

# Lead Director Network ViewPoints

April 1, 2014



## Dealing with shareholder activism

On March 4, 2014, Lead Director Network (LDN)<sup>1</sup> members met in New York City to discuss shareholder activism. Ralph Whitworth, founder, principal, and investment committee member of Relational Investors and non-executive chairman at Hewlett-Packard, joined members for dinner to provide an activist's perspective. Members were also joined by King & Spalding corporate partner Bill Baxley during the meeting. For further information about the LDN, see "About this document," on page 10. For a list of participants, see the appendix on page 11.

### Executive summary

This *ViewPoints* synthesizes member discussion on four key topics relating to shareholder activism:<sup>2</sup>

- **A new era of activist investing** (*page 2*)

Lead directors shared their views on the evolution of activist investing. While companies and boards once viewed activist investors in a negative light, lead directors now recognize that in some instances activists can bring positive change to companies. This is consistent with evidence of trends in shareholder activism that demonstrate both an increase in activist activity at large public companies and a more widespread acceptance by institutional investors of activist tactics.

- **Preparing for activist interest** (*page 4*)

Lead directors discussed the need for companies to assess the financial and strategic vulnerabilities that could lead to an activist approach. This assessment often includes both a critical review of a company's performance and position in the marketplace and a proactive approach to addressing potential issues that may trigger activist interest. Members stressed the importance of putting a plan in place for dealing with an activist while understanding that, as one member said, "*It is never going to go exactly as you expect.*"

- **Negotiating with activist investors** (*page 6*)

When an activist does approach a company, it is important to understand the activist's agenda as early in the process as possible. Lead directors also noted the importance of taking today's activists seriously. One member explained that by the time an activist discloses an investment, "*They have done real research and have serious views.*" Whether or not a board director is personally involved in the negotiations with an activist, LDN members underscored the need for the company to present a unified response.

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<sup>1</sup> Lead Director Network documents use the term "lead director" to refer interchangeably to the titles lead director, presiding director, and non-executive chair unless otherwise stated.

<sup>2</sup> *ViewPoints* reflects the network's use of a modified version of the Chatham House Rule whereby names of members and their company affiliations are a matter of public record, but comments are not attributed to individuals or corporations. Italicized quotations reflect comments made in connection with the meeting by network members and other meeting participants.

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- **Working with an activist investor on the board** (page 8)

Members discussed instances where they worked closely with activist investors to improve company performance, including situations where an activist joined the board. In many cases, members had positive experiences when both the board and the activist were open-minded about the relationship and guidelines on behavior, such as confidentiality, had been agreed in advance. Members also discussed the role of the lead director in maintaining a frank and candid environment when an activist or an activist's nominee joins a board.

### A new era of activist investing

LDN members have turned their attention to investor activists demanding specific improvements in company performance or in the company's returns to shareholders. Such activism is not new and can be traced back to at least 1927.<sup>3</sup> Despite its lengthy history, several recent trends in shareholder activism have made Fortune 500 companies and directors take notice:

- **More money.** Investors have been putting more money into activist funds over the past several years.<sup>4</sup> By some estimates, assets under management at activist hedge funds have increased from less than \$12 billion to more than \$100 billion in the last decade.<sup>5</sup>
- **Media interest.** According to one member, "*Activists have become very adept with social media and are great on television.*" As a result, activists are often able to generate attention at large companies with relatively small stakes – such as ValueAct's 0.8% position in Microsoft, Pershing Square's 1% position in Procter & Gamble, and Barington's small stake in Darden Restaurants.<sup>6</sup> Likewise, as one member explained, activists are "*Adept at writing the history of what they have done.*" In particular, some lead directors believe that activists are often good at taking credit for a company's success, whether or not they prompted the actions that actually led to the successful results.
- **Activists working together.** Hedge fund activists are communicating with each other about potential investments and often investing in the same company. According to Mr. Baxley, "*A lot of directors underestimate the wolf-pack tactics and are surprised by the kind of power activists can wield. An activist that takes a 2% stake and has \$200 million in assets can still present a potential threat to a large public company.*"
- **More interventions.** Activist shareholder interventions (e.g., seeking board representation, share buybacks, spin-offs, merger and acquisition transactions, CEO removal) are on the rise worldwide, with

