

# Shareholder Activism and Proxy Contests

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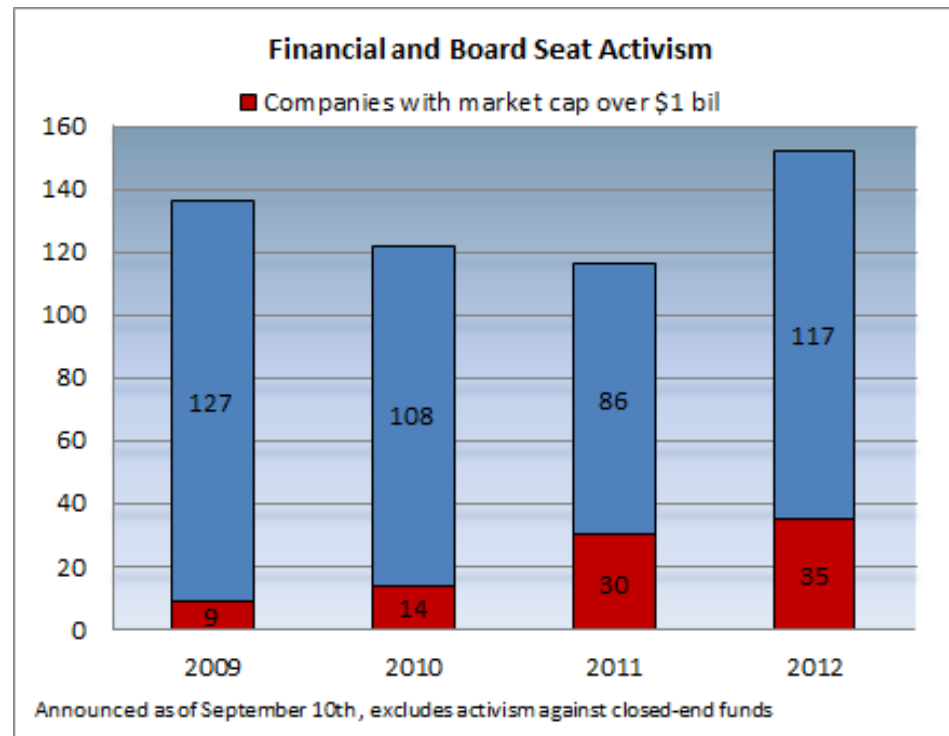
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## Overview and Trends

- **Shareholder activism continues to grow and thrive.**
  - 2012 saw 117 activist filings as opposed to 86 in 2011 and 108 in 2010.
  - Additionally, \$12.5 billion of new money was invested in activist funds in 2012.
  - Over the last three years, over \$40 billion has been invested in these funds.
  
- **Activist are moving up market.**
  - Activists are also setting their sights on larger targets.
  - The number of companies targeted that had a market capitalization over \$1 billion has increased for three consecutive years.
  - Thirty-five of the companies targeted in 2012 were companies of this size, a 289% increase over the same period in 2009.
  - As of April 22, 2013, almost 30% of the companies targeted in a financial or board seat activist campaign this year had a market capitalization over \$1 billion at the time the campaign was announced as opposed to 20% in 2012.
  
- **Activists have been successful in obtaining Board representation.**
  - In contested situations, dissident shareholders have been successful in obtaining at least one Board seat in over 50% of the contested situations in each of the last five years.
  - Through April 22, 2013, activists had been successful in 64% of proxy fights.

## Activism on the Rise



An analysis of U.S. activism levels in 2012 reveals not only an overall increase in the number of new campaigns being announced but also an increased willingness by activists to target larger companies. According to FactSet SharkWatch, the 152 financial and board seat activist campaigns announced in 2012, is the most in any year since 2008. These campaigns, with a stated goal of obtaining board representation or maximizing stockholder value, have increased 31% over the same period in 2011, where 116 such campaigns were announced.

