension and hedge funds) owe fiduciary duties to their investors and, as a consequence, are under an obligation to pursue only the investors' interests.

Japan

Yo Ota, Ryutaro Nakayama and Shigeru Sasaki
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General

1 What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

The Companies Act and its relevant ordinances provide for the rights of shareholders with regard to the company and its organisation, such as the right to make a shareholder proposal or initiate a derivative suit against directors. The rights stipulated in the Companies Act are, in principle, of a civil nature and enforced through court rulings.

The Financial Instruments and Exchange Act (FIE Act) and its relevant orders and ordinances regulate or provide for:

- the disclosure obligations of companies whose securities are widely held;
- the rights of investors to sue the company or its related parties;
- the rules regarding a tender offer (TOB);
- the disclosure obligations of an investor with large shareholdings;
- the rules protecting market fairness, such as prohibitions on market manipulation and insider trading; and
- the rules regarding a proxy fight.

The FIE Act has both civil and administrative aspects. It is therefore enforced through court rulings and administrative actions by the relevant authorities, such as the Financial Services Agency and the Securities and Exchange Surveillance Commission. In some cases, criminal sanctions may be imposed for certain violations.

Both the Companies Act and the FIE Act are legislated and amended by the Diet, while relevant Cabinet orders and ordinances are enacted by the Cabinet or by various ministries or agencies, such as the Financial Services Agency, as the case may be.

Securities exchange rules and guidelines also regulate disclosures by listed companies and their communications with investors. While such rules and guidelines are not enforced through court rulings or administrative procedures, securities exchange regulatory entities may impose various sanctions against a violating company, including a suspension of transactions of the company's shares on the securities exchange, a designation as a security on alert, a monetary penalty for a breach of the listing contract, submission of an improvement report and, in extreme cases, delisting.

2 What are the other primary sources of practices relating to shareholder activism and engagement?

The Japanese Stewardship Code may also be applied if a shareholder voluntarily chooses to accept the Stewardship Code. The Stewardship Code only lays out principles, which do not have any legally binding power (ie, the Code is 'soft law'). The Stewardship Code provides, among other principles, that an institutional investor should establish and disclose its policy on discharging its responsibility to facilitate the continuous growth of the invested company and to try to increase the medium-term or long-term return of the beneficial owners or clients of the institutional investor. The Stewardship Code also recommends constructive dialogue between the institutional investor and the company to share the issues and come to an understanding on the circumstances surrounding the company.

Such dialogue is also recommended for listed companies. While the Japanese Corporate Governance Code does not provide for detailed rules but rather provides for several guiding principles, it applies to all listed companies through the listing rules. The Corporate Governance Code recommends that listed companies respond positively to an investor's offer for a meeting in order to facilitate the continuous growth of the company and to try to maximise the corporate value from a medium-term or long-term perspective. While the Corporate Governance Code does not mandate that a listed company comply with all of its principles, it requires an explanation by the company if it chooses not to follow any of the principles. Thus, the Corporate Governance Code may make Japanese listed companies more open to dialogue with institutional investors. At the same time, a listed company may make the counter-argument that, under the Corporate Governance Code, an activist's proposal or idea would not achieve the mid-term or long-term growth of the company.

In addition to the two codes mentioned above, the Japanese Ministry of Justice, which is the drafter of the Companies Act, and the Ministry of Economy, Trade and Industry, after holding discussions with scholars and practitioners, published guidelines for defence measures against hostile takeovers, which also apply to large-scale share purchasing policies (see question 13). Although they are not legally binding, they are expected to be considered best practices.

Guidelines for proxy agents, including ISS and Glass Lewis, influence the voting policies of financial institutions, particularly foreign ones, which act as custodians, and other companies, including insurance companies, which manage the money of others. Consequently, issuers – the listed companies – carefully consider such guidelines.

3 How is shareholder activism generally viewed in your jurisdiction? Are some industries more or less prone to shareholder activism? Why?

Shareholder activism is mostly viewed negatively as the activities of activists are sometimesdeemed short-termism, which is criticised in the Stewardship Code and Corporate Governance Code. However, those views may change if activist shareholders make proposals that are reasonable or constructive for mid-term or long-term investors. While there is little observable bias among the industries targeted by activist shareholders, on an individual company level, one or more of the following factors often apply to the targeted listed companies:

- low price-to-book ratio;
- excess reserved cash or cash equivalents;
- management scandals or inefficient management;
- status as a conglomerate; and
- status as a listed subsidiary.

4 What are the typical characteristics of shareholder activists in your jurisdiction?

While there are some individual activist shareholders who make shareholder proposals, or in some instances bring a lawsuit against the targeted company, most activist shareholders of Japanese companies are financial funds. While the boundaries are not so clear, such activist funds can be categorised into two types.

The first are 'aggressive' or 'dogmatic' activists who seek short-term returns by putting pressures on the company's management in various ways. They criticise the existing management's plans or skills or, as the case may be, any management scandals in order to put

pressure on management, via either private or public methods such as media appeals, proxy campaigns or partial tender offers. Although their arguments are often too dogmatic and myopic to attract the support of other shareholders, in order to avoid wasting management resources and damaging the company's reputation, management will sometimes compromise with an activist's proposal or support an exit of an activist's investment.

The second are 'soft' activists. They would prefer to have a dialogue with management to improve the governance structure, management plan or financial structure of the targeted company. They will sometimes launch a formal shareholder proposal at a general shareholders' meeting to elect outside directors or to increase dividends. As such proposals are generally in line with other shareholders' common interests, it is not uncommon for such proposals to attract general shareholder support even without intensive proxy campaigning.

In addition to the two types mentioned above, in 2016, a third type of activist appeared in the Japanese market. Funds have started targeting companies whose shares are, in a fund's opinion, overvalued. First, the fund shorts the target shares by borrowing the shares from lenders, then the fund makes a public report to the effect that the target shares are overvalued. After the share price drops, the fund then acquires the shares and returns them to the lenders. Because of the nature of their strategy, this third type of activist typically does not make shareholder proposals.

5 What are the main operational, governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

Traditionally, activist shareholders in Japan have demanded that the targeted companies increase dividends or buy back shares. Another common request by activist shareholders is the introduction of or increase in the number of outside directors. On the contrary, US-based activist shareholders have sometimes requested that Japanese companies make drastic business divestures.

Traditional proposals for the increase of dividends or share buybacks are still made, but activist shareholders have recently been campaigning over governance concerns more often. In addition to proposals regarding outside directors or oppositions to a company's slate, activist shareholders, especially US-based activist shareholders, have campaigned for divestures of cross-held shares (or '*mochiai*'). In addition, certain US-based activist shareholders have conducted campaigns to raise the TOB prices in some Japanese listed companies which were the targets in friendly M&A transactions by way of the TOB.

On the other hand, some individual activists tend to focus more on social issues, such as the abolition of atomic power plants.

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

In principle, in a listed company, a shareholder who satisfies certain requirements may propose a matter to be discussed at a general shareholders' meeting up to eight weeks prior to the meeting (section 303, the Companies Act). The eligible shareholder must possess 1 per cent or more of the issued and outstanding shares, or 300 or more voting rights, for more than six months before submitting the proposal. The same shareholding minimum and shareholding period apply if a shareholder demands that the company describe the specific content of a proposal in the convocation notice of a general shareholders' meeting at the company's cost. A company may limit the number of words of the proposal description in accordance with its internal rules and procedures for managing shares. If the proposal violates any law or the articles of incorporation of the company, or if a substantially similar proposal was not supported by more than 10 per cent of the voting rights of all shareholders during the three-year period immediately preceding the proposal, the company may decline to include the proposal in the convocation notice.

If a shareholder does not demand the inclusion of its proposal in the convocation notice, there are no shareholding minimum or shareholding period requirements, and every shareholder who has a voting right may submit a proposal at any time. However, a proposal is not permitted if it violates any law or the articles of incorporation of the company, or if a substantially similar proposal was not supported by more than 10 per cent of the voting rights of all shareholders during the three-year period immediately preceding the proposal.

The above rules apply to every shareholder regardless of the nature of the shareholder.

7 What common strategies do activist shareholders use to pursue their objectives?

In most cases, activist shareholders first tried to negotiate with management privately. Aggressive activist shareholders sometimes disclose their proposals or requests publicly without any private negotiation in order to put pressure on management.

With respect to general shareholders' meetings, which must be held at least annually, activist shareholders submit shareholder proposals as mentioned in question 6, and sometimes wage proxy fights to pass their proposals. Such shareholder proposals include proposals to appoint one or more outside directors. Another form of proxy fight is opposing a company's slate. Activist shareholders have rarely been successful in gaining mainstream investor support of such proxy fights. However, in 2017, Kuroda Electrics' general shareholders' meeting approved the only candidate on the dissident slate.

In addition to the above strategies, while it is not so common, activist shareholders can also threaten to launch a TOB for target shares. Some activists use the threat of a lawsuit against the targeted company or its management.

However, regulations on giving benefits to shareholders prohibit any person, including activists, from demanding money or any form of benefit, including a company buy-back of activist shares, in return for withdrawing their shareholder proposals or requests.

8 May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

For a listed company, a shareholder who has more than 3 per cent of all voting rights during the six-month period immediately preceding the proposal may call an extraordinary shareholders' meeting (section 297, the Companies Act).

If the company does not send the convocation notice promptly, or if the convocation notice does not indicate that the extraordinary shareholders' meeting will be held within eight weeks of the shareholder's demand, the demanding shareholder may call, by himself or herself on behalf of the company, an extraordinary shareholders' meeting with court approval (section 297, the Companies Act). The courts must approve such convocation unless circumstances indicate that the shareholder is merely abusing his or her rights to create a nuisance or other similarly irrelevant purposes.

If shareholders unanimously approve a proposal by written consent in lieu of a meeting, such approval is deemed to be the equivalent of a resolution of a shareholders' meeting (section 319, the Companies Act). If the consent is not unanimous, the consent is not equivalent to a resolution. In listed companies, each shareholder may exercise its voting rights in writing or through a website without physically attending the meeting.

9 May directors accept direct compensation from shareholders who nominate them?

The Companies Act is silent on this issue. However, a director must act for the best interests of the company. If an individual shareholder directly compensates a director, the payment is treated as a gift, not salary, for tax purposes. In addition, if a director acts for the benefit of a shareholder instead of for the benefit of the company due to being directly compensated by such shareholder, it may be a criminal breach of trust that violates regulations on giving benefits to shareholders.

However, some subsidiaries of listed companies are also listed companies themselves, and directors of such subsidiaries are often employees seconded or dispatched from their parent companies. Under such circumstances, the compensation a director receives as an employee of the parent company may inevitably appear to be compensation for acting as a director of a subsidiary. Even in such circumstances, the director must act for the benefit of the subsidiary, not for the parent company.

10 May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

Shareholders may nominate directors who are not on the company's slate. Nominations are considered to be shareholder proposals. See question 6 for the appropriate procedures.

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

Shareholders may bring derivative actions (section 847, the Companies Act). Shareholders who have continuously held shares for more than six months may demand that the company sue its directors (and other officers, if applicable). If the company does not file the lawsuit within 60 days of the demand, the shareholders may bring a derivative action on behalf of the company. The shareholders of the parent company may also file a derivative suit against directors (and officers, if applicable) of wholly owned subsidiaries of the parent company (ie, a double or multiple derivative suit) if such subsidiary does not file the lawsuit within 60 days of the demand against the subsidiary by the parent company's shareholders.

The company cannot strike down the lawsuit by itself even if it is an abusive action by a shareholder. However, if it is abusive, in theory, the company may pursue a tort claim against the shareholder and request damages. In order to ensure that the company may recover damages if a derivative action is found to be abusive, the court may order the shareholder to place a certain amount in escrow prior to the start of a derivative action (section 847-4, paragraph 2, the Companies Act).

Japan does not have class action lawsuits similar to those in the United States, and a person cannot file a multi-plaintiff litigation without obtaining the approval of each plaintiff. Although a new type of 'consumer litigation' was introduced on 1 October 2016, securities transactions may be outside the scope of this new type of litigation, as tort claims under the new type of litigation are limited to claims based on the Civil Code of Japan, even though litigation in Japan regarding securities transactions belongs to the wider category of tort claims.

Company response strategies

12 What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

As activist shareholders have enhanced their presence in Japanese businesses, we generally advise our clients to periodically check the shareholders' composition and improve their governance structures, business plans or financial structures and recommend that they engage in proactive communication with their shareholders.

13 What structural defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

Based on the report published by the Tokyo Stock Exchange in March 2017, more than 12 per cent of companies listed on the Tokyo Stock Exchange have adopted the Japanese rights plan or 'large-scale share purchasing policies', even though the ratio has been gradually decreasing (the ratio is higher among larger market-cap companies in comparison). Under such a plan, a company implements procedures in advance that a potential raider must follow, though the company does not issue rights or warrants (unlike poison pills in the United States). If a potential raider crosses the threshold (typically 20 per cent) without complying with the procedures, or a potential raider is recognised as an 'abusive raider', new shares will be issued and allocated to all shareholders other than the violating raider; thus, the raider's shareholding will be diluted.

Other than such a plan, structural defences such as dual capitalisation are rarely possible, particularly because of the listing rules. In addition, as the term of office of a director at a Japanese listed company is one or two years depending on its governance structure, a staggered board is not an effective measure in practice.

While there are few cases where the validity of the rights plan or anti-takeover defence measures has been tested, in the Bull-Dog Sauce case, the Supreme Court recognised the validity of an anti-takeover defence (similar to a poison pill in the United States) implemented by the company (Bull-Dog Sauce) because the defence measure was fair and reasonable. Though Bull-Dog Sauce had not adopted the rights plan and the anti-takeover defence measures in the case were adopted after the raider announced its intent to launch a TOB, the Supreme Court stated in obiter that such rights plan had a net positive effect as it heightened the predictability of the outcome of a takeover. The Supreme Court also followed the logic in the guidelines issued by the Japanese Ministry of Economy, Trade and Industry (see question 2).

During 2017, there were no changes in the laws and regulations or court rulings to limit the anti-takeover defences available to a company.

14 May shareholders have designees appointed to boards?

While a company and an activist shareholder may agree to appoint the activist shareholder's designee as a director or a statutory auditor (by means of a standstill agreement), it is unclear whether such an agreement is legally enforceable. Therefore, it has not been common for Japanese-listed companies to enter into such an agreement with an activist shareholder.

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

The articles of incorporation of all listed companies are available as exhibits to their securities reports on the Electronic Disclosure for Investors' Network (EDINET) run by the Financial Services Agency.

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

A shareholder on the shareholders' list may request access to the shareholders' list (section 125, paragraph 2, the Companies Act). The company may reject such a request on certain grounds, including:

- if the request is made for purposes other than exercising general shareholder rights;
- if the request is made with the purpose of interfering with the execution of the operations of the company or prejudicing the common benefit of the shareholders;
- if the request is made in order to report facts obtained through the request to a third party for profit; or
- if the requesting shareholder reported facts obtained through a prior request to a third party within two years (section 125, paragraph 3, the Companies Act).

The shareholders' list in a listed company only records nominee shareholders, and the beneficial owners are not recognised by the shareholders' list.

17 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

Under the Japanese Corporate Governance Code, the board of a listed company must determine and approve a corporate governance policy that facilitates constructive dialogue with shareholders and disclose the policy in a corporate governance report that must be filed under section 419 of the Securities Listing Regulations. Individual communications need not be disclosed.