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<sup>3</sup> In 1927, Benjamin Graham – the father of value investing and Warren Buffett's mentor – discovered that Northern Pipe Line Company, whose stock traded at \$65, held \$95 per share in liquid assets. Unable to convince management to share that wealth with shareholders, Graham took his argument to the annual meeting. Management scuttled his first attempt on a technicality – Graham failed to bring a supporter to second his motion – but he was elected to the board the following year and soon distributed \$70 per share to the company's owners. Joe Carlen, "[How Benjamin Graham Revolutionized Shareholder Activism.](#)" *Bloomberg*, May 17, 2013.

<sup>4</sup> Stephen F. Arcano and Richard J. Grossman, "[Activist Shareholders in the US: A Changing Landscape.](#)" *Harvard Law School Forum on Corporate Governance and Financial Regulation* (blog), June 28, 2013.

<sup>5</sup> Cal Smith, "[Responding to the New Shareholder Activism.](#)" *King and Spalding Directors Governance Center*, December 4, 2013.

<sup>6</sup> "[Introduction to the SDX Protocol.](#)" *Harvard Law School Forum on Corporate Governance and Financial Regulation* (blog), February 5, 2014, and Dana Mattioli, "[Activist Pushes for Split of Darden Restaurants.](#)" *Wall Street Journal*, October 9, 2013.

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the majority of that growth in Europe and the United States.<sup>7</sup> Since 2006, more than 15% of the companies in the S&P 500 have experienced a public activist intervention.<sup>8</sup> More proxy fights were announced in 2013 than in any year since 2009.<sup>9</sup> Among other things, the cash amassed by many companies in recent years has motivated activists to get involved.<sup>10</sup>

- **Larger targets.** In 2009, there were only seven activist campaigns involving companies whose market capitalization exceeded \$10 billion.<sup>11</sup> That number increased to 23 in 2012 and 42 in 2013.<sup>12</sup> The average market value of companies targeted by activists increased to \$8.2 billion in 2012, up from \$3.9 billion in 2011.<sup>13</sup>
- **Weakened defenses.** In the past decade, there has been an overwhelming move to dismantle key takeover defenses, including efforts to remove rights plans, declassify boards, eliminate supermajority voting requirements, and decrease the percentage of shares needed to call a special shareholders meeting.<sup>14</sup> These efforts have received substantial and consistent support from institutional investors, pension funds, and proxy advisory services such as Institutional Shareholder Services (ISS). One member said, *“Barriers have been eliminated, which has made it harder for us. I wonder if it’s actually good for the shareholders.”*
- **New partners.** Active-but-not-activist investors are also pushing companies to change policy and practice, adopting certain activist tactics. For example, the California State Teachers’ Retirement System recently cosponsored a proposal with Relational Investors to break up the Timken Company.<sup>15</sup> In the words of one commentary, *“Supporting activists has largely lost the stigma that it had among traditional institutional investors, which once may have viewed activists as a disruptive influence acting contrary to the long-term interests of the company, but today view activist investors as a useful tool.”*<sup>16</sup> Recent research from Deutsche Bank Markets Prime Finance found that 44% of institutional investors also directly invest in hedge funds.<sup>17</sup>
- **Record of success.** Activists have a record of achievement in two important areas: investment returns and contested proxies. Not every activist intervention is successful, but overall investment returns are strong. According to Thomson Reuters, activist investment funds averaged 25% returns in 2012,

<sup>7</sup> Ajay Khorana et al., *“Rising Tide of Global Shareholder Activism.” Citi Global Perspectives & Solutions*, November 12, 2013.

<sup>8</sup> Ibid.

<sup>9</sup> Kerry E. Berchem, *“Top 10 Topics for Directors.” Harvard Law School Forum on Corporate Governance and Financial Regulation* (blog), December 31, 2013.