## Activism: Not Just Hedge Funds

- **Increasing pressure to improve shareholder returns**
- **Force multipliers**
  - Event-driven hedge funds
  - Corporate governance activists
  - Unions
  - State pension funds
  - Mutual funds
- **Traditional mutual funds increasingly involved in activism**
  - Fidelity (Clear Channel, Deutsche Borse, VNU)
  - Franklin Mutual (Weyerhaeuser)
  - Morgan Stanley Investment Management (New York Times)
  - T. Rowe Price (Laureate Education MBO, Diversa sale to Celunol)
  - Oppenheimer (Take-Two Interactive)

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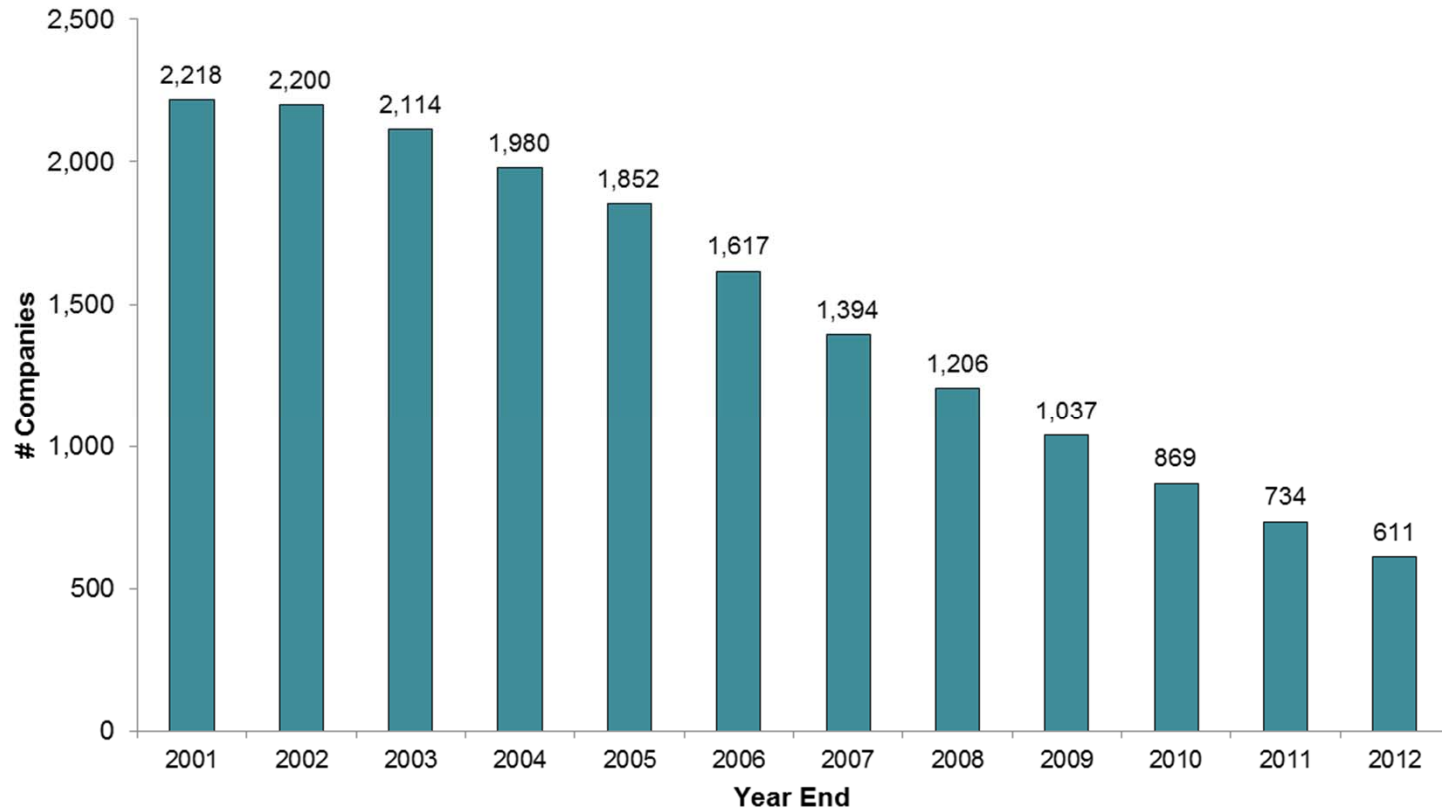
## Names to Watch for: “Activist” Investors with Greatest Track Record of Pursuing Fights