Through the amendment to the FIE Act and new Cabinet orders and ordinances which are scheduled to be implemented from 1 April 2018, listed companies will be required to make equal disclosure to a certain degree to all shareholders. The new regulation is similar to Regulation FD in the United States rather than the EU Market Abuse Regulations. Even under the new regulations, a listed company may make selective or unequal disclosure if the recipient owes a non-disclosure obligation and is prohibited from making a transaction of the company's securities. If disclosure to a shareholder, investor or other third party is not exempted and is intentionally made, the company must make public disclosure at the same time as the disclosure to such third party. If the disclosure is not intentionally made, the company must make public disclosure immediately after the disclosure to such third party. The company may make public disclosure through EDINET

Update and trends

On 29 June 2017, the annual general shareholders' meeting of Kuroda Electric Co, Ltd, appointed Mr Yasunobe as an independent director by a majority vote (52.3 per cent of issued and outstanding shares with voting rights). Even though Mr Yasunobe is a former director of the Electronic Policy Division in the Ministry of International Trade and Industry and a visiting professor at the Graduate School of Commerce and Management (Business School), Hitotsubashi University, he was not in the incumbent slate but was put in the slate by Reno and other shareholders acting in concert with Reno (their aggregated shareholding ratio was more than 35 per cent just before the record date for the shareholders' meeting). Through the proxy fight, Institutional Shareholder Services recommended voting in favour of the Reno's slate considering the slate as the minority independent director, while Glass Lewis recommend voting against. This event was reported to be the second successful case of activists getting their slate approved in a Japanese listed company since in Aderans in 2008. Although there are many views on the factors that led to the voting result, one important factor is the change of the voting attitudes of Japanese institutional investors. In this respect, on 29 May 2017, the Financial Services Agency amended the Japanese Stewardship Code to give institutional investors an incentive to disclose their voting results as a shareholder in each company in which they invest. Even though the Code is 'soft law' (see question 2), many institutional investors, including Japanese insurance companies, banks, trust banks and asset management companies, that hold large shares of Japanese listed companies, started to disclose the details (ie, whether they voted for or against or abstained in each item in each company). Although those institutional investors have historically voted with management, public disclosure of their voting results might place pressure on them when making voting decisions, and might make it difficult for a listed company to persuade such large institutional investors in proxy fights. Consequently, the daily dialogue with shareholders will become increasingly important to get support for management of the listed company. On the other hand, a new fair disclosure regulation will be implemented, and listed companies may be cautious in engaging in direct dialogue with their shareholders or investors. The dialogue between companies and shareholders may continue to be a hot issue in 2018.

(see question 15), TD-net (the electronic disclosure system of the Tokyo Stock Exchange) or its corporate website.

In addition to the above fair disclosure regulation, the disclosure of insider information to specific shareholders under certain circumstances may result in a violation of insider trading regulations.

18 Do companies receive daily or periodic reports of proxy votes during the voting period?

Trust banks that act as standing agents receive voting forms from shareholders. Consequently, in practice, a company may receive early voting ratio and other information during the period for sending back voting forms (ie, after the convocation notice but before the due date of the voting forms). The company is not obliged to disclose any information it receives from the voting forms prior to the date of the general shareholders' meeting. During a proxy fight, however, a company does not have any way of determining how many proxies an opposing shareholder will receive.

19 Must shareholders disclose significant shareholdings?

The FIE Act requires a shareholder of a listed company to file a report of the possession of a large volume of shares within five business days after the shareholding ratio of the shareholder exceeds 5 per cent. To determine the shareholding ratio, shares obtained by certain types of stock lending and certain share options have to be aggregated. Though the long positions of total return swaps are generally not included, certain types of total return swaps conducted for purposes other than pure economic profit or loss must also be aggregated. Consequently, in some cases, activists have not filed a report of the possession of a large volume of shares even though they purported to 'own' more than 5 per cent and have made certain demands or held certain conversations as large shareholders.

If multiple persons acquire shares of the same company in concert, or if multiple persons agree on the exercise of voting rights, the threshold is determined based on the aggregate of those persons' shares, but determining whether multiple persons are acting in concert is difficult and is not necessarily enforced.

Certain institutional investors, including banks, broker-dealers, trust banks and asset management companies, may file the report based on the ratio on the record date, which in principle is set once every two weeks if the investor holds 10 per cent or less and does not intend to act to significantly influence the operation or management of the issuer company.

A violation of the reporting obligation may result in an administrative monetary penalty.

Additionally, in certain transactions where an acquiring company and a targeted company are considered to be large by industry standards, antitrust laws require a prior filing and mandate an appropriate waiting period. Further, the Japanese Foreign Exchange and Foreign Trade Control Act requires non-Japanese investors to make the filing prior to acquiring 10 per cent or more shares of listed companies in certain industries designated by the Japanese government as vital to national security, public order or the protection of public safety. Such industries include, among others, electric power, natural gas, telecommunications, broadcasting and railways. The Japanese government may suspend or modify the proposed acquisition of a business in any of these industries. For example, in 2008, the Japanese government ordered the Children's Investment Fund to suspend its acquisition of more than 10 per cent of the shares of Electric Power Development Co, Ltd(known as J-Power).

Regulations in certain industries also limit the non-Japanese shareholding ratio to one-fifth (eg, broadcasting companies) or one third (eg, airlines). In other words, if non-Japanese entities hold more than 20 per cent in aggregate, their voting rights are limited to only 20 per cent and are allocated on a pro rata basis among such non-Japanese shareholders.

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

The FIE Act requires a mandatory TOB be conducted when a purchaser acquires shares from off-market trading and consequently holds one third or more of all voting rights. If multiple purchasers act in concert, the above threshold, one-third, is determined in aggregate. Therefore, if the aggregate shareholding ratio of shareholders acting in concert exceeds one-third and such shareholders intend to acquire additional shares in an off-market transaction, they must make a TOB. This requirement, however, does not apply to share acquisitions in the market. In addition, even a mandatory TOB does not necessarily result in the acquisition of all the shares of the targeted company, and the purchaser may make a capped TOB.

As stated in question 13, certain Japanese companies have adopted the Japanese rights plan, which:

- requires a potential purchaser who intends to acquire a certain percentage (generally 20 per cent or more) of shares to disclose the information of the purchaser and the proposed management plan after the acquisition; and
- alerts the potential purchaser of countermeasures the company may take if the potential purchaser does not comply with the rule or is recognised as an 'abusive raider'.

Under such a plan, the specific percentage is often determined by the shareholding ratio of the purchasers acting in concert. Such plan does not distinguish between market trading and off-market trading. In determining whether the tender offer is 'abusive', an important factor generally is whether the offer is made for all shares of the targeted company. Therefore, an activist may have limited strategies against companies that have implemented such a plan.

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders?

Regulations on proxy solicitations or Japanese proxy rules apply to both companies and shareholders when they solicit proxies (section 194, the FIE Act; section 36-2 to 36-6, Enforcement Order of the FIE Act; and

Cabinet Office Ordinance on the Solicitation to Exercise Voting Rights of Listed Shares by Proxy). The regulations set forth certain requirements on the proxy and also require that certain information be provided to the shareholders during a proxy solicitation. However, if the same information is disclosed in the reference documents that are typically enclosed with the convocation notice of a shareholders' meeting for which proxies are solicited, those who solicit the proxies (the company or the shareholders) do not have to provide the above-mentioned required information separately. Further, if a company solicits proxies, offering certain economic benefits to shareholders to facilitate favourable voting results may violate regulations on giving benefits under the Companies Act. Currently, social media platforms (such as Twitter and LinkedIn) are not commonly used as communication tools during campaigns between targeted companies and activists.

22 Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

While organised engagement among activist shareholders is not common, when an activist shareholder launches a campaign, other activist shareholders may support the campaign. Consequently, engagement efforts tend to be public and formal. Even during a public campaign, the company may choose to compromise by accepting the activist's proposal or presenting the proposal during the shareholders' meeting as the company's proposal.

23 Are directors commonly involved in shareholder engagement efforts?

While the Japanese Corporate Governance Code recommends that directors should take a leading role in engaging with shareholders, in most cases, management or the executive team is in charge of shareholder engagement efforts. Executive directors are sometimes directly involved in shareholder engagement, but it is at the company's discretion.

Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

In general, a director's duty with respect to an activist proposal is similar to other board decisions; namely, the business judgement rule. Unless there is a conflict of interest between the company and the directors, and unless there is a violation of laws or the articles of incorporation of the company, the courts generally respect the wide discretion of the board, assuming that the board made a reasonable decision that duly recognised the applicable facts and circumstances. However, even under this Japanese business judgement rule, Japanese courts may sometimes carefully scrutinise the context and situation surrounding the board's decision. In Japan, it has thus far been understood that no controlling shareholder owes any fiduciary duty to minority shareholders.

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General

1 What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

The main statute relating to shareholder activism is the Swedish Companies Act (2005:551), enforced in the courts. The preparatory works to the Act emphasise the importance of active ownership. Active shareholder participation promotes a healthy balance of power between owners, the board and the executive management.

Additional rules can be found in the Swedish Corporate Governance Code, which is part of Swedish self-regulation on the securities market. The Code is mandatory for listed companies under the comply or explain principle, and companies not applying the Code in the correct manner can be fined by the relevant stock exchange where their shares are admitted to trading.

The ownership structure of the Swedish stock market differs significantly from that of countries such as the United Kingdom or the United States. While the majority of listed companies in those countries have a very diverse ownership structure, ownership in Sweden is often concentrated to single or small numbers of major shareholders, as is the case in many other continental European countries. In around half of the listed companies, these shareholders strengthen their positions further through holdings of shares with greater voting rights. They often play an active ownership role and take particular responsibility for the company, for example by sitting on the board of directors. A particular characteristic of Swedish corporate governance is the engagement of shareholders in the nomination processes for boards of directors and auditors, which they exercise through their participation in companies' nomination committees. Nomination committees are not regulated by the Companies Act, but by the Code. A Swedish nomination committee is not a subcommittee of the board, but a drafting body for the shareholders' meeting made up of members appointed by the company's owners.

Swedish society takes a positive view on major shareholders taking particular responsibility for companies by using seats on boards of directors to actively influence the governance of the company. At the same time, major holdings in companies must not be misused to the detriment of the company or the other shareholders. The Companies Act therefore contains a number of provisions that offer protection to minority shareholders, such as requiring qualified majorities for a range of decisions at shareholders' meetings.

Additional rules, such as rules on disclosure of holdings in the Financial Instruments Trading Act, market abuse rules in the Market Abuse Regulation (596/2014) and the Market Abuse Penal Act, also play a role in relation to shareholder activism. The Securities Council, entrusted with promoting and defining sound Swedish stock market practice, is also an important rule-maker. The statements by the Council are sanctioned for listed companies. Any action by a Swedish or foreign-listed company, or by a shareholder of such company, that relates to or may be of importance to a share in such company, may be subject to the Swedish Securities Council's evaluation.

2 What are the other primary sources of practices relating to shareholder activism and engagement?

Swedish institutional shareholders play an important role in Swedish-listed companies. All large Swedish institutional shareholders have an ownership policy, and many of them have teamed up in the Association of Institutional Owners, which has also issued policy recommendations in certain areas. As there is no proxy system in Swedish company law, proxy advisory firms are not very active in Sweden besides working for international institutional shareholders with holdings in Swedish-listed companies.

3 How is shareholder activism generally viewed in your jurisdiction? Are some industries more or less prone to shareholder activism? Why?

There is no particular industry that is more or less prone to shareholder activism than others.

4 What are the typical characteristics of shareholder activists in your jurisdiction?

Shareholder activism has been fairly moderate in Sweden. As a consequence it has not been debated very much and the general view is thus still fairly neutral.

However, there is a growing tendency, particularly among institutional investors to take a more active role. The activist strategies have also in general leaned more to private approaches. Although, in recent time there are also examples where public approaches have been used.

In almost all Swedish-listed companies, there is a controlling shareholder (or shareholders), who may have retained control through shares with greater voting power, such as certain family or privately controlled investment companies.

Together, Swedish institutional shareholders have large stakes in many listed Swedish companies. In specific cases, they try to team up and then exert great influence. They normally react to attempts by foreign owners to take control over Swedish listed 'crown jewels', and have in some cases succeeded. In their daily 'activism' they try to influence through direct dialogue with the boards and by taking part in the nomination committees.

Foreign institutional shareholders are normally not active.

The traditional activist can take the form of a hedge fund or an individual. Hedge funds are quite rare, and individuals act directly or through their investment companies, for example, Christer Gardell through Cevian Capital.

Activist shareholders normally gain a position through the acquisition of a corner in the company (in many cases together with foreign activist funds). However, we have seen very few activist investors in Swedish companies.

Swedish institutional investors have traditionally been reluctant to support these activist investors.

In Sweden, it has been case-dependent whether the activist investors' investments have been short-term or long-term. Some of the activists have indicated their intended long-term commitment to the target company, and equally there have been clear short-term activist engagements.

5 What are the main operational, governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

Typical demands of a shareholder activist in Sweden are divestiture or break up of conglomerates. The activist will normally build up a share position of at least a few per cent, either alone or together with some international fund's backing, and demand a position on the nomination committee and on the board of directors, and voice his or her request publicly.

A few Swedish institutional investors have sustainability agendas, but would not normally be called activist shareholders. In Sweden, executive compensation is regulated to an extent not seen in other countries and hence is not on the agenda for activists.

In Sweden, underperformance have attracted shareholder activists' attention. Shareholder activism has also, in the last couple of years, increased in companies which are subject to a takeover offer, wherein the activist is calling for a higher price to be paid by the bidder after the offer is completed, by taking a stake in the target during the offer period and thereafter take advantage of the strong minority protection contained in the Swedish Companies Act.

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

There is a great difference between 'matters' (agenda items) and 'proposals' (under an agenda item).

Any shareholder who wishes to have a matter addressed at a general meeting may submit a written request thereof to the board of directors. The right to have a matter addressed at the general meeting may be exercised by any shareholder irrespective of the number of shares held in the company. This right is considered to be a minority protection rule and may not be limited in any way. Therefore, processes and guidelines do not change based on the type of shareholder submitting a proposal.

The matter must be addressed at the general meeting if the request from the shareholder is received by the board of directors no later than seven weeks prior to the general meeting or at a later date if the request is submitted in due time for the matter to be included in the notice to attend the general meeting. Nothing precludes a shareholder from submitting an application to the board of directors on matters that he or she wishes to be addressed at the next upcoming meeting. The proposed matter must concern an issue relevant to the company, which falls within the competence of the general meeting. Thus, a simple request for information does not qualify as such request, nor does the provision entitle shareholders to make a general statement at the meeting.

Any shareholder can make a proposal as late as during the meeting with regard to matters that are already on the agenda. There are a few exceptions to this main principle, for example, in relation to share issues, repurchase of shares, changes to the articles of association, etc, where a proposal must have been made public no later than three weeks ahead of the general meeting. If a proposal is presented to the company before the notice has been published, the notice normally includes the main content of the proposal.

According to the Swedish Corporate Governance Code, a listed company must disclose the time and place for the general meeting on its website as soon as this has been determined. Information must also be given regarding by what time at the latest an agenda item or a proposal from a shareholder must be received by the board of directors for it to be included in the notice.

Sweden does not have a proxy voting system (or similar system) – all voting is done at the general meeting (either by the shareholder in person or by anyone with a written power of attorney).

Many decisions are reserved for shareholders – election of and remuneration to board directors and auditors; dividends; changes to the articles of association; any share issue (or issue of convertibles or warrants); share repurchases; mergers, etc.

7 What common strategies do activist shareholders use to pursue their objectives?

Typical strategies activist shareholders seem to be using are:

- privately negotiating with the company and significant shareholders;
- publicly presenting demands about the future of the company and criticising the company and its management;
- obtaining a seat in the nomination committee, and, if possible, a seat on the board of directors; and
- making proposals for resolutions (demergers, spin-offs, etc) to the general meeting.

In relation to takeover interference, the activist shareholders are exercising minority rights, such as demanding that the board convene an extraordinary general meeting to address a specified matter or requesting for the appointment of an extra auditor or special examiner.

8 May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

Owners of not less than 10 per cent of all shares in the company (owned by one shareholder alone or by a number of shareholders in conjunction) may demand in writing to the board of directors of the company that an extraordinary general meeting be convened to address a specified matter. If such request is correctly made, the board of directors is obliged to convene the meeting and must issue a notice to attend the meeting within two weeks of receipt of the demand. A specified matter refers to an issue relevant to the company that can be decided upon at the extraordinary general meeting. For that reason, it is not possible to demand that an extraordinary general meeting be convened, for example, merely in order to ask questions of the board members or the management.

According to the Swedish Companies Act, shareholders may act by written consent in lieu of a meeting if every single shareholder agrees to such simplified procedure and the matter considered falls within the competence of the general meeting. This means that written consent is not available for listed companies.

