

THE ACTIVIST'S TOOLKIT

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Introduction

- **Mark Harnett** Co-founder of MacKenzie Partners, Inc. with responsibility for developing and implementing strategies and campaigns for clients involved in proxy contests, tender offers, mergers, financial restructurings and other complex corporate transactions. Over 20 years of experience in the industry and was co-founder of the Proxy/M&A Group at Dewe Rogerson, Inc., the predecessor firm to MacKenzie Partners. Six years prior experience with D.F. King & Co. in tender offers, proxy solicitations and proxy contests.
- **Eric Rosenfeld** President and Chief Executive Officer of Crescendo Partners, L.P., a New York based investment firm, since its formation in November 1998. Prior to forming Crescendo Partners, he held the position of Managing Director at CIBC Oppenheimer and its predecessor company Oppenheimer & Co., Inc for 14 years. Mr. Rosenfeld serves on the board of directors of several public companies. Mr. Rosenfeld is a regular guest lecturer at Columbia Business School and he is a faculty member at the Directors College. He has served on numerous panels at Queen's University Business Law School Symposia, McGill Law School, the World Presidents' Organization, the Canadian Corporate Counsel Association Conference and the Canadian Foundation for Investor Education. He has also been a regular guest host on CNBC.

The Activist's Toolkits

1. The Set of Financial, Strategic, Corporate Governance and/or Operational Catalysts For Unlocking Value for Shareholders

- Utilizing effective strategies to create shareholder value
- Never lose sight of the goal – unlocking value
- Election contest not just about winning board seats, but enhancing shareholder value at undervalued companies

2. The Tools and Strategies Employed in an Activist Campaign to put Activist in a Position to Effect Change and/or Help Unlock Value

- A “team” approach
- Formulated through upfront strategy discussions with client, legal and proxy solicitor
- What is the right “Path to Change”
- Investment strategies to create value formulated by fund manager/individual activist investor

The Activist's Tools for Seeking Board Representation

- Each activist campaign has its own unique toolkit
 - Meet with the client to understand the business issues that have caused client to identify target
- Based upon a full-blown work-up and strategic profile to assess the path to change
- State law considerations, i.e. what are state's default laws regarding calling of special meetings, staggered boards, removal of directors, size of the Board, action by written consent, filling of vacancies, applicable voting thresholds, demanding Shareholders' list, etc.
- Provisions in Company's Charter and Bylaws and interplay with State law, i.e. can Shareholder call special meetings, act by consent, remove directors without cause, fill vacancies, increase size of Board of Directors, etc.

The Activist's Tools for Seeking Board Representation: Additional Considerations

- Does the target have a Shareholder Rights Plan/Poison Pill? (Legal)
- Analysis of shareholder base (Proxy Solicitor)
- Nomination deadlines and advance notice procedures (Legal)
- Assess past RiskMetrics and Glass Lewis reports to determine vulnerabilities or pressure points (Legal/Proxy Solicitor)
- Review voting results at past three annual meetings to assess director vulnerability or weaknesses (Legal/Proxy Solicitor)
- “Know thy enemy” – who is target’s legal advisor, proxy solicitor and PR/IR firm? (Legal/Proxy Solicitor)
- What is target’s history, if any, in dealing with activist(s)? (Legal/Proxy Solicitor)

The Activist's Tools for Seeking Board Representation

- Select “tools” and create strategic roadmap based on client’s objectives and governance profile.
- Several considerations which vary by situation and client, such as:
 - How many directors to nominate?
 - How many internal nominees?
 - Engage Management/Board privately?
 - Draft and send public letters to Board?
 - Submit shareholder business proposals?
 - Form a group with other shareholders? (pill, anti-takeover provisions)
 - Conduct extensive background checks on existing directors?

Considerations for Selecting Director Nominees and How Many to Run In a Slate

- Activists frequently nominate one or two fund principals to serve on the board of a targeted company along with one or more independent candidates
- Without qualified independent nominees, activists run the risk of institutional investors splitting their vote resulting in neither principal getting elected
- General perception among institutional investors and RiskMetrics is an activist with significant share ownership is entitled to one board seat and will support additional, activist nominated candidates provided they are independent, qualified and have relevant experience
 - The selection process for candidates should include the evaluation of current board weaknesses and strengths to develop board candidate search criteria
 - Engagement of a respected search firm can identify and vet independent candidates suitable for nomination
 - Depends in part on percentage ownership of Company

