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August 2014

**HALF-YEAR
REVIEW**

**WOLOSKY &
FREEDMAN**

**H1 IN
NUMBERS**

ACTIVISM MONTHLY *Lite*



Activist Insight

In association with

OLSHAN



Editor's letter

Josh Black, Activist Insight

The beginning of this year seems a long time ago now. In the past six months, there have been some enormous stories that have shaken Wall Street; though Darden Restaurants and Allergan still make the news on a regular basis, we have also witnessed Carl Icahn taking on eBay, Trian Fund Management resuming hostilities with PepsiCo CEO Indra Nooyi and Third Point winning three seats on the board of Sotheby's. All of these campaigns would have been shocking, if not unthinkable, two years ago, and yet today they are part of the everyday life of the equities markets.

Our feature story this month is a statistical review. The Activist Insight Online database is perhaps the most comprehensive activist-tracking tool in the world for the period since the financial crisis subsided, allowing a major surge in activism, and is revealing of the trends that define activism as we know it. So far this year, we have recorded 161 new campaigns initiated since January—trumping the 150 recorded in the first half of 2013.

Several points from the data are worth highlighting. First, activism is continuing to take off. Not everywhere, perhaps, but certainly in the US, where several funds have been forced to restrict their inflows after raking in billions at a time during 2013. Second, activism is changing

with macro-economic trends. The growing confidence in M&A activity among executives has a tailwind from activist investors, who are pressing for more deals, rather than attempting to frustrate or amend bids. Our “campaign in focus” is an exemplar of this, with JANA Partners’ stake in PetSmart calling into question whether the company would benefit from industry consolidation.

“ Activism is continuing to take-off. Not everywhere, perhaps, but certainly in the US”

Third, different industries are opening up to activism. The technology sector is becoming overweight and therefore increasingly beyond the reach of activists, with the number of activist campaigns in these stocks down 36% this year. Services have flourished, however, with high real estate valuations and consolidation leading to a rash of campaigns.

Finally, the market is adjusting to new entrants, with the number of activists seeking board representation rising. One of these new players is the very successful Engaged Capital, run by former Relational Investors man Glenn Welling. In our activist interview this month, he tells us

that it is sometimes more effective to coordinate with fellow activists to force changes at a company.

Elsewhere in the magazine we have an interview with Mike McCauley from the Florida State Board of Administration. This is the first in what we hope will become a regular feature—an opportunity to hear what institutions are thinking about activism and why they are currently investing so heavily in activist funds. For me, Florida's role in the campaign at Darden is a revelation, and points to one of the reasons activists often seem to have a disproportionate influence.

We are delighted to have Olshan Frome Wolosky sponsor this review. Their activist practice, which represents big names like Relational, GAMCO and Starboard Value, as well as up-and-coming investors such as Lone Star Value and Engaged Capital, is one of the most experienced in the US, having fought over 300 proxy contests since 2005. Their thoughts on the trends in activism this year make for interesting reading.

We are also pleased to be participating in the second of ArrowCon Partners' activism conferences, this time in Toronto. If any of our readers are interested in attending, please feel free to get in touch for more details.

jblack@activistinsight.com



Activist Insight

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PUBLISHED BY:

Activist Insight Limited
26 York Street, London, W1U 6PZ
+44 (0) 207 129 1314

www.activistinsight.com
info@activistinsight.com
Twitter: @ActivistInsight

For additional copies, please contact Adam Riches at ariches@activistinsight.com.

Activism Monthly Premium

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Activist Insight

Activism Monthly Premium magazine is the authoritative source of thought leadership and editorial in the activist investing space.

“Great articles on shareholder activism”

Carl Icahn



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“I’ve been impressed by the thoroughness and accuracy of Activist Insight’s research. I believe Activism Monthly Premium is ‘must read’ information both for activists and the advisory firms increasingly providing services around shareholder activism.”

Greg Taxin, Clinton Group

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A golden era

OLSHAN

Steve Wolosky and Andy Freedman,
Olshan Frome Wolosky, LLP

If 2013 was the year activism became a major force in developed markets, the past six months have been our busiest and most successful proxy season on record. To date in 2014, we have delivered 34 nomination letters, negotiated 26 settlements, and helped clients achieve board representation at 30 public companies. As advisers, we share this expertise more with our clients than the public, but are pleased to be partnering with Activist Insight to shine a light on this dynamic and exciting space. Given the amount of capital entering the activism space, and with no sign of this subsiding any time soon, we feel justified in saying we are in the middle of a “golden era” of shareholder activism.