9 May directors accept direct compensation from shareholders who nominate them?

The basic rule is that directors receive their remuneration from the company concerned. There are, however, no rules directly prohibiting a director from also accepting compensation from a shareholder having nominated him or her. In practice the director may, for example, be employed by the nominating shareholder. In some cases, a director, being employed by the nominating shareholder, waives his or her remuneration from the company. Such arrangements should be factored in when determining whether the rules regarding disqualification of a director to decide on a specific matter involving such a nominating shareholder are applicable.

Also, the independence rules of the Swedish Corporate Governance Code must be taken into account. The majority of the directors elected by the shareholders' meeting are to be independent of the company and its executive management. At least two of the members of the board who are independent of the company and its executive management are also to be independent in relation to the company's major shareholders. If a board member receives compensation from a shareholder, he or she is not deemed independent from that shareholder.

10 May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

There is no proxy voting system in Sweden. Director nomination is done by the nomination committee, which in Sweden is not a board committee but a committee set by and including the largest owners.

The Swedish Corporate Governance Code stipulates that a company shall have a nomination committee, which, inter alia, shall nominate candidates to the board of directors. The general meeting elects the members of the nomination committee, and thus large shareholders generally have great influence over the composition of the committee. However, at least one of the members should be independent in relation to the company's largest shareholder or group of shareholders that cooperate regarding the management of the company.

The nomination committee should safeguard the interest of all shareholders in its nomination of candidates. The nomination committee's proposal is presented in the notice to attend the general meeting. The board of directors is elected by a majority vote, unless the articles of association stipulates otherwise. The market practice in Sweden has been to elect the entire board by a single vote. This is not required by

law, and some international investors have raised demands on listed companies to switch to separate voting for each member of the board.

Any shareholder may, however, nominate directors for election to the board and have the nomination included in the notice to attend the general meeting, as long as such proposal is presented to the board of directors within the time frame stipulated in the Swedish Companies Act and otherwise complies with the applicable provisions in the Act. Furthermore, if the matter of election of members of the board is already on the agenda of the general meeting, a shareholder has the right to propose a candidate as late as at the meeting itself.

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

Derivative actions on behalf of the company may be brought where a minority of owners of not less than 10 per cent of all shares in the company have, at a general meeting, supported a resolution to bring such a claim or, with respect to a member of the board or the managing director, have voted against a resolution regarding discharge from liability. If shareholders holding at least 10 per cent of the shares in the company vote against a resolution regarding discharge from liability, a claim of damages may be brought against the board and the managing director despite the fact that the rest of the shareholders have voted for discharge.

Where the general meeting has adopted a resolution to grant discharge from liability or to not commence an action for damages (without 10 per cent of the shareholders having voted against such resolution), or the period of time for the commencement of an action has expired, an action may nevertheless be brought where (in the annual report or the auditor's report or otherwise) from a material aspect correct and complete information was not provided to the general meeting regarding the resolution or the measure on which the proceedings were based.

It is also possible for any shareholder to commence an action for damages to the company in his or her own name. The shareholders commencing the claim will bear their own legal costs.

Strike suits do not exist in Sweden, as the probability of winning a lawsuit against the company or its directors are quite low, and reaching a final non-appealable verdict may take many years (in some cases up to 10 years).

Company response strategies

12 What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

In order to avoid activism, the general advice to boards is to be transparent, and to continuously review their business and the company's structure. As Swedish company law gives shareholders great influence, it will normally not be possible to prevent activism by any other means. Takeover defence manuals are not uncommon, as Swedish takeover rules are prone to takeovers, preventing target boards from taking defensive measures.

13 What structural defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

The Swedish corporate governance framework is significantly guided by the principle of equal treatment and a strong requirement on the board to always act in the best interest of the company and all its shareholders. The board may not promote shareholders' initiatives that conflict with these rules and principles. Generally, it is not the board's task to have a view on their shareholders, and the board is not seen as representing the shareholders in shareholder-related matters. In the Nordic corporate governance framework, the board has a neutral role in general meetings, contrary to some jurisdictions.

However, major shareholders usually have strong control over their companies. Dual-class stock with differentiating voting rights is common in Swedish listed companies, and some owners build their control through cross-ownership. The vast majority of Swedish-listed companies are controlled by one or a few large owners.

Staggered boards do not exist (each board member is elected annually, and there is no way of preventing a new owner from making an immediate board replacement). Poison pills, Stitching, etc, are not allowed under Swedish law.

There has been no specific movement in Sweden towards limiting the defence measures available to companies. The reason for this is the already strict approach against defence measures for target boards.

14 May shareholders have designees appointed to boards?

An activist cannot strike any deal with the board or company, as the board is not authorised to enter into any such agreement. If an activist is given a seat at the nomination committee or the board, this is either through the size of its holding or by having an understanding with the company's largest shareholders.

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

The corporate charters of Swedish companies are publicly available in the public records kept by the Swedish Companies Registration Office. According to the Swedish Corporate Governance Code, listed companies should have it published on their websites.

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

According to the Swedish Companies Act, the share register of a company is accessible to anyone in the public that requests to receive it. This refers to registered shareholders. Nominees (at least European nominees) must be inserted as nominees, and the nominee must be able to present a list of all beneficial owners.

For listed companies, the digital book-entry securities system is used. A printout or other presentation of the share register (or of beneficial owners) comprising shareholders with a shareholding of more than 500 shares in the company must, however, be available at the company office and at the central securities fund, which in Sweden is Euroclear Sweden AB, for anyone wanting to review it (and at the nominee's office, in relation to beneficial owners).

17 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

Companies must not disclose shareholders' engagement efforts or how shareholders communicate directly with the board of directors.

Selective disclosure of inside information constitutes a violation of the Market Abuse Regulation (596/2014), which will result in sanctions for the company from the relevant stock exchange where the company's shares are admitted to trading. Such disclosure may also constitute a criminal offence for the person making such disclosure under the Market Abuse Regulation.

In special situations, for example, ahead of a rights issue where the company wants to secure commitments from its largest shareholders, selective disclosure may be acceptable. In such situation the disclosure of inside information to the public is considered being delayed. In order to be allowed to delay the disclosure of inside information to the public the following conditions must be met according to the Market Abuse Regulation, (i) immediate disclosure is likely to prejudice the legitimate interests of the company, (ii) the delay of disclosure is not likely to mislead the public, and (iii) the company is able to ensure the confidentiality of that information. When the selectively disclosed inside information is publicly disclosed the company must submit a written explanation to the Swedish Financial Supervisory Authority specifying that the disclosed information was delayed and explain how the aforementioned conditions were met.

The equal treatment principle of the Swedish Companies Act is also applicable, at least in theory, to selective disclosure to certain shareholders (inside information or not). However, in practice, this will normally not stop the company from communicating with its shareholders.

18 Do companies receive daily or periodic reports of proxy votes during the voting period?

Not applicable.

19 Must shareholders disclose significant shareholdings?

Provisions regarding disclosure of significant shareholdings and voting rights in a listed company are set out in the Swedish Financial Instruments Trading Act. Based on the updated EC Transparency Directive, changes to shareholdings must be disclosed if the changes result in the proportion of the shares or voting rights in a listed company exceeding or falling below one of the following thresholds: 5, 10, 15, 20, 25, 30, 50, two-thirds and 90 per cent. Shares held on behalf of others are also covered for the purpose of determining the proportion of shares or voting rights held by a shareholder. Other arrangements that entitle the shareholder to voting rights of other shares or shareholdings of a shareholder's spouse or minor child also trigger the notification obligation, including cash-settled derivatives relating to shares. Further, the company is obliged to disclose any changes to the number of outstanding shares and votes at the end of each month, which can also trigger the notification obligation. Normally, shareholders acting in concert without any shareholders' agreement or similar will not be regarded as concert parties under the Act.

The company and the Swedish Financial Supervisory Authority should be notified of the changes in the shareholding as soon as possible and no later than on the third trading day following the notification-triggering activity. The Swedish Financial Supervisory Authority will publicly disclose and store the information contained in the notification.

The Swedish Supervisory Financial Authority may issue a conditional fine order to shareholders not complying with the provisions concerning the notification obligation. The company may also be fined a special charge amounting to between 15,000 Swedish krona and 5 million Swedish krona, should it not comply with the disclosure provisions.

Other relevant thresholds can be found in antitrust legislation, prudent owner-rules for financial companies and the mandatory bid threshold of 30 per cent of the votes in a listed company.

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

Shareholders acting in concert are subject to mandatory bid requirements set out in the Swedish Takeover Act. A mandatory bid requirement is stipulated for shareholders that, alone or together with a related party, reach a shareholding of at least three-tenths of the votes in the company. Shareholders are perceived as acting in concert with another party if an arrangement is in place between the parties regulating the exercise of voting rights in the company in order to achieve a common long-term influence over the management of the company, or other cooperation aiming to acquire significant control of the company.

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders?

The primary rules relating to communications made by companies concern disclosure duties and the equal treatment of the shareholders. Information perceived to be price-sensitive should be disclosed, without undue delay, to the market in a non-discriminatory manner. The information disclosed by the company must be correct, relevant and clear and may not be misleading. Selective disclosure is only permitted in situations where, for example, the information is given to larger or prospective shareholders in connection with a planned rights issue.

According to the Market Abuse Regulation, all publicly disclosed inside information should be made available on the company's website and stored there for at least five years. There are no other rules governing the media platforms to be used as distribution channels; however, social media platforms are rarely used for shareholder activity-related matters. In addition, since the purpose of the disclosure duties is to make sure that the information is disclosed to the market simultaneously, the companies most commonly use an information distributor for this purpose.

Companies normally do not solicit votes from shareholders in Sweden and there are no rules regulating the solicitation of votes.

22 Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

It is uncommon to have organised shareholder engagement efforts relating to shareholder activism. Otherwise, efforts such as roadshows when seeking new investors are commonly used.

23 Are directors commonly involved in shareholder engagement efforts?

Directors are not usually involved in shareholder engagement efforts.

Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

Board members have a fiduciary duty to act in good faith and in the best interest of the company, which entails a duty to act in the interest of all shareholders. For that reason, the board of directors may not consider an activist proposal under any different standard of care compared to other board decisions, and individual shareholders may not be given an unfair advantage compared to the other shareholders in the company. However, the board of directors may cooperate with an activist as long as the board of directors does not breach the duty of equal treatment of all shareholders.

A shareholder does not owe the same fiduciary duties towards the company as the board of directors, and is not required to act positively in the interest of the company. However, a shareholder should compensate for damage that he or she causes to the company, a shareholder or another person as a consequence of participating, intentionally or through gross negligence, in any violation of the Swedish Companies Act, the applicable annual reports legislation or the company's articles of association.

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General

1 What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

The primary sources of laws and regulations relating to shareholder activism are the Swiss Code of Obligations (CO) governing the rights and obligations of companies' boards of directors and shareholders in general and the Swiss Financial Market Infrastructure Act (FMIA), enacted on 1 January 2016, containing additional rules for listed companies and their shareholders. The provisions of the FMIA are set out in more detail in two ordinances, the Swiss Financial Market Infrastructure Ordinance (FMIO) and the Swiss Financial Market Infrastructure Ordinance by FINMA (FMIO-FINMA). Further, the Ordinance against Excessive Compensation in Listed Companies (OAEC) contains specific rules on the compensation of management and board of directors. The Takeover Ordinance (TOO) sets out detailed rules on public takeover offers including boards' and qualified shareholders' obligations. Companies listed on the SIX Swiss Exchange are also bound by, inter alia, the Listing Rules (LR-SIX), the Directive on Ad hoc Publicity (DAH) and the Directive on Information relating to Corporate Governance (DCG).

The CO and FMIA are enacted by the national parliament, the FMIO and the OAEC by the Swiss Federal Council, the FMIO-FINMA by the Swiss Financial Market Supervisory Authority FINMA (FINMA), the TOO by the Swiss Takeover Board and the LR-SIX as well as the DAH by SIX Exchange Regulation.

Compliance with the CO and the OAEC is primarily enforced by the civil courts. FINMA enforces the FMIA as well as its ordinances and the Takeover Board enforces the TOO and the takeover related provisions of FMIO-FINMA. Compliance with the LR-SIX, DAH and DCG is enforced by the SIX Exchange Regulation.

2 What are the other primary sources of practices relating to shareholder activism and engagement?

Prominent Swiss proxy advisers, such as Ethos, SWIPRA and zRating, publish general proxy voting guidelines, corporate governance principles as well as company-specific voting recommendations. Additionally, shareholders may delegate their voting rights to the company's independent proxy based on written instructions. A delegation of votes to certain advisory firms is also possible. In the absence of specific instructions such firms will generally exercise votes obtained according to the respective voting recommendation. Also, proxy guidelines issued by internationally known proxy advisers such as the Institutional Shareholder Services Inc (ISS) or Glass Lewis have developed considerable influence on the voting behaviour at Swiss-listed companies' shareholder meetings.

According to the OAEC enacted on 1 January 2014, Swiss pension funds are obliged to exercise their voting rights related to their participation in listed companies with respect to certain agenda items (eg, election of the board of directors and its chairman as well as the total compensation of the directors and the management). Since the exercise of the voting rights must happen in the best interest of the insured persons (and such interest is deemed preserved if the voting behaviour is in furtherance of the continuing prosperity of the pension fund), pension funds tend to rely on the recommendations of the aforementioned proxy advisers both for efficiency and potential liability reasons.

3 How is shareholder activism generally viewed in your jurisdiction? Are some industries more or less prone to shareholder activism? Why?

With almost 30 shareholder actions between 2010 and 2017, Switzerland is a key European target for activist shareholders. Since 2012, actions in Switzerland have more than doubled. It seems like basic materials and services are regularly targeted industries; the financial industry, industrial goods and the healthcare sector have also attracted interest from activists. Due to the variety of reasons that have attracted activist shareholders in the basic materials industry, a general conclusion that this industry is particularly prone to activist campaigns should not be drawn. Also, there are no regulatory reasons that facilitate shareholder activism in certain industries over others.

In Switzerland, namely three shareholder activists are currently engaged in ongoing campaigns: (i) The US-based investment fund Third Point with its founder Daniel Loeb acquired 1.3 per cent in Nestlé at the end of June 2017, (ii) the investor group White Tale Holdings acquired a stake in Clariant and recently increased the stake to more than 20 per cent and successfully prevented the merger between Clariant and Huntsman, and (iii) RBR Capital Advisors with its manager Rudolf Bohli acquired a stake of 0.2 to 0.3 per cent in Credit Suisse and requests that Credit Suisse be split into three businesses (ie, an investment bank, an asset manager and a wealth management group).

4 What are the typical characteristics of shareholder activists in your jurisdiction?

Swiss public companies have been mainly targeted by international hedge funds, but Swiss hedge funds have also engaged in a number of situations.

Although it is hardly possible to make a general statement regarding the short- or long-term orientation of the inhomogeneous group of activists present on the Swiss market, it is probably fair to say that they are naturally rather mid- to long-term oriented. Typically, activist shareholders aim at giving all supporting shareholders a voice at the board table. They may raise different issues that ultimately ensure companies to be managed in the (may it be short or long-term) interest of their owners. However, there has been an increasing level of more contentious activist interests in recent years. These activists are focused on ensuring that any value being invested for the long-term benefit of the company is immediately released for the investing public (eg, by cutting investments with long-term returns, closing or spinning off separable divisions or increasing payout ratios). There is no clear pattern as to whether traditional large shareholders support activists in their endeavours. This partly depends on whether the activists benefits from recommendations of leading proxy advisers.

5 What are the main operational, governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

Shareholder activism in Switzerland primarily focuses on governance issues (particularly board representation and executive compensation) as well as on strategic and operational matters (particularly dividends

and divestitures). Activist shareholders usually seek a (stronger) representation in the board of directors. It is estimated that in Switzerland activists use board representation as a tactic more than anywhere else in Europe. In particular, the implementation of the OAEC has led to increased attention placed at executive compensation-related governance issues: activist shareholders have a binding vote on the executive compensation of the Swiss company's executive management – one of the most powerful tools to direct the management's conduct. It is worth noting, however, that it is extremely rare that shareholders reject the compensation submitted to them by the board of directors.