Recent Campaign Experience

- The Risks and Benefits of a Frontal Assault vs. Behind the Scenes Conversation with Company First
- Decision to Run a Majority vs. Minority Slate
- Use of 13D filings as a Campaign Tool
- Books & Records Request
- Settlement Agreements
 - Willingness of Company to Negotiate
 - Can You Achieve Enough in a Settlement?
 - How Long Are You Willing to Stand Still?
 - Payment of Expenses – more likely to get reimbursement of expenses pursuant to a settlement agreement than if successfully win minority board representation, though it does occur

Hypothetical Activist Situation

- Target Profile

- 3 different lines of business -- a market leader in primary business, but has underperformed its competitors and lost market share for the last three years and two other smaller businesses unrelated to primary business with different geographic locations, but outperforming peers
- Incorporated in Delaware
- Annually elected directors
- Stockholders not permitted to call special meetings
- Standard advance notice bylaw provisions
- No shareholder rights plan in place; class of blank check preferred stock exists
- 9-member board (2 insiders, 4 on board for 10yrs+, and 3 recent additions – one in past year who is industry specialist, one two years ago who is financial expert and chair of Audit Committee and one two years ago who has indirect connection to CEO)
- Target's stock has underperformed its relevant index and peers by 20% for the last two years
- Compensation of CEO is slightly below average CEO compensation of peers but overall S,G&A out of line with competitors
- Shareholder base is 15% retail, 45% institutional ownership (15% quants and 25% overall RiskMetrics-directed) and balance hedge funds

With New Rules Come New Tools: NYSE Rule 452 Amendment

- The SEC has approved the elimination of broker discretionary voting of uninstructed shares in uncontested director elections effective January 1, 2010.
- Discretionary voting will remain in place for routine proposals such as the appointment of auditors.
- A study of MacKenzie Partners' clients indicate the elimination of the routine vote in director elections will result in an average loss of 20% shares voting FOR the election of directors
 - The greatest losses were seen in companies with either or both, high percentage of retail holders and low stock prices

With New Rules Come New Tools: 452 Amendment Issues

- Power of Institutional Investors
 - Retail voters who do not provide voting instruction to their brokers will no longer have uninstructed shares voted. Therefore, institutional investors (who do vote) will have more influence over the election of directors, while the retail owners will be effectively disenfranchised to the extent that they believed their brokers would be voting their shares.
- Influence by Proxy Advisory Firms
 - Proxy advisory firms have increasingly been issuing “withhold” or “against” vote recommendations in director elections. Since many institutional shareholders are influenced by the recommendations of proxy advisory firms such as RiskMetrics or Glass Lewis, the outcome of many director elections may relate directly to such recommendations.
- Influence by Activist Shareholders
 - Activist shareholders will have an enhanced ability (due to lower voting turnouts) to challenge an incumbent board member by instituting “vote no” campaigns. In addition, should proxy access be required in the future, and a shareholder proposes a competing director, the result would be a contested election in which majority voting would not apply (a director vote would revert to a plurality standard in contested elections.)
- Increased Costs
 - Many shareholders do not have a good understanding of the proxy voting process and the ability or inability of brokers to vote uninstructed shares held in street-name. Companies may need to spend additional time and resources to reach and educate retail shareholders.
- Quorum Achievement
 - Brokers have generally helped companies to achieve a quorum for shareholder meetings because broker votes are counted for quorum purposes even with respect to non-routine matters on which they are not entitled to vote as long as there is at least one routine item to be voted on at the meeting.
- Majority Voting Concerns
 - Since in the past, brokers have generally voted with management, the elimination of discretionary voting in the election of directors by brokers will mean the loss of a significant block of votes for nominees proposed by management and may generally make it more difficult for directors to achieve the majority support needed for election.