We have also seen that it is no longer taboo for traditionally passive investment managers to engage openly with underperforming portfolio companies, and as a result there is a much larger universe of investors who may be willing, in the appropriate circumstances, to undertake an activist campaign than five years ago. At the end of the day, shareholder activism is about working with a company to improve shareholder value. Activist campaigns often result in more engaged, accountable, highly qualified and better-performing boards, which, in turn, create the right mix for significant enhancement of shareholder value. We are seeing

more capital invested in activist funds because value is being realized.

More capital means more participants, yet while the activist market has become increasingly crowded with a slew of new market entrants, we have yet to see levels of activism impacted negatively. Instead, we are seeing more shareholder groups formed to avoid confusion and conflicting

“ We are seeing more capital invested in activist funds because value is being realized”

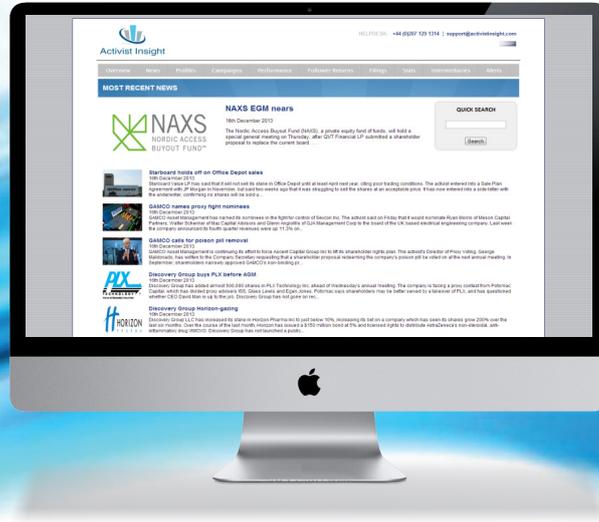
agendas, as well as keen interest in activist campaigns overseas, where the scene is less crowded. Indeed, with interest rates currently low, we see a period of increased M&A activity on the near-term horizon, which creates an economic environment in which activists historically thrive.

As the economic environment changes, so, too, does activism develop new tastes. When various sectors encounter prolonged underperformance, they become breeding grounds for activists with ideas for closing the value gap. In 2014, activists have set their sights on a large number of restaurant and retail companies, because aside from generally underperforming

and being undervalued, many of these companies have other assets, such as real estate, on their balance sheets that provide an angle for unlocking hidden value. Starboard’s campaign at Darden Restaurants, where we advise the activist, is a key example of this.

Shareholder democracy is alive and well in 2014. Some prominent activists have discovered creative ways to work around restrictive bylaws and use the proxy process, whether by special meeting or consent solicitation, to seek a shareholder mandate. As ISS recently stated, shareholder meetings provide “a definitive, authentic, and unassailable answer to the question of what shareholders want,” while “institutional shareholders in particular, accept that the shareholder vote is the premier mechanism for the owners of the company to settle significant questions about the company’s future.” This was relevant in Starboard’s solicitation of a special meeting at Darden and also in Pershing Square’s call for a special meeting at Allergan.

Activist campaigns are tactical affairs, and elsewhere in this issue we highlight some of the ways companies have been seeking to impede their progress. Needless to say, the landscape will continue to develop, and battles will continue to be fought, well into 2015 and beyond.



Activist Insight Online

The definitive resource on activist investing

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Activist Insight

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Half-year review

The latest data from Activist Insight suggests 2014 could be the busiest year on record for shareholder activists, with the number of new campaigns in the first six months of the year eclipsing that in the same period in 2013. However, there are also signs that activism is transforming, with market conditions playing a role in defining both the tactics and targets of activist investors. In this review of the latest data available, we seek to explain why activists seem to be targeting smaller stocks, as well as why M&A and board seats are increasingly popular demands. We also identify a rise in the number of settlements as a consequence of activist campaigns, suggesting issuers are finding common ground, or else seeking to avoid sending issues to a vote.