By way of contrast, social activism is rarely tabled in any activist campaigns. However, there are certain indications that sociopolitical matters such as board gender diversity or the disclosure of political spending and lobbying could play a role with regard to governance activism in the future.

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

All shareholders have the right to attend shareholders' meetings, the right to vote and to request information and inspect documents (to the extent company interests requiring confidentiality do not prevail). The right to information is regularly used by activist shareholders to increase pressure prior to shareholders' meetings. The board is obliged to respond to such questions during the shareholders' meeting. All shareholders have the right to propose motions and counter-motions (eg, regarding board elections) at shareholders' meetings and may request a special audit or a special expert committee to investigate certain facts and behaviours of the board or management.

Furthermore, any shareholder (or group of shareholders) representing shares of a par value of at least 1 million Swiss francs (the articles of association may contain a lower threshold) is entitled to demand that certain agenda items be tabled at the next shareholders' meeting. Any shareholder (or group of shareholders) representing 10 per cent of the share capital (again, a lower threshold may be contained in the articles of association), may request that an extraordinary shareholders' meeting be convened. According to the predominant legal doctrine, these thresholds should be regarded as alternative criteria (ie, shareholders representing 10 per cent of the share capital are also entitled to put forward an agenda item and shareholders representing shares of a par value of at least 1 million Swiss francs may call an extraordinary shareholders' meeting).

The current draft for a revision of Swiss corporate law suggests to lower the thresholds for shareholders to benefit from certain minority rights (eg, to request items to be added to the agenda). The revision has not yet been passed into law.

In case a shareholder demands that an agenda item be tabled for the next shareholders' meeting, the respective deadline for such submissions is contained in the articles of association and ranges typically between 40 and 55 days prior to the meeting. The company is obliged to include the item and the shareholders' motion relating thereto in the invitation to the shareholders' meeting. The board will add its own motion to such item.

Shareholders representing at least 33.3 per cent of the voting rights may block special resolutions (capital transactions, mergers, spin-offs, etc), shareholders holding at least 50 per cent of the voting rights may force ordinary resolutions (eg, appointment of a director) and shareholders representing at least 66.6 per cent of the voting rights may force special resolutions (eg, amendments to the articles of association). As these thresholds typically relate to the total votes represented at the shareholders' meeting and given that shareholder representation typically ranges between 45 and 65 per cent, the shareholdings required to pass the aforementioned thresholds are much lower.

Under the CO and OAEC a number of corporate decisions such as the amendment of the articles of association, capital increases, the approval of the annual accounts and resolutions on the allocation of the disposable profit, the election of board members, the chairman and the members of the compensation committee as well as board and management compensation fall into the mandatory competence of the shareholders' meeting. According to the OAEC, elections (or re-elections respectively) of board members must take place annually and elections must take place individually. Therefore, activist shareholders aiming at deselecting members of the board of directors are not required to request an extra agenda item for this purpose, but may simply vote against the re-election tabled by the company.

Except for the request for an extraordinary shareholders' meeting or a special audit and the appointment of an auditor at the request of a shareholder, it is not possible to request that additional agenda items be tabled during the shareholders' meeting. However, any shareholder may make motions relating to any agenda item during the shareholders' meeting. This is particularly relevant with respect to any election items as additional persons may be proposed for election. Against the background that a significant number of shareholders cast their votes via the independent proxy without giving specific instructions as to ad hoc motions (or by instructing the independent proxy to follow the board's recommendation in such case), ad hoc motions generally have a low likelihood of succeeding.

Other than with respect to the number of votes or percentage of the capital, Swiss law does not distinguish processes depending on the type of shareholder submitting a proposal.

7 What common strategies do activist shareholders use to pursue their objectives?

Shareholder activism normally starts with building up a relatively small stake of shares avoiding triggering the disclosure obligations pursuant to the FMIA (especially the first threshold of 3 per cent). Prior to increasing its stake, a common activist will make private contact with the company's executive management or board representatives in order to present and discuss its ideas and specific demands. Such private negotiations are also the reason why it is believed that almost 50 per cent of all activist campaigns never become public. However, attention should be paid to the duty of equal treatment of all shareholders and the duty of ad hoc publicity.

If the private negotiations fail, an activist may launch a public campaign to divulge the key requests towards the company and by doing so obtain the support of other shareholders (since shareholders do not have a right to access the share register the only way of reaching out to other shareholders holding less than 3 per cent is through the media). As psychology plays an important part in the fight for control, gaining the support of the public opinion is a crucial element in winning the battle. The share price is likely to increase following the publication of the key elements of the campaign as it is likely to attract new investors. In the run-up to the shareholders' meeting the composition of shareholder base of the target company may change towards increased support of the activist's campaign. Based on the public support and also depending on the support from professional proxy advisers, the activist shareholder may be in a position to find an attractive compromise with the board.

Fruitless settlement attempts may lead to proxy fights at and outside the shareholders' meeting (including the enforcement of the information rights, freezing entries in the commercial register and challenging allegedly non-compliant shareholders' resolutions) or even result in litigation (eg, liability claims) and criminal charges.

Ahead of the shareholders' meeting the activist shareholder may decide to form a group with one or more other key shareholders. According to the FMIA, any person who reaches, exceeds or falls below 3, 5, 10, 15, 20, 25, 33.3, 50 or 66.6 per cent of the voting rights of the target company must notify the target company and the stock exchange (the SIX Disclosure Office for SIX-listed companies). The activist may use such disclosure as signal of determination to the company and financial markets. It typically also triggers an additional round of media reports.

Although irrelevant to win a proxy fight but helpful to the communication strategy, the activist shareholder often uses the shareholders' meeting to speak publicly and reiterate their requests for improved performance.

8 May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

Any shareholder – individually or acting in concert – representing 10 per cent of the share capital (or, according to the predominant legal doctrine, representing shares of a par value of at least 1 million Swiss francs; see question 6) has the right to call an extraordinary shareholders' meeting. Certain companies have introduced lower thresholds in their articles of association. The required threshold may also be reached by several shareholders acting in concert. The request to call

an extraordinary shareholders' meeting must be submitted in writing to the company's board and must contain the requested agenda items including the activist's motions thereto.

Shareholders may not act by written consent in lieu of a meeting, but they can be represented by issuing written voting instructions to either the independent proxy or (depending on the articles of association) to another shareholder or a third party.

9 May directors accept direct compensation from shareholders who nominate them?

There is no Swiss law or regulation preventing shareholders from paying direct compensation (ie, remuneration in addition to the compensation bindingly resolved by the shareholders' meeting) to their directors. However, the shareholders may not derive any special rights from this contribution as the directors are always obliged to act in the best interest of the company (duty of loyalty to the company) and generally to treat all shareholders equally. The board member will need to disclose and handle resulting conflicts of interest according to the company's regulations and the company may have to disclose the compensation in the annual report and pay social security contributions on all such amounts.

10 May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

Any shareholder is entitled to nominate a director for election to the board, usually as a motion within the agenda item 'election of the members of the board of directors'. In this context, if the motion is filed with the company in a timely fashion, the board is obliged to publish the shareholder's motion in the company's invitation to the shareholders' meeting at the company's expense. However, shareholders may not directly access the share register and divulge their requests via a special proxy access tool.

Activists typically use the media and/or a dedicated web page for their campaigns once their intentions are publicly disclosed.

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

Shareholders may in principle not file lawsuits on behalf of the corporation or on behalf of all shareholders. However, they may file liability actions against directors and members of the executive management where the payment of damages is directed to the company. In addition, any shareholder may challenge shareholders' resolutions made in violation of the laws or the articles of association with effect for the entire company. Also, certain post-M&A appraisal actions under the Swiss Federal Merger Act have erga omnes effect (ie, all shareholders in the same position as the claimant receive the same compensation). The cost of such proceedings must generally be borne by the company (ie, the defendant).

In general, class actions are not specifically addressed in the Swiss civil procedure. Nevertheless, it allows for a joinder of plaintiffs or defendants: several parties may join their lawsuits in case the same court has jurisdiction and all claims are based on the same set of facts and questions of law. This approach reduces costs and avoids conflicting judgments, but increases complexity. Another corporate litigation tactic worth noting is launching a single litigation test case in order to have a precedent for multiple actions involving the same set of facts and questions of law.

Shareholders are not able to directly prevent the company from accepting a private settlement with an activist shareholder. They may only challenge the board's settlement resolution on the grounds that such decision was void or bring liability actions against the directors should the board have breached their directors' duties and should they have caused damage to the company by doing so.

Company response strategies

12 What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

As shareholder activism has gained traction in Switzerland, larger listed companies are investing more time and resources in activist engagement in order to deal with activists' concerns appropriately. Accordingly, the preparation and implementation of preventive as well as defending measures against activists' attacks have become part of a corporation's routine. This increased attention may be regarded as an impact resulting from shareholder activism.

Preventive measures aim at minimising the risk of a campaign. In particular, the board may identify and reduce existing exposures of the company to activist shareholders. As a first step the board will examine the company's exposure and analyse issues that are likely to be addressed by an activist investor. Key features of an exposed company are, inter alia, (i) undervaluation (which can be addressed by value-adding sale possibilities of separable divisions or non-core assets), (ii) board instability (especially decreasing support by the shareholder base), (iii) large cash reserves combined with a comparably low dividend payout ratio, and (iv) M&A transactions involving the company. Additionally, the executive management should continuously monitor and assess the company's shareholder base to identify potential shareholder activists. At this stage, the board may also consider appointing a (standby) task force comprising specialists in public relations, finance and law. However, even if the board manages to implement effective preventive measures, a complete elimination of the risk of becoming a target of activists is – in light of the various activists' interests – not possible.

Once an activist investor emerges and expresses its concerns to the company's board, which usually occurs in a private setting at first, the board should be in a position to revert to a set of prepared tools. First, a board is well advised to listen open-mindedly and attempt to engage politely in a constructive dialogue with the activist investor addressing and considering the activist's legitimate concerns. Following a close examination of the issues raised, the dialogue should continue and a dismissive or confrontational stance should be avoided. Consistency in the board's engagement is important to preserve credibility.

Where no satisfactory solutions can be reached during the private conversations, the board may revert to its defence tools which include (i) responding clearly and comprehensively to the activist (ignoring the issues addressed is usually not an option), (ii) using committed and consistent board communication (direct and public engagement with the shareholders, especially by issuing a white paper illustrating the company's position), and (iii) engaging in dedicated dialogue with the company's major shareholders and significant proxy advisory firms (in order to secure their support). The company may be able to identify an investor who would go public in support of the board. An approach that has proven effective in past activist campaigns is to slightly relent towards the position of the activist with a moderate alternative proposal in order to steal the activist's thunder.

As a long-term defence measure, some target boards consider gaining a friendly long-term anchor shareholder who is supportive of the current board's strategy.

13 What structural defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

The potential target company may implement a set of defensive measures, particularly defensive provisions in the articles of association concerning, inter alia, transfer restrictions, voting rights restrictions (3 and 5 per cent are the most common thresholds), super voting shares (ie, shares with a nominal value reduced by up to 10 times by keeping the one-share, one-vote principle, normally assigned to an anchor shareholder) and super majorities relating to specific resolutions or to a quorum at the shareholders' meeting. Such structural defences may be an efficient tool to hinder short-term interested shareholders. In addition, Swiss regulation already provides for certain effective impediments an activist must overcome including, especially, the disclosure requirements (see question 7) and the mandatory tender obligation (at 33.3 per cent) pursuant to the FMIA as well as the lack of access to the company's share register. It is a difficult balancing act for the activist to engage in conversations with other shareholders and to avoid triggering disclosure obligations or even a mandatory bid obligation due to an acting in concert. Target boards will sometimes use this legal risk to destabilise the activist shareholder and shareholders showing sympathy with his or her actions.

A structural feature that makes a corporation more likely to be the target of shareholder activism is, in particular, the implementation of an

opting-out clause (or an opting-up clause, respectively) regarding mandatory bid obligations. The release of an investor building up a majority stake from the duty to launch a public tender offer means an elimination of a main legal impediment that activists face in Switzerland.

Although not picked up by the recently published draft revision of Swiss corporate law, criticism with respect to the instruments of super voting rights and opting out has been voiced in relation to the ongoing battle for control over Swiss listed company Sika.

14 May shareholders have designees appointed to boards?

If a company decides to cooperate with an activist shareholder and to grant the activist a representation on the board, the company and activist usually enter into a (formal or informal) agreement stating that the company will support the election of a board representative at the shareholders' meeting and possibly that the company will call a special shareholders' meeting for such purpose (see also question 16). Such agreement may also contain a standstill provision.

If an agreement is reached, the company is typically obliged to publish a respective ad hoc release as all changes to the board composition are deemed price-relevant facts from an ad hoc regulation's perspective.

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

The articles of association of any company with its registered seat in Switzerland are publicly available and can be obtained from the relevant cantonal commercial register authority. In addition, SIX-listed companies typically publish their articles of association on the company's website. There is no duty to disclose the by-laws (organisations rules) of the company, but the majority of the SIX-listed companies publish them on their website.

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

The shareholders' register of a Swiss company is not publicly available and the shareholders may therefore not receive a list of the registered shareholders from the company. However, any shareholder holding at least 3 per cent in a listed company has to disclose, inter alia, the number of shares represented and the legal and beneficial owner. This information is available on the website of the respective stock exchange (eg, of the SIX Swiss Exchange). To foreign investors it may come as a surprise that they are, as shareholders, not entitled to address their concerns with other shareholders by directly or indirectly using the company's share register or by including their communications to other shareholders in the company's proxy materials.

17 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

Corporate law requires the board of directors to treat all shareholders equally under equal circumstances. Hence, valid reasons are required in order to allow for a selective information policy. Against the background that shareholders have no fiduciary duties towards the company, the board will rarely have valid reasons to selectively disclose confidential information to an activist shareholder within a proxy fight ahead of a shareholders' meeting.

The board is not obliged to disclose its engagement with activist shareholders for as long as no agreement is entered into. In the event that, for example, an activist shareholder requests that an agenda item be tabled at the next shareholders' meeting or that an extraordinary shareholders' meeting be convened, the board must make an ad hoc publication. For SIX listed companies any such announcement must be distributed to SIX Exchange Regulation, at least two widely used electronic information systems, two Swiss daily newspapers of national importance, the web page of the company and any interested party requesting to be included in the electronic distribution list.

18 Do companies receive daily or periodic reports of proxy votes during the voting period?

In general, the company itself is not entitled to request to receive and review proxy forms returned to the independent proxy or proxy advisory firms (see question 2) prior to the shareholders' meeting. However, proxy advisers tend to get in contact with the company (if the company has not itself reached out to the proxy advisers) to discuss their voting recommendation prior to releasing them. This dialogue with proxy advisers gives the company a rough indication of how votes might be cast at the shareholders' meeting.

19 Must shareholders disclose significant shareholdings?

Any shareholder or group of shareholders acting in concert must disclose if it attains, falls below or exceeds the threshold percentages of 3, 5, 10, 15, 20, 25, 33.3, 50 or 66.6 of the voting rights of the company (irrespective of whether the voting rights may be exercised or not). This applies to direct or indirect holdings of shares as well as to the holding of financial instruments with such shares as underlying. Shareholders are considered to be acting in concert if they are coordinating their conduct by contract or by any other organised method with a view to the acquisition or sale of shares or the exercise of voting rights.

The disclosure entails the number and type of securities, the percentage of voting rights, the facts and circumstances which triggered the duty to disclose the date the threshold was triggered, the full name and place of residence of natural persons or the company name and registered seat of legal entities as well as a responsible contact person.

The disclosure must be made towards the company and the stock exchange within four trading days following the triggering event. The company must publish the required information within another two trading days.

The maximum fine that may be imposed on non-reporting parties amounts to 10 million Swiss francs in case of intentional conduct and 100,000 Swiss francs in case of negligence. The Federal Department of Finance (FDF) is the competent authority to issue such fines. In most instances the FDF commences its procedures following a criminal complaint made by FINMA.