- Starboard
- Carl Icahn
- ValueAct
- Relational
- Pershing Square
- Southeastern
- Barington Capital
- Clinton Group
- Corvex Management
- Crescendo Partners
- Elliott Associates
- Franklin Mutual Advisers
- GAMCO
- JANA Partners
- Loeb Capital Management

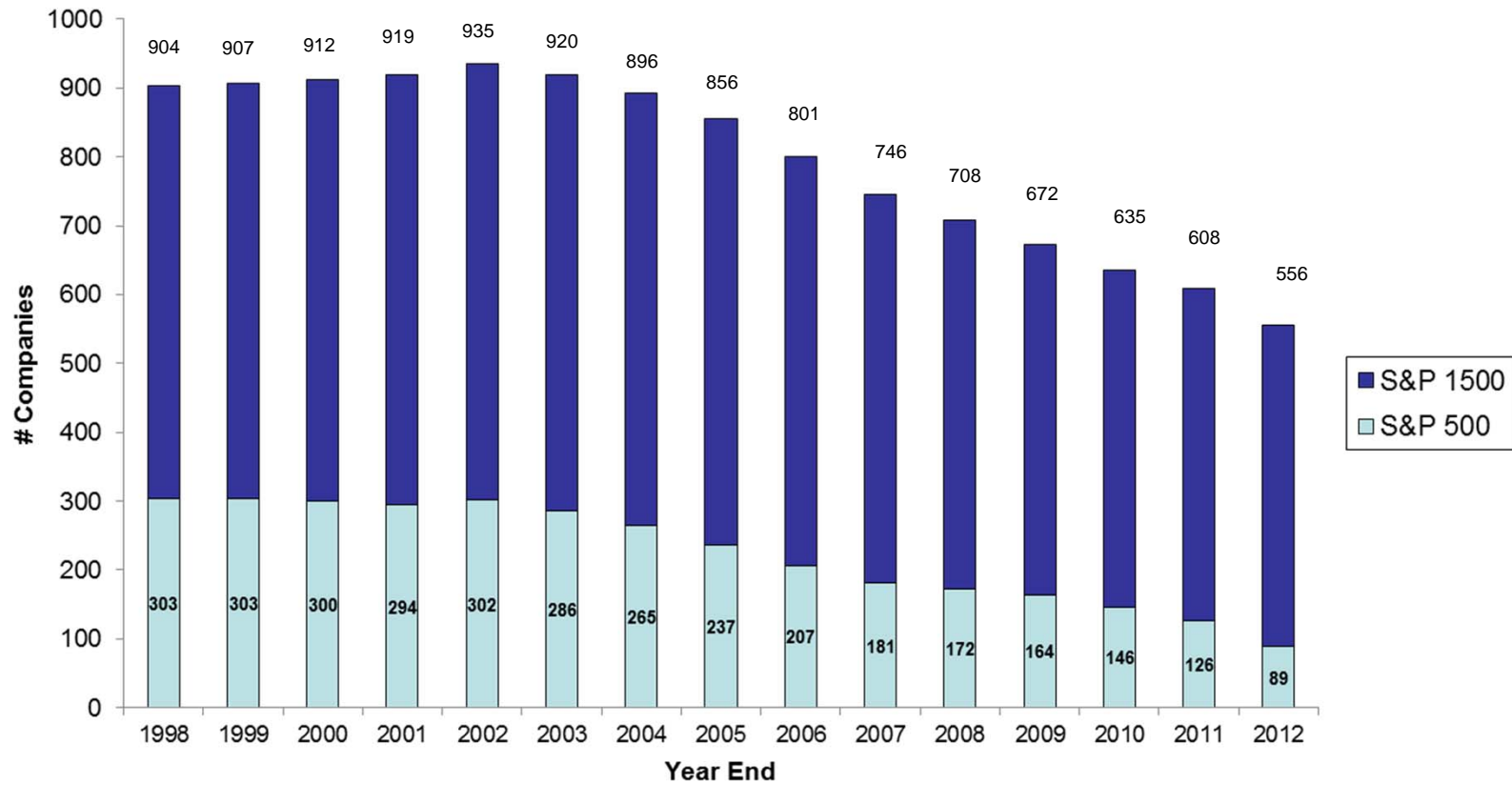
## Impact of Proxy Advisory Firms

- Proxy advisory firms, such as ISS and Glass Lewis, have a significant impact on public companies, especially in activist situations.
- For instance, ISS has guidelines and procedures for making voting recommendations in all matters being considered at stockholder meetings. ISS's stance of poison pills and staggered board are primarily responsible for the dramatic decrease of these takeover defenses for large public companies.
- In contests for board representation, ISS generally asks two key questions:
  - Has the dissident demonstrated that change is warranted?
  - If change is warranted, are the dissident nominees more likely to effect that change than the management nominees?
- In contests where the dissident is seeking board control, ISS will also review the dissident's business plan and identification of new management.
- In recent years, ISS has supported one or more of the dissident nominees in over a majority of proxy fights.
- Each company should analyze its own list of stockholders to determine how important the proxy advisory's views are to them.

US-Incorporated Poison Pills In Force at Year End



**S&P 1500 Classified Boards at Year End  
(Includes Non-US Incorporated Companies)**





## TAKEOVER DEFENSE TREND ANALYSIS 2008 to 2012 SP 500

Percentage of Firms by Defense Type <sup>(1)</sup>

	S&P 500 (2008)	S&P 500 (2012)
Classified Board	34.22	16.91
Majority Vote Standard to Elect Directors		81.21
Plurality Vote Standard w/Resignation Policy		10.65
Board Fills All Vacancies	76.84	78.91