“ACTIVISM IS BEING BOOSTED BY THE TURNOVER IN SHARE OWNERSHIP TO ARBS AND OTHER HEDGE FUNDS AFTER AN ACTIVIST DISCLOSES A STAKE”

US activism surges

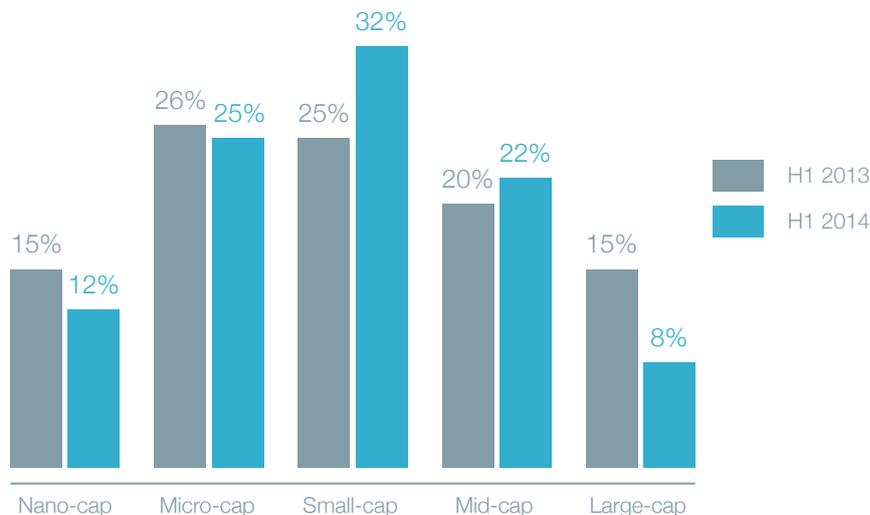
Talk of activism peaking in 2013 appears to have been exaggerated. The latest figures from Activist Insight’s database of campaigns reveals that more companies were targeted in the first half of 2014—traditionally the busiest period as it covers much of proxy season—than in the same period a year ago. For those who wondered whether there was anywhere left to go after the level of activism more than doubled between 2010 and 2013, there is no sign of a ceiling yet. A total of 161 companies were targeted by activists in the first six months of this year, a 7.3% increase on the 150 from January to June 2013.

Geographical focus

Despite much talk of the expansion of activist investing into markets beyond the jurisdiction of the United States, it is actually in the traditional home of activism that the growth has been largest, with 11.4% more companies targeted this half-year. That was no surprise for CamberView Partners’ Abe Friedman, who told Activist Insight in an interview last month “activism continues to rise at a fast clip and I don’t see any likelihood of that changing any time soon.”

The reason, Friedman continued, is three-fold. “Money continues to flow into activist funds, institutional investors have become more comfortable with certain kinds of activist strategies when they feel they are consistent with long-term value creation, and activism is being boosted by turnover in share ownership to arbs and other hedge funds after an activist discloses a stake.”

Most other jurisdictions saw relatively



Sizes of activist-targeted issuers as a proportion of total activist-targeted issuers

“There has been a decisive shift in the type of M&A activism employed”

consistent levels of activism—Canada and Japan had an identical number of public campaigns as in the first half of 2013 at six and three respectively. But in Europe, while there has been plenty to discuss with campaigns by US activists at FirstGroup, Morrisons and Bwin.party appearing to mark a watershed moment, overall volumes of activism are down 2.6% after flat-lining between 2012 and 2013. That doesn’t necessarily mean there is less activism in Europe than in previous years, Blackstone’s John Studzinski says, because much of it is done behind closed doors.

Market-Cap analysis

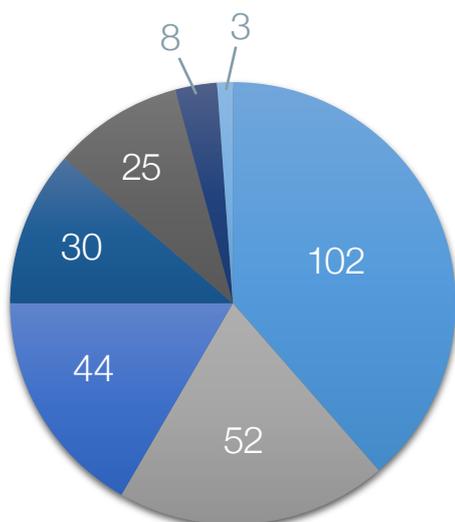
Although there were some major new campaigns in the large-cap space (\$10 billion and above), the first half of 2014 has seen something of a retreat from these targets. Indeed,

activism in large-caps is down 36%, or from 22 companies targeted in the first half of 2013, to 14 in 2014. Carl Icahn’s campaigns at Apple and eBay might give some clues as to why, with the investor not fully satisfied in his demands at either company. This and runaway equity markets may have made activists somewhat hesitant, but large companies themselves will find little comfort in the numbers. Triun Fund Management has renewed its efforts at PepsiCo and has a new investment in BNY Mellon, while Pershing Square’s \$4 billion stake in Allergan is one of the biggest activist positions in years. Meanwhile, activism has increased most in the small-cap space (\$250 million to \$2 billion), rising by 43%.