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

Shareholders acting alone or in concert with other shareholders with the intention to control the relevant company are obliged to launch a mandatory bid if they exceed the threshold of 33.3 per cent of the voting rights of a listed company. The articles of association of a company may raise the relevant threshold up to 49 per cent of the voting rights (opting up) or may put aside the duty to launch a takeover offer completely (opting out).

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders?

As activist shareholders do not have access to the share register of the company, they may publish their intentions on their website or in the media (eg, with open letters to shareholders or by approaching significant shareholders). Where the intentions of the activist shareholder are deemed as insider information, they may not disclose such information to other shareholders prior to making it public unless the communication to other shareholders is required to comply with legal obligations or in view of entering into an agreement. Activists will get in contact with proxy advisers to try to obtain their recommendations.

Generally, companies are free to approach their shareholders (eg, by way of letters to shareholders, public statements or individual approaches). As soon as the activist approach is publicly known, the media play an important role in shaping shareholder opinion in the run-up to a shareholders' meeting. The board usually engages with the key shareholders in order to gain their support, which may require that the board compromises on certain issues. This shareholder engagement by the board must occur within the limits of the law, in particular, the transparency rules and rules on equal treatment (see question 17).

The board will also engage with proxy advisers to gain their support (possibly in the form of a special situations report) and, if successful, to make the proxy advisers' recommendation public to underline the viability of the board's position with its shareholders.

22 Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

Joining forces with regard to an activist campaign is not uncommon. By reference to a recent case, RBR Capital and the English hedge fund Camox Master have built a disclosed group that controls more than 10 per cent of the Swiss public company gategroup Holding AG.

Organised shareholders customarily conclude a shareholder agreement at first to outline their joint concerns and plan of action. Such agreements typically entail voting commitments regarding shareholders' meetings, how to handle disclosure notification issues pursuant to the FMIA (disclosure only needs to be made by one member of the group), provisions to avoid triggering the mandatory bid obligation (see question 20), a communication policy and confidentiality obligations. Such jointly organised engagement allows shareholders to publicly announce their group with a joint approach, which can increase the pressure on the company. Even without a formal shareholder agreement, the acting in concert of several shareholders is likely to trigger disclosure obligations. Swiss law does not provide for any formal requirements in how activist shareholders must approach the company. Depending on their campaign strategy and their general policies, they will either engage with the company in confidential conversations or take the public route (which is typically preceded by confidential discussions). The levels of success of these approaches depend on the specific characteristics of target including the industry it belongs to.

23 Are directors commonly involved in shareholder engagement efforts?

Once the initial private conversations between the activists and the target company turn out to be fruitful, it is common to contractually fix the framework conditions regarding the further approach (eg, relating to a supported board representation). It is common for activists to approach not only the chairman of the company's board but also those board members they already know or who they have been introduced to through their networks.

Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

Directors must apply the same standard of care to an activist proposal as to any other proposal or matter. They have to act and resolve in the best interests of the company and must treat all shareholders equally under equal circumstances. Also, board members (formally or informally) representing a shareholder on the board of directors must appropriately deal with their conflicts of interests when facing their shareholder's activist campaign.

In contrast, shareholders, including significant or majority shareholders, do not owe any duty of loyalty to the company.

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General

1 What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

The primary sources of law and regulation that are relevant to shareholder activism and engagement are the Companies Act 2006 (the Companies Act), the Listing Rules, the Disclosure Guidance and Transparency Rules (DTRs), the EU Market Abuse Regulation (MAR) and the City Code on Takeovers and Mergers (the Takeover Code).

The Companies Act was introduced by Parliament and applies to all companies incorporated in the UK.

The Listing Rules and the DTRs are made and enforced by the Financial Conduct Authority (FCA). The Listing Rules apply to all companies (whether incorporated in the UK or elsewhere) with a listing on the premium segment of the Official List. Chapter 5 of the DTRs (DTR 5) is particularly relevant in the context of shareholder activism and applies to:

- UK companies with shares admitted to trading on a 'regulated market' (such as the Main Market of the London Stock Exchange);
- UK public companies with shares admitted to trading on a 'prescribed market' (such as AIM); and
- non-UK companies whose shares are admitted to trading on a 'regulated market' whose home state is the UK.

MAR is an EU regulation that is directly applicable in the UK. It is enforced in the UK by the FCA.

The Takeover Code is a set of rules administered and enforced by the Takeover Panel and applies, inter alia, to takeover offers for:

- companies incorporated in the UK, Channel Islands or Isle of Man if any of their securities are admitted to trading on a regulated market or multilateral trading facility (such as AIM) in those jurisdictions; and
- public companies incorporated in the UK, Channel Islands or Isle of Man that are considered by the Takeover Panel to have their central place of management and control in any of those jurisdictions.

2 What are the other primary sources of practices relating to shareholder activism and engagement?

Corporate governance rules and market guidance and institutional investor expectations on 'best practice' for listed companies are also relevant in the context of shareholder activism and engagement.

All companies (whether incorporated in the UK or elsewhere) with a listing of equity shares on the premium segment of the Official List are subject, on a 'comply or explain' basis, to the UK Corporate Governance Code (the Governance Code) issued by the Financial Reporting Council (FRC). However, certain provisions of the Governance Code apply only to FTSE 350 companies, including, for example, provisions requiring the annual re-election of directors.

In addition, the FRC's UK Stewardship Code (the Stewardship Code) sets out good practice for institutional investors seeking to engage with boards of listed companies and also applies on a 'comply or explain' basis.

Representative bodies, such as the Pension and Lifetime Savings Association (PLSA), Pensions Investment Research Consultants, Hermes and the Investment Association, as well as Institutional Shareholder Service, the US-based proxy advisory service, regularly issue voting guidelines recommending the positions investors should take on shareholder votes. These guidelines carry significant influence in practice.

3 How is shareholder activism generally viewed in your jurisdiction? Are some industries more or less prone to shareholder activism? Why?

Shareholder activism has grown in prevalence both in the UK and, more generally, in Europe in recent years. While shareholder activism in the US has tended to be viewed as more adversarial, hostile or opportunistic in nature, in the UK there is growing support for activist investors, particularly as many have taken a more collaborative approach to activism and engaged with companies privately instead of taking public action at the outset.

Activists in the UK are not restricted to any particular industries. Natural targets are characterised by poor share price performance compared with industry peers, high cash reserves, business lines that can be sold or spun off, corporate governance concerns or a receptive shareholder base.

4 What are the typical characteristics of shareholder activists in your jurisdiction?

US hedge funds and alternative investors with event-driven strategies are often considered to be the principal shareholder activists in the UK. However, in recent years, long-term institutional investors have become increasingly involved in activist campaigns (outside takeover or merger arbitrage situations) and, on occasion, have formed alliances with hedge funds or alternative investors for this purpose.

The apparent behavioural shift of institutional shareholders is due to a number of factors, including the publication of best practice guidance aimed at promoting effective engagement between institutional shareholders and listed companies (see question 22) and the introduction of 'say-on-pay' legislation (see question 6).

5 What are the main operational, governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

Activism in the UK has historically focused on board composition and remuneration, with specific attention given to companies with entrenched, long-standing boards that are under-performing or unwilling to contemplate a change in strategic direction. However, long-term institutional investors have become increasingly involved in what some may regard as activist-like campaigns (outside takeover or merger arbitrage situations) and, on occasion, have formed alliances with hedge funds or alternative investors for this purpose.

The apparent behavioural shift of institutional shareholders over recent years can be attributed to a number of factors, including the introduction of 'say-on-pay' legislation (see question 6) and a political shift in favour of the active engagement of investors in public companies as evidenced by the establishment of the Investor Forum and the publication of best practice guidance aimed at promoting effective engagement between institutional shareholders and listed companies (see question 22) and recently published UK government proposals on corporate governance (see update and trends).

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

Certain matters are reserved for shareholders of a UK company under the Companies Act and must be approved by ordinary resolution (passed by a simple majority) or special resolution (passed by a 75 per cent majority). These thresholds are determined by reference to those who vote at the meeting in question, which, in reality, would typically represent a much lower percentage of the overall shareholder base. An ordinary resolution is the more common and is used, inter alia, to authorise directors to allot shares, approve the board's remuneration policy, remove directors from office, ratify board decisions and, for premium-listed companies under Listing Rules 10 and 11, respectively, approve significant (Class 1) transactions or transactions with related parties. Special resolutions, on the other hand, are required to reduce a company's share capital (which is commonly used to create or increase distributable reserves) and to amend the company's constitution. In addition, as a result of guidance issued by the Institutional Investor Committee, listed companies are expected to approve share repurchases by way of special (rather than ordinary) resolution.

The requirement that the board's remuneration policy is subject to a binding vote by way of ordinary resolution, which must be passed every three years, is particularly significant in an activism context as it provides an effective means for shareholders to express their dissatisfaction with the performance of management. It is coupled with an annual advisory (non-binding) vote on the company's implementation report, which sets out how the remuneration policy has been implemented during the previous financial year. Advisory votes are otherwise uncommon in the UK, but may be used by shareholders to request (rather than formally require) the board to take particular actions as an indication of their collective wish.

If a shareholder (or shareholders) of a UK company wishes to make a proposal, it can require the company to call a general meeting under the Companies Act, provided that it holds at least 5 per cent of the paid-up share capital which carries voting rights (excluding treasury shares). The requisition must state the business to be dealt with at the meeting and may include the text of any ordinary or special resolution which the relevant shareholder proposes to be tabled. Any such resolution must not be ineffective (eg, due to illegality), defamatory, frivolous or vexatious, although a company's board may be accused of obstructing shareholder engagement if it were to challenge a resolution on this basis. If a valid requisition request is made, the board must call a general meeting within 21 days and the meeting itself must be held not more than 28 days after the date of the notice of the meeting. Where the board fails to do so, the shareholder who requisitioned the meeting (or, where more than one shareholder, any of them representing more than half of the total voting rights of the requisitionists) may himself or herself call the meeting.

Additional rights are available to a shareholder (or shareholders) holding at least 5 per cent of the total voting rights (excluding voting rights attached to treasury shares) and to any group of 100 shareholders with the right to vote on the resolution (provided that each holds, on average, £100 of paid-up share capital). The latter may be satisfied by an activist shareholder holding less than 5 per cent voting rights by splitting its shares between nominee accounts. A shareholder satisfying these criteria is permitted to require resolutions to be put before an annual general meeting (AGM) of a public company or to require the company to circulate a statement to shareholders. Any resolution to be put before an AGM must not be ineffective, defamatory, frivolous or vexatious and must be received by the company at least six weeks before the later of the AGM and the circulation of the AGM notice. A statement to shareholders, on the other hand, must be limited to 1,000 words and relate to a matter referred to in a proposed resolution or other business to be dealt with at the meeting. The company must send the statement to every member entitled to receive notice of the meeting in the same manner as the notice of meeting and at the same time as, or as soon as reasonably practicable after, it circulates the notice of meeting. Subject to limited exceptions, the shareholder who requests the circulation of the statement will be responsible for the costs associated with its circulation, unless the company determines otherwise.

As described above, the availability of certain procedures to investors will depend on whether they hold a sufficient stake in the company or can gather a sufficient amount of support among other shareholders. As noted in question 3, US activist shareholders are more likely to use public measures at an early stage in the campaign process, such as requisitioning general meetings and voting against resolutions for the appointment of new directors. On the contrary, UK-based institutional investors tend to first engage in private discussions with the board before submitting a formal proposal.

7 What common strategies do activist shareholders use to pursue their objectives?

In general, activist tactics in the UK are more cooperative than in the US. Any public form of engagement would usually represent a last resort, largely because it involves considerably more expense and risk (both in execution and reputation). Typically, therefore, an activist would pursue its objectives through private engagement with the company's board. While there is a multiplicity of private engagement strategies, it would be common for the activist not to involve other shareholders in the first instance in order to reduce the risk of leaks and divergent views on solutions and objectives. However, where collective engagement is preferred, an activist shareholder will be entitled to request a copy of the shareholder register under the Companies Act (see question 16) and review notifications of significant shareholdings in public announcements made in accordance with DTR 5 (see question 19) with a view to contacting other shareholders.

If the activist is satisfied that its objectives will not be met through private engagement, it may use public announcements, open letters, website campaigns and even social media to voice its concerns and obtain support for its proposals from other shareholders and representative bodies (such as the Investment Association and PLSA).

Depending on the activist's percentage shareholding, it may be able (either alone or with other shareholders) to requisition a resolution at the AGM or convene a general meeting to consider resolutions to effect changes. Ideally, the activist will have received letters of intent or voting undertakings from other shareholders to support its proposals at the meeting. Legal action of the kind described in question 11 is uncommon.

8 May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

Shareholders of a UK company may call shareholder meetings in accordance with the process outlined in question 6.

There is no statutory procedure for shareholders of a UK public company to pass written resolutions in lieu of a meeting. However, a written record of the passing of a resolution, which has been signed by all shareholders of the company in full knowledge of what they are resolving, should be accepted as a valid expression of member approval.

9 May directors accept direct compensation from shareholders who nominate them?

It would be highly unusual for a listed company not to remunerate board members for the services they perform in their capacity as directors of the company. Ordinarily, executive directors are remunerated under the terms of their service contracts with the company, and non-executive directors receive a fee for their services to the company under letters of appointment.

However, a director nominee or designee may be separately employed by the relevant shareholder and directly remunerated by that shareholder under the terms of his or her employment contract. If a director nominee is separately employed and remunerated by a shareholder, the director will need to ensure compliance with the requirements of the Companies Act relating to conflicts of interest and, in particular, the positive duty to avoid a conflict.

10 May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

Shareholders of a UK company may nominate directors for election to the board by requisitioning a shareholder meeting or a resolution to be tabled at the meeting in accordance with the process outlined in question 6.

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

Under the Companies Act, a shareholder may bring a derivative action on behalf of a UK company for negligence, default, breach of duty or breach of trust by a director (even if the director has not benefited personally from the breach). Only a single share needs to be held for this purpose, and this can be acquired after the event in question.

Two facets of the English legal system operate to reduce the likelihood of shareholders bringing derivative actions for nuisance value (akin to a US 'strike suit'). First, the shareholder must demonstrate that it has a prima facie case. The court will dismiss the claim where it is satisfied that the director's action has been authorised or ratified by the company (which would therefore operate as a defence against the claim) or where no director of the company would seek to continue the claim on the company's behalf. If the action has not been ratified but is capable of ratification, it is likely that the court will adjourn to enable the shareholders to hold a meeting. Second, while a derivative action is brought in the name of the company, the shareholder bringing the claim is responsible for funding the action unless the court orders the company to reimburse its costs.

In the UK, multiparty litigation (akin to US class actions) may be brought only in respect of competition claims in the Competition Appeal Tribunal. Outside competition claims, the UK rules would permit shareholder actions to be managed collectively under a group litigation order, but each such action would have to be issued separately and to a significant extent would still be treated individually, which can increase cost and complexity.

Company response strategies

12 What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

The principle of shareholder engagement is a key feature of UK corporate governance (see question 22). A company will be less vulnerable to challenge from an activist shareholder if it engages regularly with its major shareholders, and we advise our clients to do so.

We also advise certain clients to take additional proactive steps to protect themselves from being challenged by activist shareholders – for example, by conducting regular strategic reviews to identify potential areas of challenge (including, if appropriate, through a 'fire-drill' exercise, where management is put through mock attack scenarios); and by monitoring unusual trading (or other) activity that may indicate that the company is being targeted.

The directors of UK listed companies are becoming increasingly focused on this area and preparing for shareholder activism in the same manner in which they would prepare to defend a hostile takeover bid for the company.

13 What structural defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

Notwithstanding a rise in shareholder activism in the UK generally, structural or 'poison pill' defences are not prevalent in the UK. Their adoption would, in all but extreme cases, constitute a breach of fiduciary duty by the directors of a UK company.

Further, and in the context of a possible takeover offer for a UK-listed company, General Principle 3 of the Takeover Code prohibits a target company's board from denying its shareholders the opportunity to decide on the merits of a bid. This General Principle is supplemented by Rule 21 of the Takeover Code, which prohibits the board from taking certain actions without shareholder approval during the course of an offer or if it believes that an offer might be imminent, which would include issuing shares, selling material assets or entering into non-ordinary course contractual arrangements.