Shareholders Cannot Call Special Meetings	55.12	46.76
No Action by Written Consent	71.52	71.40
Fair Price Provision	23.36	18.16
Supermajority Votes for Mergers	24.39	20.88
Directors Removed Only for Cause	39.55	33.61
Supermajority Vote to Remove Directors	28.48	23.38
Expanded Constituency Provision	7.38	7.31
No Cumulative Voting	92.83	94.99
Blank Check Preferred Stock	95.08	94.99
Poison Pill in Force	21.40	7.60

(1) Percentages are based upon the number of eligible and active companies in the SharkRepellent.net database. For the Poison Pill in Force calculation by index, non-US companies are included.

## TAKEOVER DEFENSE TREND ANALYSIS 2008 to 2012 S&P 1500

Percentage of Firms by Defense Type <sup>(1)</sup>

	S&P 1500 (2008)	S&P 1500 (2012)
Classified Board	47.05	36.92
Majority Vote Standard to Elect Directors		48.16
Plurality Vote Standard w/Resignation Policy		12.19
Board Fills All Vacancies	76.07	78.81
Shareholders Cannot Call Special Meetings	50.78	48.37
No Action by Written Consent	72.81	72.00
Fair Price Provision	19.86	16.28
Supermajority Votes for Mergers	26.44	24.18
Directors Removed Only for Cause	46.17	43.53
Supermajority Vote to Remove Directors	29.69	29.36
Expanded Constituency Provision	10.10	9.54
No Cumulative Voting	91.86	93.80
Blank Check Preferred Stock	92.47	94.01
Poison Pill in Force	29.73	12.13

(1) Percentages are based upon the number of eligible and active companies in the SharkRepellent.net database. For the Poison Pill in Force calculation by index, non-US companies are included.

## Hypothetical Number 1

- **Activist Investor calls up Company A's head of Investor Relations and wants to set up a introductory meeting so it can understand the Company and consider increasing its investment. What should you do?**
  - Do you take the meeting?
  - If so, who should go? Directors?
  - Counsel?
  - Do you hire advisors?