<sup>10</sup> Jeff Green and Beth Jinks, *“Icahn’s EBay Talks Show Boards Listening to Activists.” Bloomberg*, January 23, 2014.

<sup>11</sup> Ed Hammond, *“Advisers Play at Activism to Pre-empt the Next Icahn.” Financial Times*, December 12, 2013.

<sup>12</sup> Activist Insight, *“Activists Target Bigger Stocks.” Activist Investing: An Annual Review of Trends in Shareholder Activism*, 2014.

<sup>13</sup> Smith, *“Responding to the New Shareholder Activism.”*

<sup>14</sup> See, for example, Ted Knutson, *“S&P 500 Moving Towards Declassification, Annual Board Elections.” Corporate Secretary*, March 1, 2013; Lucian Bebchuk, Scott Hirst, and June Rhee, *“Towards Board Declassification at 100 S&P 500 and Fortune 500 Companies: Advancing Annual Elections in the 2014 Proxy Season.” Harvard Law School Forum on Corporate Governance and Financial Regulation* (blog), December 10, 2013; and *Introduction to the SDX Protocol* (2014), which notes the success of Harvard Law School’s shareholder rights project.

<sup>15</sup> Louis M. Thompson, *“When Pension Funds Turn Activists.” Compliance Week*, December 17, 2013.

<sup>16</sup> Arcano and Grossman, *“Activist Shareholders in the US: A Changing Landscape.”*

<sup>17</sup> Christine Williamson, *“44% of Institutional Investors Invest in Hedge Fund Managers’ Long-Only Strategies – Survey.” Pensions & Investments*, December 2, 2013.

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outperforming the S&P 500 by 12%.<sup>18</sup> Although returns in 2013 were down relative to the S&P 500, the average return for activist hedge funds was double the average return for non-activist funds.<sup>19</sup> Recent academic research found that companies targeted by activists generally improved operating performance and maintained those gains over five years following the intervention.<sup>20</sup>

In addition, research from ISS shows that activists won 68% of contested fights for board representation in 2013, up from 43% in 2012.<sup>21</sup> So-called “short slate” contests, where activists seek representation on but not control of the board, are especially difficult to defend because many investors see a potential benefit and little harm from adding a small number of activist-backed board members.

For these reasons, companies – even megacap companies – are taking more notice of shareholder activism. As some members noted, it is no longer enough to tell shareholders or proxy advisory firms that you do not like the activists (or their ideas) and that management has a better plan.

### Preparing for activist interest

Members discussed a variety of steps that companies should consider taking before an activist arrives. These included two general categories of preparation: vulnerability assessment and proactive change.

#### Assess potential vulnerabilities

One member said it is “*Good to know your own vulnerabilities as a company,*” whether or not an activist has taken a position. In addition to preparing the company for activist defense, these steps can also lead to improved performance and governance. This is particularly valuable because strong performance and governance are often the best activist defenses. Mr. Whitworth said, “*Good corporate governance lowers the cost of capital by institutionalizing safeguards and accountability.*” One member also noted that in the current activist environment, it is important to understand that “*Vulnerability has expanded to include strategy, not just the financials.*”

Members identified the following approaches to assess vulnerabilities:

- **Learn about shareholders and changes in the shareholder base.** Members recommended assuring that investor relations professionals stay apprised of corporate ownership. One easy way to identify an activist at the door or an institutional concern that could provide the platform for an activist approach is to monitor movements in and out of the company’s stock. Members also noted the benefit to understanding which institutional investors are most likely to support an activist and whether the profile of the active-but-not activist shareholders presents any additional risks.

Members also noted that monitoring the filing of statements of beneficial ownership such as Securities and Exchange Commission Schedule 13D or 13G is not enough because activists may

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<sup>18</sup> John J. Madden, “[The Evolving Direction and Increasing Influence of Shareholder Activism.](#)” *Harvard Law School Forum on Corporate Governance and Financial Regulation* (blog), December 23, 2013.