In any event, shareholder consent would be required to implement any poison pill involving an amendment to the company's capital structure or the rights attaching to its share capital, which is unlikely to be granted by UK institutional investors; and for companies with or seeking a premium listing it is unlikely to be consistent with the requirements of the Listing Rules.

For completeness, we note that a classified or 'staggered' board is not a concept embedded within English company law: directors of a UK company may always be removed by ordinary resolution under the Companies Act notwithstanding any agreement to the contrary between the company and the director. We also note that the Governance Code provides that all directors of FTSE 350 companies should be elected (or re-elected) annually.

14 May shareholders have designees appointed to boards?

The composition and structure of the board of a UK-listed company is governed by the Governance Code. This requires that the board consist of directors with the appropriate balance of skills, experience, independence and knowledge of the company to enable it to discharge its duties and responsibilities effectively. Ancillary to this requirement, the board should include an appropriate combination of executive and non-executive directors (and, in particular, independent non-executive directors) such that no individual or small group of individuals can dominate the board's decision-making. For FTSE 350 companies, the Governance Code requires that at least half the board, excluding the chairman, comprise independent non-executive directors.

Notwithstanding this, UK-listed companies have been willing to grant board representation to significant shareholders (typically, shareholders holding at least 10 per cent of the company's shares) by the appointment of a non-executive director nominated by that shareholder. In the context of an initial public offering and listing, it is relatively common for large shareholders to retain board representation. It is less common for board representation to be granted to an investor who actively builds a stake in a UK-listed company.

Where a shareholder is entitled to nominate or appoint a non-executive director, the shareholder would be expected to enter into a relationship agreement with the company, which would regulate their future interaction and support the company's independence. The relationship agreement would typically impose non-compete, non-solicitation, confidentiality or standstill commitments on the shareholder and require the shareholder to procure compliance with corporate governance standards. In return, the shareholder's right to nominate or appoint a director would be enshrined in the contract, together with information and consultation rights.

For premium listed companies with a 'controlling shareholder' (meaning any person who, together with its concert parties, controls at least 30 per cent of the votes of the company), there is a mandatory requirement under the Listing Rules to have a relationship agreement in place. Such listed companies must also have a dual voting structure for the election or re-election of independent non-executive directors to ensure that they are separately approved by both the shareholders as a whole and independently of any controlling shareholder.

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

A UK company's constitutional documents are publicly available at Companies House, the UK Registrar of Companies. These documents can be accessed online on the Companies House website.

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

A UK company is required by the Companies Act to comply with any request from a shareholder to inspect or receive a copy of the company's shareholder register. The company may resist the request only if it has not been made for a 'proper purpose'; in which case the company must apply to the court and demonstrate that, on the balance of probabilities, this is the case. The words 'proper purpose' are given their ordinary meaning in this context. A non-binding (non-exhaustive) list of matters constituting a 'proper purpose' has been published by the Institute of Chartered Secretaries and Administrators, which includes shareholders seeking to contact other shareholders generally about matters relating to the company, their shareholding or a related exercise of rights.

The shareholder register will only show the legal owners of the shares. However, under the Companies Act, a UK public company must also make available to shareholders on request (either for inspection or by providing copies of entries) a register of interests in its shares that

has been disclosed to the company, unless the request is not made for a proper purpose. An interest in shares will have been disclosed only where the company has required, by service of notice, that such disclosure is made by a person who it knows or suspects is interested in its shares beneficially or otherwise. A significant proportion of UK public companies instruct brokers to serve such notices on a monthly basis.

In addition, UK companies (other than those that are subject to DTR 5) are required to maintain a publicly available register of persons with significant control over the company. A person with significant control includes any individual who:

- holds (directly or indirectly) 25 per cent or more of the company's shares or voting rights;
- has the power (directly or indirectly) to appoint or remove a majority of the board; or
- otherwise has the right to, or actually does, exercise significant influence or control over the company.

17 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

As detailed further under questions 22 and 23, it is best practice for a UK-listed company's board to ensure that there is an effective mechanism to facilitate direct communication between shareholders and the board, and for the board to provide details of its engagement with shareholders in the company's annual report.

Generally, a UK-listed company must not selectively disclose information to third parties, including to shareholders. With effect from 6 July 2016, MAR, which is directly applicable in the UK, sets out a pan-EU regime dealing, among other items, with the disclosure of 'inside information'. Under MAR, a UK-listed company must generally disclose inside information (that a reasonable investor would use when making investment decisions) to the market as soon as possible through a Regulatory Information Service (RIS).

MAR does allow the disclosure of inside information to be delayed where immediate disclosure is likely to prejudice the issuer's legitimate interests; delay of disclosure is not likely to mislead the public; and the issuer is able to ensure the confidentiality of the information. Selective disclosure of inside information is permitted where the person receiving the information owes the company a duty of confidentiality and requires the information to carry out duties for the company. In any event, UK-listed companies must draw up and update 'insider lists' indicating the persons working for or on behalf of the company who have access to inside information.

In addition to the obligations of the UK-listed company, it is also critical that any recipient does not trade on the basis of the selective disclosure, which would likely constitute an offence under MAR. See question 21 for further information.

18 Do companies receive daily or periodic reports of proxy votes during the voting period?

A UK company's registrar would typically provide daily proxy updates to a company in advance of a general meeting.

A proxy vote is usually given in favour of the chairman of the company and is confidential to the company in the period prior to a general meeting. The quantum of the proxy votes for or against a resolution could constitute inside information (see question 17).

19 Must shareholders disclose significant shareholdings?

DTR 5 imposes an obligation on a person to give notice of an acquisition within two trading days where that person acquires (directly or indirectly through other group entities) in aggregate 3 per cent or more of the voting rights in a UK company to which DTR 5 applies. A further notice has to be given each time a percentage holding above 3 per cent increases or decreases through a 1 per cent threshold (rounding down to the nearest whole percentage point). The notification thresholds for non-UK companies to which DTR 5 applies are 5, 10, 15 per cent, 20 per cent, 25, 30, 50 and 75 per cent; and the deadline for making the notification is four trading days. In either case, the company must then disclose any notifications to the market.

For the purposes of making a notification, an investor is required to aggregate voting rights held by any third party with whom that investor has agreed to adopt, by concerted exercise of voting rights, a lasting common policy towards the management of the company. Helpfully, the Financial Services Authority, the predecessor to the FCA, previously indicated that a high threshold would be applied in this context: it is unlikely to include the kind of ad hoc discussion and understandings that might be reached between institutional shareholders in relation to particular issues or corporate events. However, advice should be sought at an early stage where shareholders adopt an agreed approach to voting at an upcoming general meeting.

Notification obligations under DTR 5 also extend to financial instruments, provided that they give the holder a long position on the economic performance of the company's shares, whether the instrument is settled physically in shares or in cash. In effect, anyone holding a financial instrument that may provide access to the company's shares (eg, as a result of the counterparty having hedged the underlying shares) is intended to be captured.

Notifications under DTR 5 must include, inter alia, details of the resulting situation in terms of voting rights, the chain of controlled undertakings through which voting rights are effectively held and the date on which the threshold was reached or crossed. The notification must be sent to the FCA and the company. Failure to do so may result in the FCA imposing a penalty on the relevant person or issuing a public censure. The investor might also find himself or herself in breach of the market abuse rules (see question 20 for further information).

In addition, where the company is subject to the Takeover Code, a person interested in 1 per cent or more of its securities must disclose details of his or her interest under the Takeover Code no later than 12pm on the 10th business day after the company enters an offer period or an announcement is made that first identifies the bidder. Thereafter, the relevant person must report any dealings to an RIS no later than 3.30pm on the following business day and an electronic copy of such disclosure must be sent to the Takeover Panel. An 'interest' is broadly defined to include options and long derivative positions.

As detailed in question 16, a UK public company may also require a person to disclose his or her interest in the company's shares by service of a notice.

Certain companies in the defence and civil aviation industries impose restrictions on the percentage of their shares in which a person may be interested. For example, a 15 per cent limit on the ownership of shares by non-UK persons has been incorporated into the constitutional documents of Rolls-Royce and BAE Systems. In addition, the approval of the FCA is required where a person seeks to become a 'controller' (by acquiring 10 per cent or more of the shares or voting power) of a company authorised to carry on banking, insurance or investment services or seeks to increase its control through a notification threshold (at 20 per cent, 30 per cent or 50 per cent).

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

If shareholders acting in concert acquire an interest in shares of a UK public company (or any other company subject to the Takeover Code) and such interest carries, in aggregate, 30 per cent or more of the voting rights, they will be required by the Takeover Code to make a cash offer to acquire the remainder of the shares.

The Takeover Panel will not normally regard shareholders voting together on a particular resolution as acting in concert. However, shareholders who requisition or threaten to requisition a 'board control-seeking' proposal at a general meeting will be presumed to be acting in concert with each other and with any proposed directors. This would ordinarily require the replacement of existing board members with directors who have a significant relationship with the requisitioning shareholders.

A 'white list' of activities on which shareholders should be able to cooperate without being presumed to be acting in concert was published by the European Securities and Markets Authority in 2013.

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders?

Where a communication by a listed company or an investor includes non-public, price-sensitive information, the recipient is prohibited from

Update and trends

In the 2016/17 proxy season, institutional shareholders and activists continued to focus on executive remuneration and perceived corporate governance failings at UK-listed companies. Many FTSE 100 companies appear to have listened to concerns raised by activists in previous years and submitted more conservative remuneration policies for approval, with only Pearson and Crest Nicholson losing their advisory votes. Among FTSE 250 companies, Thomas Cook and Playtech were subject to shareholder dissent in relation to remuneration, and a number of other FTSE 250 companies decided to withdraw or amend remuneration plans ahead of their AGMs as a result of feedback from shareholder consultations.

As a result of the continued scrutiny, directors and senior management are having to commit an increasing amount of time and focus to shareholder engagement. Several companies have established measures for shareholder consultation and engagement, including Marks & Spencer, which created a private shareholder panel and has given its members access to its board, and Royal Bank of Scotland, which hosted an event specifically for private shareholders.

Furthermore, in August 2017, the UK government announced a package of proposed corporate governance reforms with the aim of increasing the transparency and accountability of large companies to their employees and shareholders. The reforms will require all listed companies to reveal and justify the pay ratio between CEOs and their average UK worker, and listed companies with significant shareholder opposition to executive pay packages will have their names published on a new public register, which will be run by the Investment Association. In addition, companies of a significant size will be required to explain publicly how their directors take employees' and shareholders' interests into account, and all large companies will also have to make their responsible business arrangements public. The package also contains a proposal to extend the scope of the Governance Code to cover large private companies, which the FRC will consult with the business community and the government to help develop.

Institutional shareholders and activists have also remained focused on building stakes in, and securing representation on the boards of, UK listed companies to achieve strategic change. In August 2017, Elliot Management disclosed that it had increased its stake in BHP Billiton to 5 per cent and increased the pressure on BHP to sell its US shale oil unit, having earlier publicly demanded BHP drop its dual London/Australia listing, increase shareholder returns and make changes to its board. By late September 2017, the new chairman of BHP had promised to bring 'fresh perspective' to the company's review of its portfolio of mines and assets. In October 2017, Elliott Management disclosed it had taken a stake in Smith & Nephew, a FTSE 100 artificial hip and knee maker, and has subsequently pushed for the company to make disposals in order for the company to be more attractive for a potential takeover.

In March 2017, Crown Ocean Capital managed to successfully replace all but one of Bowleven's directors after questioning their independence and Premier Foods agreed to appoint a representative of Oasis Management, a Hong Kong based activist, as a director on its board. Oasis began building its stake in Premier Foods last year after the board of Premier Foods rejected a takeover approach from McCormick & Co, a US spice maker, stating that the offer price was inadequate, and before later issuing a profit warning. Premier Foods has also been subject to public criticism by London-based activist Cape Wrath Capital, which said that Premier Foods' management and board had a disregard for long-term value creation, while US hedge fund Paulson & Co said the company was grossly mismanaged.

dealing on the basis of that information by the market abuse and insider dealing rules under MAR, the Financial Services and Markets Act 2000, the Criminal Justice Act 1993 and the Financial Services Act 2012.

Under MAR, insider dealing arises where a person possesses inside information and uses that information to acquire or dispose of (for its own account or for the account of a third party), directly or indirectly, financial instruments to which that information relates. In the context of communication between shareholders, the recitals to MAR explain that information regarding a third party's plans and strategies for trading may amount to inside information. Albeit in the context of the pre-MAR regime, the FCA has also previously indicated that an investor's strategy for investing in a UK-listed company can itself constitute inside information. An activist, therefore, often makes details of its strategy public at the outset of a campaign by writing an open letter to obtain support from other shareholders. In doing so, it must ensure that it is not giving shareholders a misleading impression or expectation in order to take advantage of the resulting share price movements.

Where communication is between shareholders and the company, institutional shareholders would typically have appropriate procedures in place to enable them to receive inside information and become insiders with appropriate safeguards. According to the Association of British Insurers, 60 per cent of its members have developed Chinese wall procedures to enable their corporate finance or corporate governance team to be contemporaneously inside while the portfolio managers continue to be able to trade in the company's securities. This enables investors to give non-binding feedback to companies and reflect investment views without having to implement stock restrictions.

The FCA has adopted an increasingly robust approach to the enforcement of market abuse and insider dealing offences, and the rigorous requirements relating to the control and dissemination of inside information (see question 17) and insider dealing under MAR will likely reinforce this trend. While market abuse is a civil offence for which the FCA may impose an unlimited fine, public censure or a restitution order, insider dealing may result in criminal prosecution.

Accordingly, communications are usually private and involve a small number of shareholders (see question 7). Where the company or a shareholder decides to make a communication public, electronic communications and websites are often used. Activists increasingly use social media to voice concerns and persuade other shareholders of their viewpoint.

To overcome various limitations associated with obtaining copies of and inspecting the register of shareholders of a UK company, activist investors may engage proxy solicitation agents and financial advisers to help obtain information on the company's shareholder base. In addition, activist investors, together with their advisers, typically use a company's announcements made under DTR 5, as well as information in the company's annual reports and accounts to collect and analyse information on the company's shareholder base. Once identified, the activist investors or proxy solicitation agents, or both, as the case may be, make contact with the other shareholders.

22 Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

Organised shareholder engagement has become increasingly common in recent years and now forms a key feature of best practice guidance. The Governance Code recommends that companies ensure satisfactory dialogue with shareholders as one of its main principles. This is supported by guidance published by shareholder representative groups, including the Investment Association and PLSA, which recommend that dialogue take place at regular intervals throughout the year. Further, engagement efforts are often initiated by investors rather than by the company. Investor responsibility to improve engagement in this way is now enshrined in the Stewardship Code.

Over recent years there has been an increased focus on collective engagement by the UK government. In 2011, at the request of Vince Cable, Secretary of State for Business, Innovation and Skills, the government commissioned a review of UK equity markets to be undertaken by the economist John Kay. In July 2012, the Final Report of his independent review was published. It identified that traditional forms of shareholder engagement had focused disproportionately on corporate governance matters, leading to a vacuum in respect of companies' strategies for long-term, sustainable competitive advantage. It also highlighted impediments to engagement arising from increased international ownership, increasingly fragmented shareholding and the perceived regulatory barriers that inhibit collective engagement. The review recommended the formation of an independent 'investor forum', to be championed and developed by the asset management industry. In October 2014, the Investor Forum was constituted with a view to fostering better relationships between UK-listed companies and investors and encouraging shareholder engagement. Over the course of 2015/16, investors engaged the Investor Forum to investigate 16 company situations including 14 UK listed companies. Of the 14 UK listed companies, eight situations led to a comprehensive collective

engagement, facilitated by the Investor Forum, between the investors and companies concerned including Standard Chartered, Tate & Lyle, Sports Direct International, Rolls-Royce, Royal Dutch Shell/BG Group, Cobham and Mitie Group.

Despite an increased focus from policy makers and regulators on promoting better corporate governance, proxy fights and US-style legal threats remain relatively uncommon in the UK. Rather, activist investors typically prefer to engage with companies on an informal basis, for example, by lobbying shareholders behind closed doors and attempting to resolve issues on an amicable basis. Further, UK companies remain less prone than their US counterparts to giving board positions to activists.