## Dealing with a Situation Involving Activists: What's different about communications?

- **Remember the importance of “due diligence.” Research the activist and his track record with other companies.**
- **Everything you say, can and will be used against you.**
- **Activists may seek to solicit information or establish lines of communication with directors.**
  - Even the most innocuous communications can be damaging to a Company and its strategy.
  - It is critical that the Company adopt a communications strategy and determine who is allowed to speak for the Company (CEO, Lead Outside Director, etc.) and the message that should be sent.
  - The Company must deliver consistent messages and speak with one voice.
- **Monitor trading volumes and changes to shareholder base**
- **Know your shareholders and meet with them (in good times and bad)**

## Hypothetical Number 2

- **After disappointing performance for several quarters, the Board of Company A replaces the CEO. Activist Investor makes a public filing criticizing the Company's performance, its executive compensation practices and the independence and long tenure of its existing independent directors. Investor indicates the Board needs new voices to help the new CEO set the business strategy for the Company and requests a meeting with the CEO and the Board.**
  - How should the Board react?
  - Should the CEO/Board meet with the activist? If so, who attends the meeting?
  - What about the Company's other constituencies (e.g., employees, customers, partners)? How do you communicate with them?
  - Should the Board specifically review the areas criticized by the activist?

## Preliminary Steps by the Dissident Shareholder

- A dissident shareholder will likely take a series of preliminary steps in advance of a proxy contest, including:
  - Accumulating an ownership interest in the company
    - If the shareholder crosses the 5% ownership threshold, it will be required to file a Schedule 13D and discuss its current intentions with respect to the company. As the contest progresses, the shareholder will be required to amend its 13D filing, such that the 13D provides a play-by-play of the dissident's activities.
  - Privately or publicly advocating for change at the company
    - These efforts may include letters to the board of directors, requests for meetings with management, press releases, etc.
  - Communicating with other shareholders
  - Recruiting director candidates to serve on its slate
    - In recent years, shareholders have focused on independent director candidates as opposed to employees or representatives of the shareholder.

## Hypothetical Number 3

- **After meeting with Company A, Activist publicly files a preliminary proxy statement with the SEC indicating it is running a “short” slate of directors for Company X.**
  - What is a “proxy contest” and what does it entail?
  - What is the role of independent directors in a proxy contest?
  - How do you “win”? And what exactly does “winning” mean?
  - How often do proxy contests settle? What are the common terms for a settlement?

## Proxy Contest = Political Campaign

- A proxy contest involves a battle for the “hearts and minds” of shareholders similar to a political campaign.
- In connection with a proxy contest, it is important for the company to understand the prevailing shareholder sentiment.
- The current environment tends to favor dissidents:
  - General increase in investor skepticism about boards and management
  - Shortened investment horizon of many investors
  - Fewer individual shareholders who tend to be pro-management
  - Growing influence of proxy advisory firms, such as ISS, Glass Lewis, etc.
  - Changes in technology that have increased the channels of communication for dissatisfied shareholders
  - Fewer takeover defenses
- As a result, it is important for a company to monitor changes to its shareholder base and meet with its shareholders both in good times and bad.
- ***It is critical that the company speak with one voice, and that only the designated spokesman for the company speak with shareholders.***



## Components of a Proxy Contest: Use of PR/Media

- In addition to its proxy statement and fight letters, each party may endeavor to sway shareholder sentiment and win votes by:
  - Issuing press releases
  - Preparing investor presentations
  - Using the Company's website
  - Conducting media interviews
  - Asking shareholders to speak out in support of their campaigns
  - Meeting one-on-one with large shareholders and proxy advisory firms (such as ISS)
- Once a proxy solicitation begins, almost all investor relations and employee communications will be viewed as solicitation activities and require appropriate filings with the SEC.

## How to win a proxy contest

### Top 10 things to do

- Take the high road
- Maintain tight team communications
- Define the Company's core messages
- Maintain measured approach
- Be proactive
- Keep shareholders close
- Be prepared to respond quickly
- Emphasize Board independence and strong corporate governance
- Continue to engage dissident
- Be nimble

### Top 10 things not to do

- Be defensive / attack personally
- Create misperceptions
- Appear closed off
- Assume truth will come out
- Change course without strategic rationale
- Change governance provisions
- Undertake fundamental changes inconsistent with strategic plan to placate activist
- Be inflexible
- Negatively react to proxy advisory firm's recommendations