<sup>19</sup> Svea Herbst-Bayliss, “[Activist Investors Get More Respect amid Strong Returns.](#)” *Reuters*, November 17, 2013.

<sup>20</sup> Lucian Bebchuk, Alon Brav, and Wei Jiang, *The Long-Term Effects of Hedge Fund Activism* (New York: Columbia Business School, July 9, 2013), 16.

<sup>21</sup> Brooke Masters, “[Latest Trend in Investor Activism Raises Questions.](#)” *Financial Times*, January 3, 2014.

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quietly build a stake. One member said, *“With derivatives, you really don’t know how much [of a stake] they have, so it is important to know how they work.”* Investment bankers and proxy advisors with experience in this area may be able to determine if an activist fund is acquiring options to purchase additional shares.

- **Identify signs of investor concern.** At a more fundamental level, even without evidence of a change in stock ownership, board members can assess vulnerability by listening for signs of investor concern. For example, directors may observe disconnects between shareholders and management on analyst calls or in other investor forums. Mr. Baxley noted, *“If management is getting tough questions, be aware: activists may be behind those questions.”* One member said, *“If the analysts are not discussing what you are hearing at your board meetings, you have a problem.”* Another member explained one situation where broader investor concern quickly turned into an activist approach: *“Investors were not happy, and [the activist] became a catalyst to help them push the change they needed through.”*

### Institute proactive measures

In addition to assessing potential vulnerabilities, many companies take the step of implementing, or at least considering, tactics to protect the company from activist intervention. Members identified the following proactive measures that companies should consider:

- **Improve relationships with investors.** Improving the relationship between the company and its non-activist shareholders is a critical early step to defending against an activist. This is particularly true in the current environment where activists often obtain very small stakes in the company and attempt to leverage those stakes by rallying the institutional investors to support their cause. As one member explained, if investors identify a potential problem, companies have two choices: *“Either fix it or get out in front and help them understand the business.”* Members noted that by helping institutional investors understand the company’s long-term strategy, the company will be better positioned to fend off activist criticism of shorter-term decisions. Another member said, *“We are not talking about that many investors to go see one-on-one, and they will tell you what is on their mind.”* Mr. Whitworth cautioned, however, that the message has to be substantive and compelling as some investors may view the outreach as a request to *“Give me more time to keep making these same mistakes.”*
- **Employ shareholder-director engagement.** Members also considered when and whether it is appropriate for the lead director or another board member to engage directly with shareholders. One member thought direct engagement was a good way both to build a relationship in advance of a crisis and to learn what is on shareholders’ minds. However, another member cautioned, *“There are plenty of wrong ways to do it.”*<sup>22</sup> Mr. Whitworth said that if management were not returning his calls, he would approach the lead director for a meeting; if that were also refused, his “short

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<sup>22</sup> Over the last two years, Tapestry Networks has been asked for guidance on why, how, and when US board directors and investors should engage directly with each other. In response to these questions, Tapestry led an effort to create an engagement protocol for directors and shareholders. The result was the 10-point SDX Protocol, which provides guidance to public company boards and institutional investors on when direct engagement is appropriate and how to make it valuable and effective. For more information, please visit the [SDX Protocol website](#).

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slate” will target the lead director for removal from the board: *“At that point it is about the board not management – the board sets the tone and is the ultimate steward of the shareholder’s assets.”*

- **Retain experienced advisors.** Members stressed the importance of having a team in place that understands the business long before an activist declares interest. This includes both an internal response team from the board and management and a group of external advisers such as law firms, investment banks, proxy solicitors, and public relations firms. As one member said, *“Don’t wait for a fight to put the team on the field.”*

The team that a company puts in place may not always be the exact team that represents the company after an activist arrives, however. One member explained that if a particular activist approaches, it may be wise to hire an adviser with experience dealing with that activist: *“There are lots of people who have relationships [with particular activists]. There is a whole industry of Carl [Icahn] experts.”*