23 Are directors commonly involved in shareholder engagement efforts?

Best practice guidance recommends that directors be involved in shareholder engagement efforts. The Governance Code, for example, states that the directors of a company should be accessible to shareholders and should make themselves available to engage on any issues (whether or not related to a vote at a company's general meeting). While, in practice, most shareholder contact is with the chief executive and finance director, best practice guidance emphasises the role of the chairman and senior independent director for maintaining shareholder relations. Under the Governance Code, a company with a premium listing of equity securities must include details in its annual report of the steps taken by the board to develop an understanding of the views of major shareholders.

Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

Directors are not required to consider an activist proposal under any different standard of care as compared with other board decisions.

Equally, a director who is a majority or significant shareholder, or any director appointed or nominated to the board by that shareholder, would be subject to the same fiduciary duties as all other directors of the company. These include duties to act in a way that the director considers would most likely promote the success of the company for the benefit of its members as a whole, to exercise independent judgement and to avoid actual or potential conflicts of interest. In the event of a conflict, the courts have held that the nominee director's primary loyalty is to the company and the company's interest must ultimately prevail over those of the appointing shareholder.

However, an activist acting in its capacity as a shareholder of a UK-listed company will owe no fiduciary duties to the company regardless of the size of its shareholding.

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General

1 What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

The primary sources are state corporate law and federal law. In addition, publicly traded companies must comply with the listing rules of the exchange on which they are listed. Beyond laws and regulations, there are best practices advocated by proxy advisory firms, institutional investors and others in the investment community that issue guidelines that often touch on shareholder activism and engagement issues.

State law

State corporate law establishes the fiduciary duties of directors of both privately held and publicly traded companies. Delaware is, by far, the most popular state of formation of legal entities in the United States. In addition, Delaware is often viewed as having a major influence on the corporate law of other states. For that reason, Delaware General Corporate Law (DGCL) will serve as a reference point in this chapter.

Federal law

Federal laws related to shareholder activism and engagement include the Securities Act of 1933 (the Securities Act), the Securities Exchange Act of 1934 (the Exchange Act), the Hart-Scott-Rodino Antitrust Improvements Act (the HSR Act), the Public Company Accounting Reform and Investor Protection Act of 2002 (the Sarbanes-Oxley Act) and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act). For example, shareholder activists are required to comply with beneficial ownership reporting requirements under section 13 of the Exchange Act, which generally require a person or 'group' who has acquired direct or indirect beneficial ownership of more than 5 per cent of an outstanding class of equity securities to file a report with certain information with the Securities and Exchange Commission (SEC) within 10 calendar days of crossing the 5 per cent threshold. Companies must navigate the disclosure requirements of the Exchange Act in reporting on corporate governance matters in their periodic disclosure and their annual meeting proxy statement disclosures.

2 What are the other primary sources of practices relating to shareholder activism and engagement?

Other primary sources of practices relating to shareholder activism and engagement include the policy guidelines of proxy advisory firms (such as Institutional Shareholder Services (ISS) and Glass Lewis), of large institutional investors (such as BlackRock, State Street, T Rowe Price and Vanguard) and of others in the investment community (such as the Council of Institutional Investors, Investor Stewardship Group, TIAA-CREF and CalPERS). These sources are viewed as very influential in practice (for example, a recent study found that a negative ISS recommendation on a say-on-pay proposal reduces voting support for that proposal by 25 percentage points) and, as a result, companies have a complex web of preferences for directors and management to wade through.

3 How is shareholder activism generally viewed in your jurisdiction? Are some industries more or less prone to shareholder activism? Why?

Shareholder activism and engagement is increasingly viewed as a fixture in the investment landscape. Even industry leaders that have outperformed their market peers have been recent targets of shareholder activism. In 2017, ADP, General Motors and Procter & Gamble were targets of activist campaigns, while Apple, DuPont, eBay, Microsoft, PepsiCo and Sony, to name just a few, have been subject to similar campaigns since 2014. Companies in highly regulated industries, such as banks and insurance companies, were once seen as less likely targets for a shareholder activist campaign. Although this may still be true, the targeting of AIG (by Carl Icahn) and the Bank of New York Mellon (by Nelson Peltz) makes it clear that companies in highly regulated industries can also be subject to shareholder activism. In 2017, it has been reported that the industrials, technology, power/energy and consumer industries continued to have the highest aggregate value of activist positions.

4 What are the typical characteristics of shareholder activists in your jurisdiction?

In discussing shareholder activism in the United States, it is helpful to separate shareholder activists into two separate categories:

- hedge fund or other 'fund' activists: this category consists of professional investors who make sizeable (but still minority) investments in a target company and then publicly or privately advocate for change; and
- 14a-8 activists: this category consists of shareholders who submit proposals under Exchange Act Rule 14a-8, which requires a company to include a shareholder proposal in its proxy materials if certain requirements are met (for example, the shareholder owns the lesser of US$2,000 or 1 per cent of the securities entitled to vote on the proposal for at least one calendar year prior to submission of the proposal). 14a-8 proponents vary widely and include retail shareholders, social justice groups, religious organisations, labour pension funds and other coalitions.

Traditional long shareholders, including large institutional investors, have been known to support both types of activists, although a 2015 letter from the CEO of BlackRock, the world's largest asset manager, to the CEOs of every S&P 500 company, stressed that companies should 'resist the pressure of short-term shareholders to extract value from the company if it would compromise value creation for long-term owners'. In another letter in 2016, the CEO of BlackRock further cautioned against yielding to the pressures of investors focused on maximising short-term profit. Also, a 2015 open letter from the chairman and president of Vanguard, which has US$3.6 trillion of global assets under management, stressing that 'boards [should not] capitulate to things that aren't in the company's long term interest,' indicated that while institutional investors may be willing to support shareholder activists in some instances, institutional investors will carefully evaluate whether a shareholder activist's proposal is damaging to long-term value creation. This being said, large institutional investors have shown a willingness to consider activist campaigns when appropriate and consistent with their investment goals, with each of BlackRock and Vanguard,

among others, issuing guidance on activist efforts and even launching activist campaigns.

5 What are the main operational, governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

Shareholder activists have focused on a wide variety of capital structure changes, such as increasing leverage (Ethan Allen), stock splits, dividends and repurchases (Apple, eBay, General Motors, Microsoft), and strategic changes such as a company sale or breakup (AIG, DuPont, Whole Foods) or other operational changes, including changes to management (Arconic, Buffalo Wild Wings, CSX) and boards of directors (ADP, Proctor & Gamble, Tiffany & Co). Often, shareholder activist campaigns will couple a call for capital structure changes and strategic changes with criticism of and suggested changes to corporate governance (eg, eliminating structural defences, board refreshment, management changes, criticism of executive compensation and other governance changes). Shareholder activists often stick to a similar playbook campaign-to-campaign with respect to governance changes. For example, some shareholder activists are known for criticising or suggesting an overhaul of management. In 2016, activists surveyed indicated that the top three metrics in screening for target companies are (i) underperformance compared to peers, (ii) underperformance compared to market and (iii) cash on hand and leverage.

During the 2017 proxy season, about half of the 14a-8 proposals focused on corporate governance topics (relatively steady as compared to 2016), approximately 45 per cent focused on environmental and social issues (a slight increase from the previous year) and 1 per cent focused on compensation matters (a significant decrease from the same category in 2016). It is important to note that a large percentage (approximately 25 per cent) of 14a-8 proposals never end up on ballots, either because they are withdrawn by the proponent (usually following negotiations with the target company, an increasing trend in recent years) or because they are excluded by the company on the basis of an SEC 'no action' position. In addition, the great majority of 14a-8 proposals that go to a shareholder vote do not receive majority support.

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

A shareholder may propose that business be brought before a meeting of shareholders by providing notice and complying with applicable provisions of state law and the company's by-laws and charter. The company's by-laws will generally set forth the time requirements for delivering the proposal (for example, that the proposal be received by the company's corporate secretary not more than 90 days and not less than 30 days before the meeting), other procedural requirements (such as a description of the ownership and voting interests of the proposing party) and limitations on the types of proposals that can be submitted (for example, that a proposal may not be submitted that is substantially the same as a proposal already to be voted on at the meeting). It is often costly to submit a proposal in this manner because the soliciting shareholder must develop its own proxy materials and conduct its own proxy solicitation.

Under Exchange Act Rule 14a-8, a shareholder may submit a proposal to be included in the company's proxy statement alongside management's proposals (avoiding the expense of developing independent proxy materials and conducting an independent proxy solicitation). Rule 14a-8 sets forth eligibility and procedural requirements, including:

- that the proposing shareholder have continuously held, for at least one year by the date the proposal is submitted to the company, the lesser of US$2,000 in market value or 1 per cent of the company's securities entitled to vote on the proposal and continue to hold those securities through the meeting date;
- that the proposal be no longer than 500 words; and
- that the proposal be received at least 120 calendar days prior to the anniversary of the date of release of the company's proxy statement for the previous year's annual meeting.

If the shareholder has complied with the procedural requirements of Rule 14a-8, then the company may only exclude the proposal if it falls within one of the 13 substantive bases for exclusion under Rule 14a-8 (eg, that the proposal would be improper under state law, relates to the redress of a personal claim or grievance, deals with a matter relating to the company's ordinary business operations, relates to director elections, has already been substantially implemented, is duplicative of another proposal that will be included in the company's proxy materials or relates to a specific amount of cash or stock dividends). A company will often seek 'no action relief' from the SEC staff to exclude a shareholder proposal from the company's proxy materials. If no action relief is not granted, a company could, but rarely does, seek a declaratory judgment from a court that the shareholder proposal may be excluded from the company's proxy statement.

Shareholder proposals are often precatory or non-binding, and do not require implementation even if the proposal receives majority support. Shareholder proposals may, however, be binding if the proposal is with respect to an action reserved for the shareholders (for example, a proposal to amend the by-laws may be binding depending on state law and the company's by-laws).

Rule 14a-8 eligibility requirements have been widely debated in recent years. It is important to note that the US House of Representatives-approved CHOICE Act would increase the ownership threshold to 1 per cent of the company's securities (eliminating the alternative US$2,000 threshold) and would extend the holding period requirement from one to three years. We remain sceptical that changes to the Rule 14a-8 eligibility requirements will be adopted in the short term.

7 What common strategies do activist shareholders use to pursue their objectives?

Activist shareholders may use a number of different tactics to pursue their objectives. For example, an activist shareholder may:

- privately engage the target's management or directors in order to reach a settlement before raising issues in a more public forum;
- apply pressure by reaching out to, and seeking support from, the company's other shareholders;
- apply pressure through the media or investor communications, for example, by issuing 'white papers' or open letters to management, the board or shareholders and asking tough questions on analyst calls;
- threaten or conduct a 'vote no' campaign (ie, an exempt solicitation);
- threaten or launch a proxy contest for director elections;
- demand a list of shareholders (either as a threat or precursor to formal action);
- make a shareholder proposal (either a precatory or binding resolution); or
- call a special meeting of shareholders.

The particular strategy pursued depends on the type of activist, the company's defensive measures and the activist's goals. Of course, within a single activist campaign multiple strategies may be employed.

8 May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

Whether a shareholder may call a special meeting depends on state corporate law. With respect to Delaware corporations, under DGCL section 211(d), a company's certificate of incorporation or by-laws may authorise shareholders to call a special meeting of shareholders. The certificate of incorporation or by-laws would then set forth the procedural requirements for calling a special meeting, including the minimum holding requirements for a shareholder to call a special meeting.

We note that ISS and Glass Lewis are both in favour of providing shareholders with the right to call a special meeting. ISS prefers a 10 per cent holding threshold; Glass Lewis prefers a 10–15 per cent holding threshold, depending on the size of the company. In practice, the threshold varies considerably from company to company, although 25 per cent is sometimes cited as the most common threshold.

Whether shareholders may act by written consent without a meeting depends on state corporate law. With respect to Delaware corporations, under DGCL section 228, shareholders may act by written consent in lieu of a shareholders' meeting, unless the company's charter provides otherwise.

9 May directors accept direct compensation from shareholders who nominate them?

Under federal securities law and Delaware corporate law, direct compensation from shareholders is generally permitted. This, however, is only part of the answer. Under Delaware corporate law, it would be important to analyse whether acceptance of the compensation is contrary to the directors' fiduciary duties to the corporation. Under federal securities laws, the compensation would also likely have to be disclosed. In addition, the corporation itself may have limitations in its by-laws or charter with respect to directors accepting direct compensation from shareholders who nominate them.

It is important to bifurcate compensation paid to a nominee prior to nomination and ongoing compensation paid to a director after the director is on the board. Although some in the corporate governance community have asserted that separate compensation can create dysfunctional boards with poisonous conflicts, it is important to recognise that reasonable compensation in exchange for agreeing to stand for re-election is often necessary to recruit high-quality independents to run in a proxy contest, and that this is distinguishable from ongoing compensation, which may create questions regarding alignment of economic incentives depending on the circumstances.

It is not unusual for shareholder activist director nominees to purchase target company stock prior to the public disclosure of the shareholder activist's holdings in the target company and campaign. (Often a director nominee's holdings must be disclosed in the activist's director nomination notice under the company's by-laws and under federal securities laws.) Although these purchases can be structured to not run afoul of insider trading laws, it will be interesting to watch whether over time they attract criticism from governance groups and institutional shareholders given the potential to create perverse incentives, or if they will become an accepted part of the activist landscape.

10 May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

Companies are not required by state or federal law to permit shareholders to nominate directors for election to the board and use the company's proxy infrastructure, at the company's expense, to do so (ie, proxy access is not legally mandated). In 2011, the DC Circuit struck down Exchange Act Rule 14a-11, which would have granted proxy access (limited to 25 per cent of the board) to 3 per cent shareholders who have held their shares for at least three years.

Proxy access was thrust back onto the agenda in large part through Exchange Act Rule 14a-8 proposals. In the 2017 proxy season, approximately 55 companies received proxy access proposals, a decrease from the previous year, when approximately 200 companies received such proposals that likely largely reflects the number of companies that had already adopted proxy access prior to the 2017 proxy season. While proxy access proposals brought to a shareholder vote received on average less than 50 per cent support, a substantial majority of companies that adopted proxy access by-laws in 2016 and 2017 did so voluntarily in advance of their annual meetings. At the time of writing, approximately 60 per cent of the S&P 500 have adopted a proxy access by-law with most allowing nominations for 20 per cent of the board seats by a shareholder or group of shareholders who have owned 3 per cent or more of the company's shares for three years or more. Given the relative infancy of proxy access by-laws, we have not yet observed a critical mass of shareholders utilising this new option to nominate directors, but it will be interesting to observe the existence and magnitude of such nominations in the 2018 proxy season and beyond.

Historically, shareholders wishing to nominate directors needed to submit their own competing proxy and stand-alone ballot, in each case a costly endeavour. In October 2016, the SEC proposed long-expected changes to the proxy rules to require, among other things, the use of universal proxy cards in the case of contested director elections at annual meetings. The universal proxy card would include the nominees of all parties to better simulate freedom in voting by allowing shareholders to vote for any combination of management and dissident nominees of their choice. Accordingly, each party in a contested election – management and one or more dissident shareholders – would distribute their own proxy materials but each proxy card would be required to include the nominees of all parties. At the time of writing, the fate of the SEC's universal proxy proposal is unclear. After soliciting public comment, the proposed rule is now under SEC review. We think it is unlikely that the universal proxy will remain high on the SEC's agenda given the new SEC Chairman Jay Clayton, the composition of the rest of the SEC and the prohibition on its implementation by the Financial CHOICE Act of 2017 (a proposed alternative to the Dodd-Frank Act).

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

Shareholders may bring derivative actions on behalf of a corporation, or class actions on behalf of a class of shareholders where there has been an alleged breach of the directors' or officers' fiduciary duty of care, fiduciary duty of loyalty or other wrongdoing. The purpose of a derivative suit is to remedy harm done to the corporation usually by directors and officers. In contrast, individual shareholder actions or class actions address harms to the shareholders in their capacity as shareholders. Whether a lawsuit should be brought as a derivative action or as a class action depends on the nature of the wrongdoing alleged, the type of relief sought, who suffered the harm (the corporation or the shareholder) and to whom the relief would go.