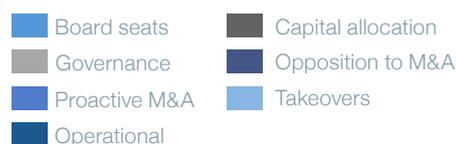
Types of activism

Earlier this year, Activist Insight predicted an increase in M&A campaigns by activists. In fact, the first six months of the year has seen a slight decrease in the number of activists pressing for M&A-related objectives and in the number of actions recorded. However, there has been a decisive shift in the type of M&A activism employed, with reactive activism—

“ACTIVISTS APPEAR TO BE DESERTING THE TECH SECTOR, WITH THE NUMBER OF SUCH COMPANIES TARGETED DOWN 36% IN THE FIRST HALF OF 2014”



Activism by type; number of public instances in H1 2014



opposition to announced deals—down 47%, and proactive activism—pushing for companies to sell, merge or acquire—up 26%. Meanwhile, the number of takeover offers made by activists in the first half of 2014 was a third of the number for the same period in 2014—leaving Elliott’s ongoing offer at Riverbed Technology looking rather unusual.

Talk of an end to the era of balance sheet activism may be more accurate, if a little premature. Activist Insight recorded 24 instances of activists calling for more disciplined or shareholder-friendly capital allocation (including dividends and buybacks) in the first half of 2014, a 40% decline on the volume in the same period last year.

That does not mean returning capital to shareholders has become unpopular with activists, however. One reason may be companies trying to pre-empt activists. In June, S&P Dow Jones

Indices reported that buybacks and dividends on the S&P 500 reached highs not seen since before the financial crisis, with \$534.9 billion returned to investors in the twelve months to end March 2014, a 29% increase on the previous year. Yet another, according to Blackstone’s Studzinski, could be that activism has become “more sophisticated” than simply calling for buybacks or dividends. “Activists are now more interested in how balance sheets are used broadly,” he says. “They are increasingly asking, ‘What’s your five-year plan?’”

Another interesting development is the increasing number of activists seeking board seats. In the first half of 2013, 53 activists sought a place (or multiple places) on company boards, but this year that number has risen to 67 – perhaps suggestive of new entrants to the ranks of activists keen to market themselves as change makers.

Sector specific

Greenlight Capital’s David Einhorn shocked the market in his first quarter investor letter when he wrote of “a clear consensus that we are witnessing our second tech bubble in 15 years.” In fact, activists appear to be deserting the technology sector, with the number of such companies targeted down 36% in the first half of this year.

Needless to say, there have been high profile examples such as eBay (a stock that ValueAct was invested in until Carl Icahn showed up), Rosetta Stone and Nexans, yet many of the actions activists were recorded as taking this year were part of legacy campaigns; Starboard Value finally saw TriQuint Semiconductor sold and Elliott Management gained board representation at Compuware as part

of a settlement agreement. Instead, the action is moving to sectors such as industrial goods, which increased by two-thirds, healthcare, and services, the latter pair both increasing by roughly 50%.

Services is a particularly interesting area, with retail and restaurant chains such as Darden Restaurants accounting for a considerable amount of the increase. Indeed, six different restaurants were targeted in the first half of this year, against three in the same period last year, and fifteen retail outlets against six last year, confirming a trend first spotted in Activist Insight’s annual report and affirmed in the April edition of Activism Monthly. Earlier in the year all attention was on Men’s Wearhouse and Jos. A. Bank’s merger of equals, but currently the focus is on Family Dollar (Icahn), and PetSmart (JANA), where analysts cite competitive pressures as an argument for consolidation.

Success rates

At this stage of the year, it is hard to compare the success activist investors have had with previous campaigns. A total of 86 activist demands remain outstanding – enough to change the finely balanced levels of success and failure. However, the number of activists who were either partially successful by Activist Insight’s criteria, or who reached a compromise or settlement with a firm, has already outstripped the absolute numbers for the first half of 2013. To date, 51% of resolved activist campaigns initiated between January and June have been concluded in the activists’ favor. Last year, nearly 52% of campaigns initiated in the first six months were successful, while a further 12% ended in a settlement or partial success for the activist.