- **Prepare legal defenses.** Another preparatory step is to review takeover defenses and determine whether additional legal measures are necessary. In particular, companies often use shareholder rights plans, or “poison pills,” as a method of limiting activist influence. These plans often dilute an activist’s stake in a company by providing additional shares to long-term shareholders if an activist acquires a certain percentage of the outstanding shares. One member said, *“There is still some acceptance of a short-term pill. It can be a good idea because it makes [the activist] come and talk to you [before acquiring a substantial stake].”* According to Mr. Baxley, *“The trend is not to have a long-term [poison] pill in place because if you have one, you may get shareholder objections, including a potential shareholder proposal to remove it. Instead, companies often have them ‘on the shelf’ and adopt them in circumstances when they need it and with terms that are appropriate to the circumstances.”*

### Negotiating with activist investors

No matter what a company does to prepare, members agreed that there is no way to avoid the possibility that an activist decides to invest in the company and seek change. Members stressed that when a company is faced with an activist investor, good communication among all parties is critical. The days of, as one member described it, *“Circling the wagons when the activists show up and trying to squash them and go your own way,”* are over. Companies need to be ready to respond when the phone rings and they hear, as one member recounted, *“This is [Joe Activist], billionaire investor. Can I speak to the CEO?”*

Lead directors identified the following approaches for a successful negotiation with an activist:

- **Understand the activist’s agenda.** Members said it is critical when dealing with activists to understand their agenda at the outset. While activists are often known for their focus on capital structure, the more sophisticated activists realize that financial engineering is, as one member said, *“Not the only tool in running a business.”* Consistent with this observation, Mr. Whitworth explained that his firm looks for a combination of factors when deciding whether to invest in a company: *“We look for that odd company that is profitable, not overleveraged, has a great*

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*franchise; but despite all of this, the price implies that the company won't do well. This indicates that something other than the assets themselves are causing the discount."*

Companies should learn the activist's particular financial or operational ideas, investment horizon, and goals. In addition, members noted the value in knowing as much about the activist's past strategies as possible. One member said that the more you learn about a particular activist, the better you can understand what they want: *"Conversation helps; listening helps a lot."*

- **Engage in open dialogue.** After learning the activist's agenda, members noted the benefits of keeping the dialogue open and providing additional information about the company, subject in many cases to proper standstill and non-disclosure agreements.<sup>23</sup> Often, this leads activists to realize the flaws in their agendas. As one member explained, *"We had a reasonable conversation with [the activist] and he decided to sell his stock. Not being confrontational paid dividends. If it got personal, he would have stayed [in the stock]."* Another member said that it is common for activists to *"come in, buy stock, have conversations, go away, and the world does not have any idea."* Another member said, *"Don't assume it is a fight. Many times investors take a position then discover they are in agreement with [management or the board]."*

Members had mixed opinions about board engagement with activists but noted that lead directors and boards should be prepared to talk with the activists directly. As one member explained, activists *"Try to get the board involved."* Another member described a situation where a director had a preexisting relationship with an activist and was deployed proactively by the company to manage the relationship. Members were cautious about attempts by activists to divide the company by engaging separately with management and the board. However, Mr. Whitworth made clear that board members are shareholder representatives and he prefers to engage with the board and with management as he prepares for a meeting to discuss the ideas his firm is putting forward.

- **Keep an open mind.** It is important for management and directors to keep an open mind and consider an activist's proposals even if they appear to include drastic changes. Along these lines, members noted the importance of reminding themselves that their ultimate goal as board directors is to create shareholder value. One member said, *"Our duty is to act in the best interest of the shareholders, whether we like the activist or not."* Another said activists are often *"Really smart guys who can help improve the performance of the company."* A third member noted the benefit of having someone with *"No vested interest in making the strategy work,"* and who is therefore *"More interested in what can be than what was."* Similarly, Mr. Whitworth said, *"The evolution into this 'activist' label has been disappointing. I am just an investor that wants to be part of the value proposition and has something to say."*
- **Present a unified response.** The company – including any board members involved in external communications – must be unified in their response. One member said, *"A split board is worse*

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<sup>23</sup> Standstill agreements preclude for some period of time the activist's participation in future proxy contests or further acquisition of common stock. Non-disclosure agreements require that the activist keep the information provided by the company confidential.