Derivative suits face a number of procedural hurdles, which depend in large part on the jurisdiction in which they are brought. Certain states require that, before a derivative lawsuit is filed, the shareholder make a 'demand' on the board of directors to bring the lawsuit on the corporation's behalf. The demand requirement implements the basic principle of corporate governance that the decisions of a corporation – including the decision to initiate litigation – should be made by the board of directors. If a shareholder makes such a demand, the board of directors may consider whether to form a special litigation committee of independent directors to evaluate the demand. If the board of directors refuses the demand, the shareholder may litigate whether the demand was 'wrongfully refused'. Certain jurisdictions recognise an exception to the demand requirement where demand would be 'futile'– namely, if a majority of the board of directors is conflicted or participated in the alleged wrongdoing. In such circumstances, it might be appropriate and permissible for the shareholder to skip the demand process and proceed directly to filing a complaint (in which he, she or it would need to demonstrate that a demand would have been futile).

While shareholder derivative suits are brought for the benefit of the corporation, shareholder direct and class actions address unique, direct harms to the particular shareholder plaintiffs. In such cases, a critical factor in determining the outcome of the litigation will be which standard of review is applicable to the board's conduct; in other words, the deferential 'business judgement rule' or a heightened standard of review that some jurisdictions have adopted (such as *Revlon, Unocal* or entire fairness). Many public companies have adopted 'exculpation' provisions in their governance documents, which provide that directors cannot be personally liable for damages arising out of breaches of the duty of care. However, a director generally cannot be indemnified or exculpated for breaches of the duty of loyalty, including the obligation to act in good faith.

Company response strategies

12 What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

Our advice is always situation-specific; that being said, a few good rules of thumb are:

- companies should 'think like an activist,' and the board and management should routinely have conversations about the company's strengths and vulnerabilities. Outlining potential arguments a shareholder activist may make for change can help facilitate tough conversations. Companies may wish to consider involving outside advisers in some of these conversations, as appropriate;
- companies should critically evaluate their shareholder engagement efforts. Being aware of concerns before they reach a boiling point should be the ultimate goal. The company should spend time developing a consistent and coherent message outlining the company's key strengths and addressing potential concerns and vulnerabilities. The process of developing these materials often airs out additional issues;

- companies should periodically review their by-laws, governance guidelines and structural defences, and focus not just on evolving 'best practices,' but on whether the company's governance structure meets its current needs;
- companies should monitor their shareholder base and be aware of the corporate governance and other preferences of its shareholders. Institutional shareholders increasingly have bespoke policies. It is important to be aware of these policies; and
- companies should be thoughtful about whether and when to enter into settlements with activist shareholders.

13 What structural defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

There are a number of structural defences available to companies, including: staggered boards, poison pills, not permitting shareholders to call a special meeting, not permitting shareholder action by written consent and not permitting replacement of directors without cause (and permitting only directors to fill director vacancies because of removals). In addition, stringent advance notice and other requirements for shareholder proposals and director nominations and the voting standard for director elections (plurality versus majority) can serve as a structural defence. Some states, such as Delaware, have an anti-takeover statute that restricts a shareholder that has acquired 15 per cent or more (but less than 85 per cent in the same transaction) of the company's outstanding shares, without approval of the board, from engaging in certain business combination transactions with the company for a period of three years.

The effectiveness of structural defences varies depending on the situation, and none of the defences make a company immune to shareholder activism. We would also note that because proxy advisory firms and others will scrutinise a company for having defensive mechanisms in place, many companies have lost the appetite to maintain structural defences. For example, 53.2 per cent and 56 per cent of S&P 500 companies had a poison pill or staggered board, respectively, in place in 2004, compared to just 5.8 per cent and 11 per cent in 2014. Entering the 2017 proxy season, the number of S&P 500 companies that had a poison pill or staggered board has fallen even further, down to 3.4 per cent and 10.2 per cent, respectively. This reflects widespread acceptance that there is little advantage to having a poison pill in place (and generating negative attention from proxy advisory firms) since a poison pill can usually be quickly and effectively adopted when a threat emerges. Exceptions to this trend are newly IPO'd companies. Such companies often have the most structural defences in place because it is easiest to adopt these mechanisms before going public. However, even here the proxy advisory firms have warned that they will recommend 'withhold' votes against directors if the defences are not dismantled early in the company's public life.

14 May shareholders have designees appointed to boards?

Shareholders may seek to nominate a director for election to the board in accordance with the company's charter and by-laws. As noted above, proxy access would allow the shareholder to nominate a director for election to the board and avoid the expense of developing independent proxy materials and conducting an independent proxy solicitation.

Often, when a shareholder activist and company have reached a settlement, they memorialise the agreement in a cooperation agreement. The form of cooperation agreements has become increasingly standard and typically includes a voting agreement by the shareholder activist to vote for the company's nominees, an agreement by the company to nominate the shareholder activist's nominees to the board (and to renominate them for election at the next annual meeting if certain conditions are met) and a mutual non-disparagement covenant. Companies typically seek to have the cooperation agreement include a standstill agreement by the shareholder activist as well, although recently many activists have successfully resisted inclusion of a standstill. The appointment of a new director to the board requires public disclosure under Form 8-K, and many companies conclude that entry into the cooperation agreement itself requires public disclosure under Form 8-K as well. In any event, the shareholder activist and company generally issue a joint press release.

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

Item 601 of Regulation S-K requires US public companies to file their charter and by-laws with the SEC. SEC filings can be accessed on the SEC's EDGAR database. In addition, many public companies include their charter and by-laws on their website. An amendment to a company's charter or by-laws triggers an 8-K filing requirement.

In addition, New York Stock Exchange listing rules require that a listed company include on its website the company's nominating and corporate governance committee charter, audit committee charter and compensation committee charter along with the company's corporate governance guidelines (ie, a purpose reasonably related to the shareholder's interest as a shareholder).

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

Under Exchange Act Rule 14a-7, if a company has made or intends to make a proxy solicitation in connection with a shareholder meeting, the company must, upon written request of a shareholder entitled to vote at the meeting, either give the requesting shareholder the shareholder list or mail the requesting shareholder's soliciting materials to the company's shareholders at the requesting shareholder's expense.

In addition, state corporate law and a company's charter and by-laws may provide for access to shareholder lists under additional circumstances. For example, Delaware corporate law allows shareholders to inspect the company's stock ledger and its other books and records so long as the shareholder submits a demand under oath and explains the 'proper purpose' of the request.

17 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

Generally speaking, companies are not required to publicly disclose their shareholder engagement efforts, although companies often choose to disclose such efforts in their annual meeting proxy in order to show responsiveness to shareholder concerns. In their annual meeting proxy, companies are required to disclose how security holders may communicate with the board of directors.

Regulation FD is intended to ensure that companies do not engage in selective or unequal disclosure. Regulation FD applies when a company or a person acting on the company's behalf (ie, all senior officers and any other officer, employee or agent of the company who regularly communicates with the financial community) discloses material non-public information to investors or security market professionals. If such disclosure is intentional (ie, the person communicating the information either knows, or is reckless in not knowing, that the information is both material and non-public), then to cure the violation the information must be simultaneously disclosed to the public. If such disclosure is inadvertent (ie, the person communicating the information did not know, and should not have known, that the information is both material and non-public), then to cure the violation the information must be promptly disclosed to the public. Disclosures under Regulation FD often consist of furnishing the information on Form 8-K with the SEC but may also include other widely disseminated sources, including press releases.

It is important to note that disclosures to persons who expressly agree to maintain the disclosed information in confidence are expressly exempted from Regulation FD. For this reason, before discussing material non-public information with a shareholder activist, a company will insist on signing a confidentiality agreement. We note for completeness that the shareholder activist may not want the company to disclose material non-public information to it, because the shareholder's ability to trade in the stock may then be limited (because of insider trading concerns).

18 Do companies receive daily or periodic reports of proxy votes during the voting period?

During a contested situation, it is not unusual for companies to receive frequent updates on proxy vote tallies. Even in uncontested situations, for relatively routine annual shareholder meetings, companies will often choose to receive updated reports on proxy voting (if for no other reason than to confirm that they will have a quorum).

Historically, Broadridge, which is the single largest agent collecting vote tallies, would provide the vote tallies both to the shareholder proponent and the company. However, in May 2013, after certain brokers objected to the release of this information to shareholder proponents, Broadridge changed its policy to provide vote tallies to the shareholder proponent only if the company affirmatively consents. Proxy rules are currently silent on preliminary vote tallies. We would also note that some companies have received Rule 14a-8 shareholder proposals regarding vote tallies. Depending on the language of the specific proposal, it may be possible to exclude the proposal on 'ordinary business' grounds.

19 Must shareholders disclose significant shareholdings?

Accumulations of large blocks of equity securities trigger reporting obligations under section 13 of the Exchange Act, which requires any person or group that acquires beneficial ownership of more than 5 per cent of a class of a public company's registered voting equity securities to file a beneficial ownership report with the SEC disclosing its ownership and certain other information. For this purpose, 'beneficial ownership' generally means direct or indirect voting or dispositive power over a security, including through any contract, arrangement, understanding, relationship or otherwise. A person is also deemed to be the beneficial owner of securities over which the person can acquire voting or dispositive power within 60 days (provided that where any such rights to acquire securities are acquired with a control purpose or effect, beneficial ownership is triggered, regardless of whether the rights are exercisable within the 60-day time frame). Thus, an option, warrant, right or conversion privilege that results in voting or dispositive power and that can be exercised within 60 days creates current beneficial ownership. Disclosure obligations may also be triggered by membership in a 'group' that beneficially owns more than 5 per cent of a class of equity securities of a public company, as discussed below. Acquisition or ownership of a class of non-voting securities does not trigger any filing obligations for these purposes.

Generally, an individual investor or group that beneficially owns more than 5 per cent of a class of equity securities of a public company must report its holdings on Schedule 13D within 10 days of its holding exceeds 5 per cent, unless it is eligible to report its holdings on a short-form Schedule 13G. Importantly, a Schedule 13D requires detailed disclosures regarding the filer's control persons, source of funds and the purpose of the acquisition of the securities, including any plans for further acquisitions or intention to influence or cause changes in the management or business of the issuer. Material changes in the previously reported facts require prompt amendment of a Schedule 13D.

Certain investors can satisfy their section 13 beneficial ownership reporting obligations by filing the simpler and less detailed Schedule 13G. These generally include specified institutional investors (eg, banks, broker-dealers, investment companies and registered investment advisers) acting in the ordinary course and without a control purpose or effect, and passive investors acting without a control purpose or effect. There are also other exceptions that may allow an investor to report beneficial ownership on a Schedule 13G instead of a Schedule 13D.

As 'beneficial ownership' is based on the power to vote or dispose of a security, whether ownership of a significant derivative position in the equity securities of a public company will trigger a Schedule 13D or Schedule 13G filing requirement depends on the type of the particular derivative. Cash-settled derivatives generally do not give rise to beneficial ownership because they do not create a contractual right to acquire voting or dispositive power, but other types of derivatives may constitute beneficial ownership of the underlying securities.

An investor may generally talk with other investors and management about its investment in a company (see question 21). However, if the investors coordinate activities or agree to act together with other investors in connection with acquiring, holding, voting or disposing of the company's securities, the investors may be deemed to have formed a 'group' for purposes of sections 13 and 16 of the Exchange Act. An investor group will have its holdings aggregated for purposes of determining whether the relevant reporting thresholds have been crossed. For example, if three investors, each with beneficial ownership of 4.9 per cent of a company's voting shares, form a group, they will have to file a Schedule 13D or Schedule 13G because their shares collectively exceed the 5 per cent threshold. In addition, because the group's ownership exceeds 10 per cent, each member will have to (i) report beneficial ownership of such member's 4.9 per cent under section 16(a) of the Exchange Act and, more importantly, (ii) be subject to section 16(b)'s short-swing profit disgorgement rules (even though each investor, by itself, owns less than 10 per cent of the public company) unless section 16 is not applicable to the issuer's securities (eg, an FPI) or the group's holdings can be reduced below 10 per cent under the Rule 16a-1(a) exemption that allows institutional investors to disregard shares held on behalf of clients or in fiduciary accounts when determining section 16 beneficial ownership.

The HSR Act may also impose a filing obligation with the Federal Trade Commission and the Department of Justice on certain investors that acquire more than US$80.8 million of a company's voting securities or assets (this dollar amount is adjusted annually) as well as a 30-day waiting period, during which the transaction cannot close. These filings are not public but either party may choose to make the fact of the filing public. In addition, if either party requests and is granted early termination of the waiting period, the fact of the grant of early termination will be made public. Finally, there are certain structures that can be used (involving put-call options or the use of multiple funds as acquisition vehicles) that may effectively allow an investor to accumulate the right to stock well in excess of the HSR Act threshold. Counsel should be consulted regarding the use of such methods as the risks are highly technical.

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

There is no 'mandatory bid' requirement under US federal tender offer rules or Delaware corporate law.

We would note for completeness that at least three states have statutory 'control share cash-out' provisions (of which, in some cases, companies may opt out), providing that if a bidder gains voting power of a certain percentage of shares (for example, 20 per cent in Pennsylvania, 25 per cent in Maine and 50 per cent in South Dakota), other shareholders can demand that the controlling shareholder purchase their shares at a 'fair price' (effectively providing the equivalent of dissenters' rights applicable to the acquiror rather than the issuer).

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders?

The federal proxy rules are the primary rules relating to communications to solicit support from shareholders. In addition, companies that choose to hold private discussions with certain shareholders must be mindful of Regulation FD (see question 17). Companies solicit formal votes from shareholders at both annual and special meetings, each of which are subject to federal proxy rules and certain notice requirements under the DGCL or a company's by-laws, or both. Shareholders may cast absentee ballots or designate a proxy to vote either at such proxy's discretion or with specific and binding guidance.

The SEC staff has provided guidance on applying the proxy and tender offer rules when statements are made through certain social media channels. The guidance permits the use of a hyperlink to information required by certain rules when a character-limited or text-limited social media channel, such as Twitter, is used for regulated communication.

22 Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

See question 12. Proactively engaging with shareholders has become increasingly common and crucial to earning the trust (and voting support) of shareholders. It is not unusual for companies to plan tours to meet with large shareholders and discuss their concerns, and to prepare presentations outlining not just the company's performance but also the company's governance structure. At the same time,

engagement has, in some instances, become so pervasive that it has actually overwhelmed proxy advisory firms and institutional shareholders. Shareholder engagement without a clear purpose can be counterproductive. Companies should also recognise that often proxy advisory firms and institutional shareholders prefer conference calls over in-person meetings, given the demands on their schedules.

23 Are directors commonly involved in shareholder engagement efforts?

There is no requirement for directors to be involved in shareholder engagement efforts. Senior management is usually at the forefront of these efforts, but there has been a continued push by some investors and some corporate governance groups for independent directors to have greater and more direct involvement in shareholder engagement. It is important for a company to carefully analyse with its advisers whether director involvement in shareholder engagement efforts is appropriate and will be effective given the company's circumstances. Care should also be given to make sure the director is appropriately prepared for meetings with investors.

Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

Directors have the same duty of care when considering an activist proposal as they do with any other board decision. That is, directors must make decisions regarding the corporation with due care, which entails acting in a fully informed and deliberate manner and with the care of a prudent person in a similar situation. It is important to note that director actions are generally entitled to the business judgement rule presumption. This is the presumption that directors act in a non-negligent manner, in good faith and in the best interest of the corporation. When the business judgement rule applies, courts will not second-guess the judgement of the board if the board arrives at such judgement through reasonable procedures and without conflicts of interest. Under certain circumstances (for example, in the context of a sale of the company, when the board of directors has a conflict of interest and with respect to defensive measures), enhanced scrutiny of the board action may apply.

A majority or significant shareholder may owe fiduciary duties to other shareholders. Such fiduciary duties are generally relevant in the context of a self-dealing transaction (where the controlling shareholder is effectively on both sides of the transaction). This set of facts is not normally present in a shareholder activist campaign.

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