The Growth of Activist Investing in Canada 2014

October 16 - The Ritz Carlton - Toronto

Positioning and Preparing Companies for Response

Canada is thought of as one of the most activist friendly jurisdictions in the world, and for many years activist investors have been successful in unlocking value in undervalued and underperforming Canadian companies. Pershing Square's success with CP Rail sent a clear message that no public company, regardless of size, structure or status can ignore activist investors.

As the Activist Investing trend continues to grow around the globe, and the Canadian regulatory landscape continues to favor shareholder activists, it becomes more important than ever for company management to understand what may attract an activist to target their company, and what to expect if they become the object of a campaign. **Activist Investing in Canada taking place October 16 in Toronto** will educate Canadian company management on how to position themselves as this trend continues to grow.

SPEAKERS INCLUDE



Glenn Welling
Founder & CIO
Engaged Capital



Stephen Griggs
CEO
Smoothwater Capital



James Vanasek
Principal
VN Capital Mngmt



Lyle Ayes
Managing Director
Evercore Partners



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Playing chess

An interview with Steve Wolosky and Andy Freedman from Olshan Frome Wolosky's Equity Investment and Activist Practice

With levels of activism at record highs, are we close to a peak in activist activity?

Wolosky: In the past few months, we have seen many "reluctant activists" muster the wherewithal to nominate a slate of directors or engage publicly with a board or management team, while there are also more pure-play activist funds now as investment veterans like Glenn Welling and Keith Meister have left their old firms to start their own funds. Assuming the experienced activists continue to mount their typical number of campaigns over the next year or two, we think there is still room for growth as more and more reluctant activists join the fray with one-off campaigns.

Freedman: Not to mention, the surge in shareholder activism over the past few years has occurred at a time when the market has been trading at or near all-time highs. The stage has certainly been set for continued growth in shareholder activism, and should there be a general market correction in the near-term, this will only serve to potentially open the door even wider for more activist campaigns.

How busy has your practice been and who has been the most active of your clients?

AF: 2014 has been, by far, our busiest

and most successful proxy season. While Starboard has certainly been busy in 2014, owing in large part to its special meeting campaign at Darden to stop the Red Lobster sale and now the annual meeting contest to replace a majority of the Darden Board, a good number of our

 We have seen many 'reluctant activists' muster the wherewithal to engage publicly with a board or management team"

activist campaigns are being waged by some of the newer names in shareholder activism. For example, Jeff Eberwein's Lone Star Value fund, a "constructive activist," has enjoyed several proxy campaign successes since its inception in October 2013.

SW: Six of our activist campaigns this year were undertaken by passive investors who converted their 13Gs to a 13D and nominated a slate of directors as a last resort means to close the existing value gap. Other new activists who kept us busy are worth keeping an eye on in 2015, including Patrick Walsh's PW Partners, Schuster Tanger's Red Alder, Jerome Lande's Coppersmith Capital, and Legion Partners, which recently teamed up with CalSTRS at

Perry Ellis International.

Why do you think more issuers are adopting short slates, effectively gifting several board seats to activists?

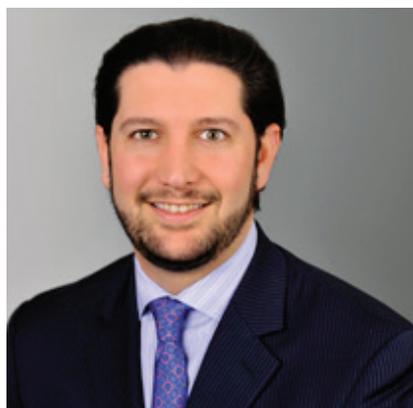
AF: Activist campaigns are like chess matches. Both sides think carefully about each step and try to see three moves ahead. The "reduced slate" tactic has become an increasingly common maneuver by management to give itself a better chance of preserving the status quo board majority, but is especially relevant at companies where there is cumulative voting, like Cliffs Natural Resources. Being able to cumulate 11 votes for 7 seats gives management a better shot of maintaining a majority.