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*than a board that goes with the activist.” Unity is critical because an activist may be able to push a bad idea through by taking advantage of a fractured board.*

In some cases, even after employing the above approaches, companies and activists are unable to reach a negotiated settlement. In those cases, the result may be a proxy fight, and this is where all the preparation can pay off. One member said, *“Be as prepared as you possibly can be so you are not at a disadvantage. Consider every tool you have.”*

Members noted that the key to managing a public fight is communicating with the other shareholders, both one-on-one and through the media – an area where activists are particularly skilled. One member advised, *“Make sure you have your long-term story in place, especially if you are not performing well [in the short term].”* Another cautioned that management should be aware that, whatever the rhetoric, *“It’s about the shareholders; it’s not personal.”* Mr. Whitworth suggested that boards remember that when putting the company’s case together, *“An idea only has value if backed by a successful track record and compelling case for creating value.”*

### Working with an activist investor on the board

In many instances, activists do not seek a board seat. One member said that more effective activists *“View asking for a board seat as a last resort.”* According to Mr. Whitworth, *“In the great majority of cases, we [Relational Investors] have a series of communications with management and they agree with our proposals, so we don’t go on the board. This is what we love. When we end up on boards, it changes our resource allocation and our liquidity profile.”*

Nevertheless, several LDN members have served alongside activist directors. One member explained, *“The big pivot was ISS saying it was great for a minority shareholder to be on the board.”* Lead directors have a special responsibility to ensure the board is collegial and productive – a responsibility that could become more challenging with an activist director. Yet, as one member put it, *“We have come a long way since an activist coming on the board was a disaster.”* Members discussed approaches and perspectives related to bringing an activist director onto the board.

### Qualifying candidates

Members said it was important to make sure the activist nominates a qualified board member. In many cases, that may not be the activist but rather a representative who satisfies the board’s governance requirements and may be more collaborative. One member noted that many activists are open to this arrangement: *“They will get the same information whether they are the director or not.”*

Members noted the value of a well-defined governance process for nominating and electing board members. One member gave an example where an investor wanted to nominate a board member, but *“His candidate did not fit the profile we use – it was like trying to fit a square peg in a round hole.”* Another described a similar situation in which the board was able to go back to the activist and ask for a different nominee that was more acceptable.

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Mr. Baxley said, *“Activists are generally respectful of the nomination process. When you negotiate, you can ask to have the person come in and speak to the governance committee.”* A member recalled working with an activist’s nominee who turned out to be *“pretty independent and actually co-opted the second [activist director].”*

### **Agreeing on ground rules**

Members said it was important to agree on ground rules when a company invites an activist to join the board. According to Mr. Baxley, *“When you invite them on the board, you need to have an agreement where discussions remain in the boardroom.”* A member said, *“It has to be clear that their duties [as a director] are to all shareholders, not just to their fund.”* Another member noted the importance of information parity as a ground rule: *“Activists seek more data than other directors, so I set a policy that whatever we sent [to the activist] went to all directors.”* Another described the benefit of establishing a relationship where all parties are on the same page: *“When bumps occur, we need to be able to deal with [activist board members] as colleagues, not a threat.”*

### **Appreciating the role of activists on the board**

As boards and management have become more open to listening to activists, members have come to appreciate the benefits that some activists provide. In one member’s experience, the activist *“Became a really great director and went on to chair a board committee.”* Another described how the board wanted the activist director to stay even after the activist fund sold its investment in the company. Another member said that activist directors can help act as a catalyst for change: *“We never could have changed the CEO pay package without [the activist] pushing. I give him a lot of credit – he said, ‘Make me the bad guy.’”*