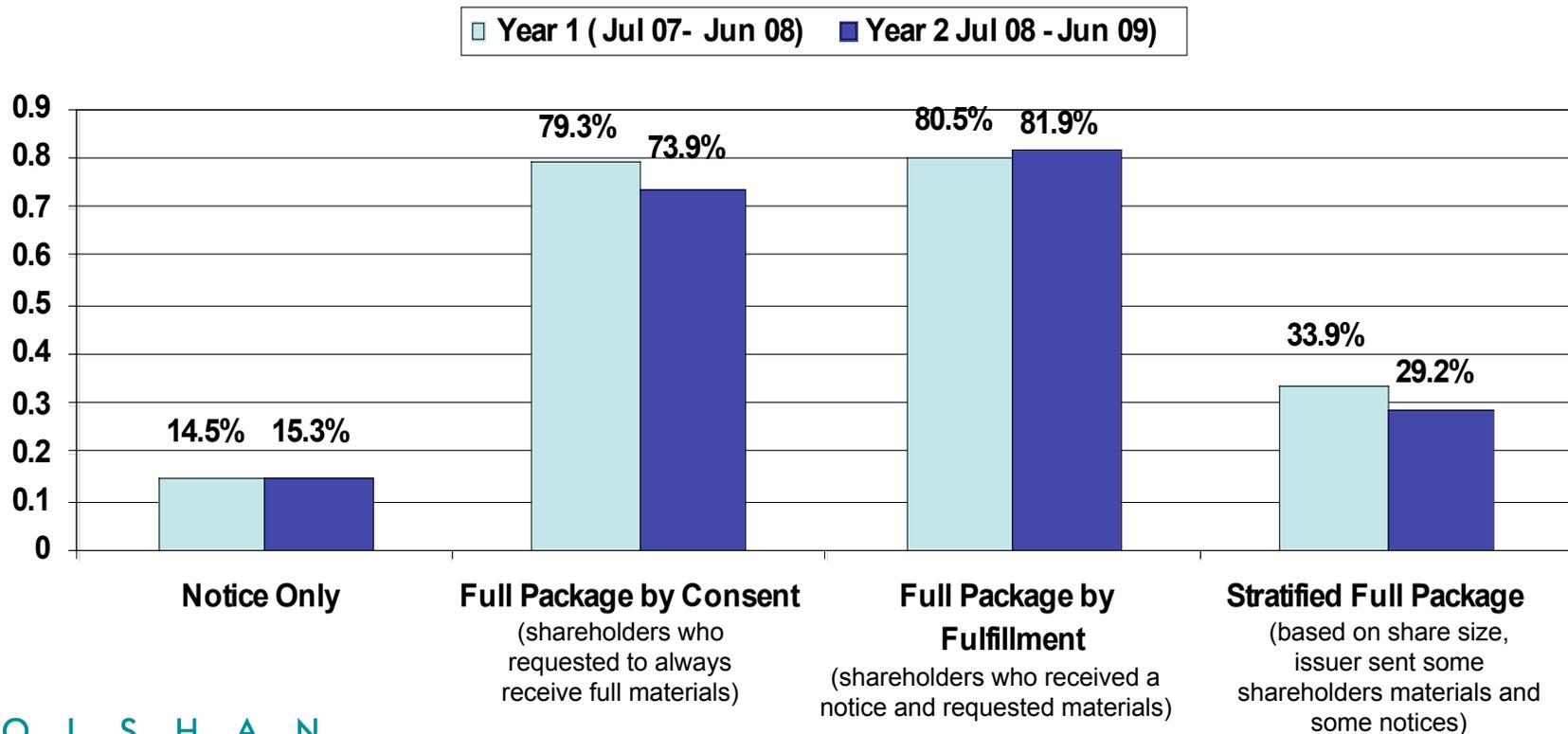
With New Rules Come New Tools: Proposed SEC Rule Amendments to Facilitate Shareholder Proxy Access

- To use proposed Rule 14a-11, a nominating shareholder or shareholder group must:
 - Meet certain ownership threshold requirements depending on the company's size:
 - 1% of the voting securities for large accelerated filers (companies with a market capitalization of \$700 million or more);
 - 3% of the voting securities for accelerated filers (companies with a market capitalization of \$75 million or more, but less than \$700 million); and
 - 5% of the voting securities for nonaccelerated filers (companies with a market capitalization of less than \$75 million).
 - Have beneficially owned the requisite percentage of shares continuously for at least one year
 - Not acquire or hold the securities for the purpose or with the effect of changing control of the company or to gain more than a limited number of board representatives.
- Other key provisions of proposed Rule 14a-11 worth noting:
 - *Limitation on number of nominees* – No more than one shareholder nominee, or that number of nominees that represents up to 25 percent of the company's board of directors, whichever is greater, would be includable in the company's proxy materials.
 - *Independence* – The shareholder nominees would need to satisfy the independence standards of the national securities exchange on which the company is traded.

With New Rules Come New Tools: E-Proxy aka Notice and Access

- Companies that have adopted the notice-only option have experienced a significant drop in participation by retail investors. On average, there is a 10% drop in voting.
- The convergence of the 452 amendment and E-Proxy may result in more of a decline. Companies should carefully consider the ramifications of adoption e-proxy.
- Broadridge's data below shows the percentage of retail shares voted by proxy delivery method. Vote turn out for shareholders receiving the Delivery by Notice Only is well below the traditional methods of delivery.

% of Shares Voted by Distribution Method



A Look at the Activist's Toolkit in Canada: Important Differences From U.S.

- Absolute ability to requisition a meeting of shareholders
- Early Warning Report vs. Schedule 13D
 - Filing threshold
 - Filing detail
 - When amendments required
 - Press release required
- Poison Pills
- Oppression Remedy
- Concentration of Shareholders and Inspecting Shareholder Lists
- Liquidity

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