SW: In majority slate contests, shareholders can only vote for management's nominees on management's proxy card and for the dissident's nominees on the dissident's proxy card, absent agreement on a universal ballot. ISS will sometimes recommend for, say, four of the nine nominees on the dissident's card, and management may fear losing an unintended majority to the dissidents and respond by either dropping one or more of its nominees or expanding the board and leaving vacancies open to assure some minority level of dissident board representation. It

“WE DON’T THINK THE PROXY ADVISORY FIRMS WILL TAKE TOO KINDLY TO BOARDS THAT DEFY A CLEAR SHAREHOLDER MANDATE”



Steve Wolosky, Partner



Andy Freedman, Partner

then lobbies institutions hard to vote on management’s card, saying it is welcoming change. We have now seen this “reduced slate” approach three times in the past year alone where Starboard is running a contest for control. Unfortunately, we have repeatedly seen that the level of change guaranteed falls well short of the change that is required at the company. We’re still waiting for the situation where management leaves a majority of seats open for the dissident nominees, but we’re not holding our breath.

[Have you seen activists adopting more aggressive tactics as a sign of confidence that institutional investors will back them?](#)

SW: We’re certainly seeing some interesting alternative campaigns this proxy season. The seasoned activists are discovering ways to seek a referendum of shareholders on the company’s future. If successful, this can provide a strong shareholder mandate and demonstrate the views of shareholders to management unequivocally. Undoubtedly, the willingness of institutional investors to

support activist agendas has helped encourage activists and given them the confidence to undertake such innovative campaigns. Companies should think twice before ignoring a clear shareholder directive, even a non-binding one. We don’t think the proxy advisory firms will take too kindly to boards that defy a clear shareholder mandate.

AF: Settlements continue to be the way most proxy contests get resolved. Close to 75% of our activist campaigns over the past two years have resulted in a negotiated settlement for board representation. This year, more than a third of our settlements have been pre-nomination as more and more companies look to resolve potential conflicts before they become public. We will see over the next year or two whether these private, pre-nomination settlements are effective for driving the operational and strategic changes the activist seeks, or whether highly public campaigns create a more defined impetus for change at a company.

Olshan’s activist practice at a glance...

- 54 directors seated this proxy season.
- 7 proxy fights for board representation went to a vote, of 34 nominations.
- 76% of campaigns for board seats ended in a settlement, with more than a third negotiated before nomination notices delivered.
- 3 consecutive-year nominations, the second increase in a row. Olshan counsels clients not to sign up to standstill agreements that cover two annual meetings.
- 3 special meetings solicited.
- 11 campaigns over a \$2 billion market-cap, though small-to-mid-cap continues to be the “sweet spot” for activist campaigns.

Continuing to Dominate the Shareholder Activism Market in 2014 and Beyond

Our 2014 Proxy Season Highlights Include:

34 Nominations
delivered

26 Settlements
negotiated

32 initial 13D's
filed

50⁺ new
Directors
seated

Featured 2014 Activist Campaigns:

EST. 1892
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& Fitch**
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Darden

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— Reuters

For more information, please contact:

Steve Wolosky, Partner and Chair
212.451.2333
swolosky@olshanlaw.com

Andrew Freedman, Partner
212.451.2250
afreedman@olshanlaw.com

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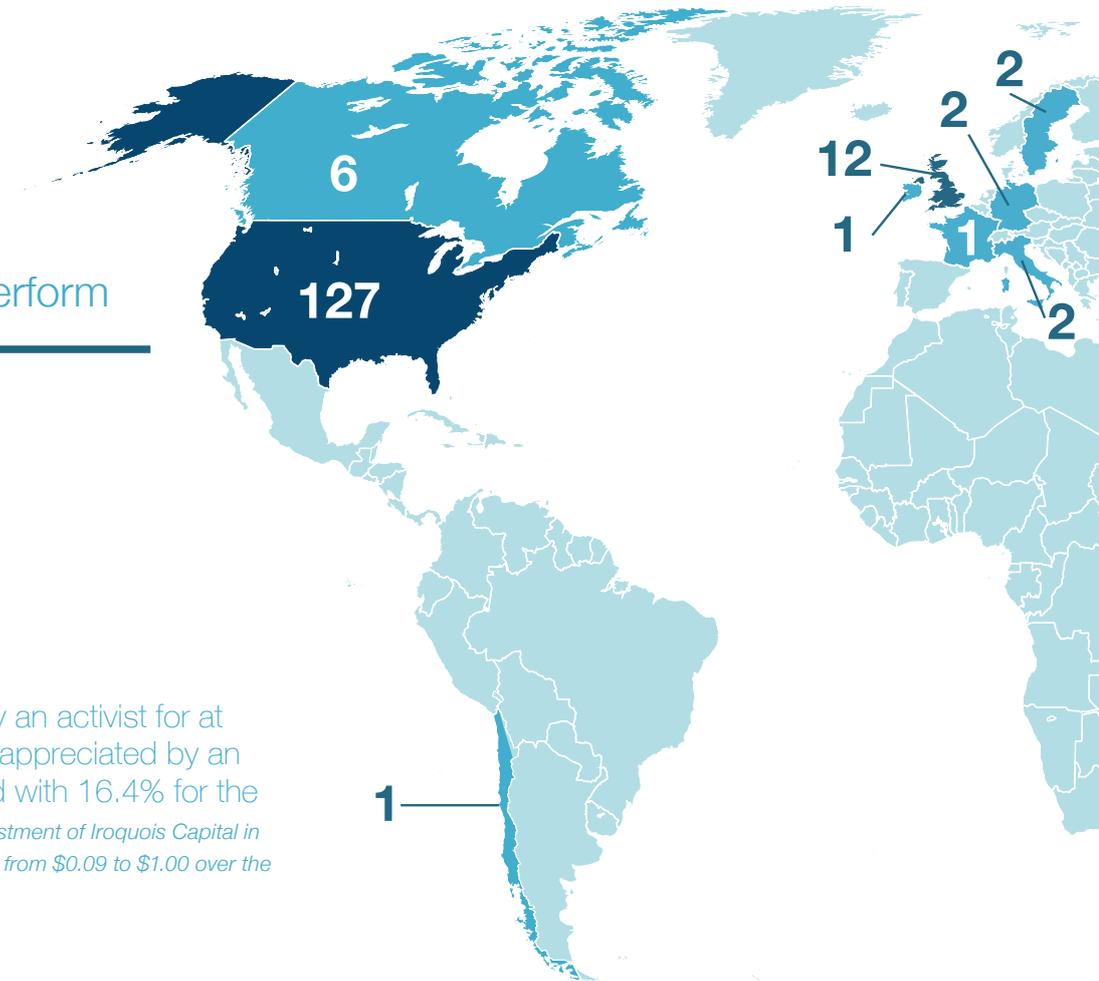
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2014: the first half in numbers

America still leads the way

While the US continued to dominate public instances of activism (with 127 campaigns initiated), a significant number were waged throughout Europe, Canada and the rest of the world.



Activist trackers outperform



The average US stock held by an activist for at least two months in H1 2014 appreciated by an annualized 51.0%*, compared with 16.4% for the S&P 500. * includes the outlying investment of Iroquois Capital in 24Holdings Inc., which saw its stock move from \$0.09 to \$1.00 over the course of six months