However, not every activist director is helpful. One member said that the wrong activist *“Can be disruptive,”* and described a situation where a *“One-sided”* activist joined the board, with negative consequences: *“Before, the board trusted each other. When someone came in under different circumstances, the board clammed up.”*

Other members noted the more general benefit of having an investor on the board, whether an activist or not: *“On one board, we have a member who is a hedge fund manager who has been wildly informative to the board, telling us what investors would think about [certain actions].”*

### **Conclusion**

At the end of 2013, the chair of the SEC noted, “It was not long ago that the ‘activist’ moniker had a distinctly negative connotation. It was a term equated with the generally frowned-upon practice of taking an ownership position to influence a company for short-term gain. But that view of shareholder activists, which has its roots in the raiders of the 1980s takeover battles, is not necessarily the current view and it is

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certainly not the only view.”<sup>24</sup> More bluntly, a columnist for the *New York Times* recently wrote, “It’s no longer an insult to be called an activist investor.”<sup>25</sup>

Companies that maintain an open mind about activism and are willing to acknowledge their own mistakes may benefit from working with any shareholder focused on creating or unlocking value; it is the responsibility of boards and shareholders to determine whether a given activist and strategy qualifies.

### About this document

*The Lead Director Network (LDN) is sponsored by King & Spalding and convened by Tapestry Networks. Drawn from America’s leading corporations, the LDN is a group of lead independent directors, presiding directors, and non-executive chairmen who are committed to improving the performance of their companies and to earning the trust of their shareholders through more effective board leadership. The views expressed in this document do not constitute advice for any purpose (legal, financial, business, or otherwise) of network members, their companies, King & Spalding, or Tapestry Networks.*

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<sup>24</sup> Mary Jo White, “Remarks at the 10th Annual Transatlantic Corporate Governance Dialogue” (Washington, DC, December 3, 2013).

<sup>25</sup> Alexandra Stevenson, “No Barbarians at the Gate: Instead, a Force for Change.” *DealBook* (blog), *New York Times*, January 6, 2014.

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### Appendix: Network participants

The following network members participated in the meeting:

- Dick Auchinleck, Presiding Director, ConocoPhillips
- Dan Carp, Non-Executive Chair, Delta Air Lines
- Dave Dorman, Non-Executive Chair, CVS Caremark; Lead Director, Motorola Solutions
- Don Felsinger, Lead Director, Archer Daniels Midland Corporation and Northrop Grumman Corporation
- Ann Maynard Gray, Non-Executive Chair, Duke Energy Corporation
- Bonnie Hill, Lead Director, The Home Depot
- Phil Humann, Presiding Director, Coca-Cola Enterprises and Equifax; Lead Director, Haverty Furniture Companies
- Bob Kidder, Former Lead Director, Morgan Stanley
- Linda Fayne Levinson, Alumnus Member, Former Lead Director, NCR Corporation
- Ellen Marram, Lead Director, Eli Lilly; Presiding Director, Ford Motor Company
- Jack O'Brien, Lead Director, TJX; Non-Executive Chair, Cabot Corporation
- Tom Wajnert, Non-Executive Chair, Reynolds American

The following network members took part in pre-meeting discussions:

- Ed Kangas, Non-Executive Chair, Tenet Healthcare; Lead Director, United Technologies
- Ed Rust, Presiding Director, Caterpillar; Lead Director, McGraw-Hill Companies
- Alex Mandl, Former Lead Director, Dell; Non-Executive Chairman, Gemalto

The following King & Spalding attorneys participated in all or some of the meeting:

- Bill Baxley, Partner; Co-Chair, Mergers and Acquisitions Practice
- Mike Egan, Partner; Co-Chair, Mergers and Acquisitions Practice
- Dixie Johnson, Partner; Special Matters and Government Investigations Practice Group
- Bill Johnson, Partner; Special Matters and Government Investigations Practice Group
- Michael Smith, Partner; Co-Chair, Securities Litigation Group
- Chris Wray, Partner; Chair, Special Matters and Government Investigations Practice Group