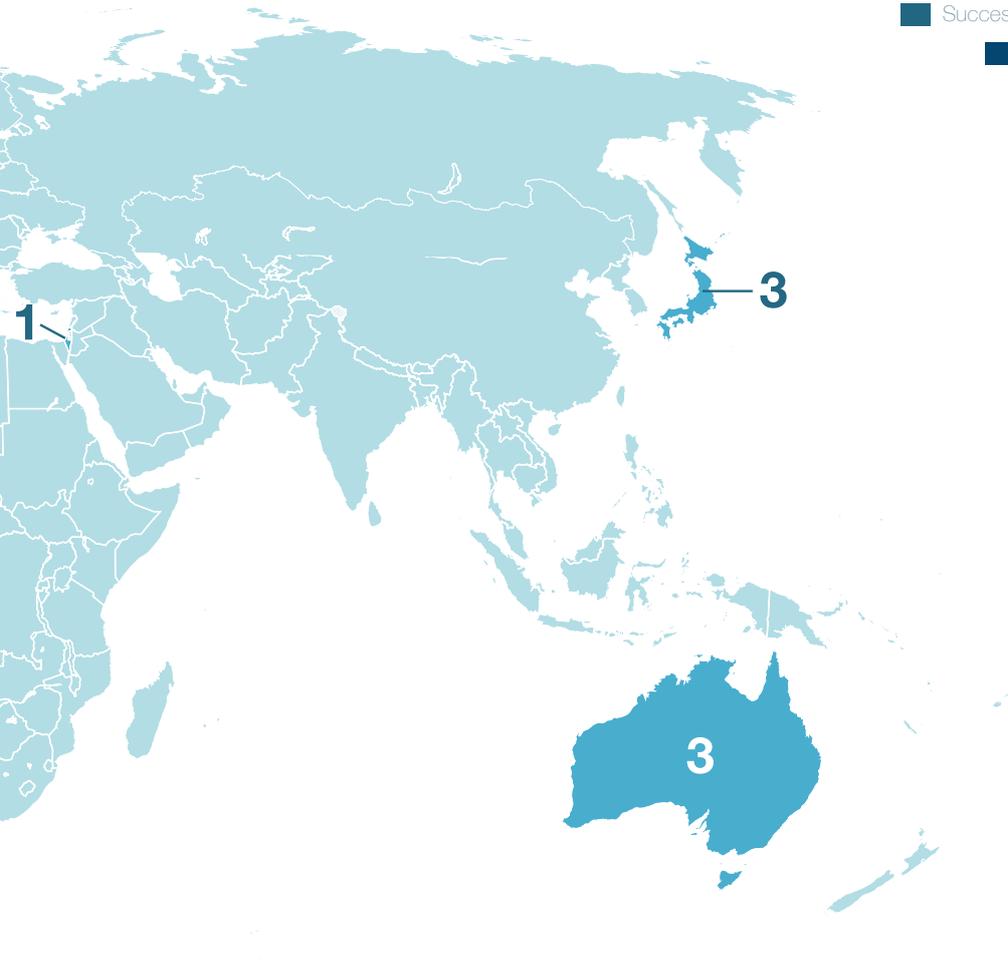
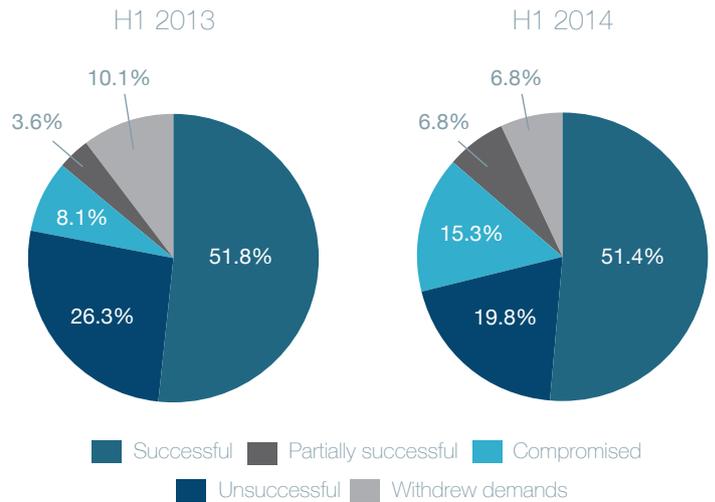
A shift in tactics



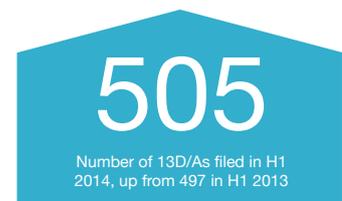
The proportion of activists seeking board representation increased by 9.16 percentage points in a survey of all activist tactics used in H1 2014 against H1 2013. Pushing the issuer towards a sale or merger was also more popular this year. Conversely, activist demands for share repurchases or dividends fell in popularity, while the removal of a CEO or board member was also called for less frequently as a proportion of all strategies used.

A wider center ground

Activists were more likely to compromise with management in relative and absolute terms, with 15.3% of all resolved campaigns in H1 2014 ending thus, compared with 8.1% of cases in the same period in 2013. They were also at least partially successful in their demands more often (right).



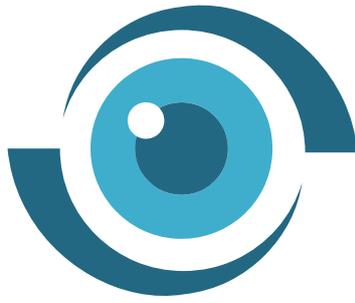
More new investments



M&A: 'Mergers and Activism'



45% of the activists who initiated new public campaigns in H1 2014 made demands related to M&A activity.



Proxy Insight

As simple as:

1

Voting policies and contacts of each investor

2

Who voted and how at any shareholder meeting

3

How an institution typically votes on a particular issue

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