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Institutional Investor Voting in Contested Board Elections

Nearly thirty years ago, Dr. Carolyn Kay Brancato published a seminal study reporting that institutional investors had purchased a majority equity interest in America's public companies.[1] At the time, it was observed correctly that this shift in voting power to institutional investors from retail investors, together with the increasing concentration of ownership among institutional investors, had noteworthy implications for issuers.[2] [3] Since then, institutional voting in the election of directors and on a wide range of proposals submitted for stockholder consideration and action has prompted much debate, including concerns that, as a group, institutional investors may be too inclined to follow the voting recommendations of proxy advisory firms, such as Institutional Shareholder Services ("ISS") and Glass Lewis & Co., LLC ("Glass Lewis").

This article reports on voting by the top fifty institutional investors (ranked and weighted by equity assets under management) in 83 contested board elections that went to a vote (including 28 proxy contests for control of the board and 55 proxy contests to elect minority-slates) at U.S. issuers in the five-year period ended June 2017, as reported in the Forms N-PX filed by these investors with the Securities and Exchange Commission (the "SEC").[4] [5]

As a Group, the Largest Institutional Investors DO NOT support Dissident Board Slates

As can be seen from the voting summaries set forth below, as a group, the largest institutional investors do not support dissident board slates. As we progressed in our review of voting by institutional investors from the top three institutional investors to the top fifty institutional investors (ranked by equity assets under management), overall support for the election of one or more dissident nominees increased from only about 29% (29.3%) to about 39% (39.3%) of the contested meetings voted, while support for the election of all dissident nominees increased from only 10% (10.2%) to about 22% (22.4%) of the contested meetings voted.

Not surprisingly, support for dissident nominees among the top fifty institutional investors decreased noticeably when the market cap of the issuer increased from under $2 billion to $2 billion or more. Apparently, the overall size of the issuer mattered.

Moreover, in the election contests studied, when ISS recommended that investors vote for one or more of the dissident nominees, Vanguard, BlackRock and State Street voted (as a group) to elect at least one dissident nominee only about 44% (44.0%) of the time, the top ten institutional investors voted (as a group) to elect at least one dissident nominee only about half (51.9%) of the time and the top fifty institutional investors voted (as a group) to elect at least one dissident nominee about 58% (57.9%) of the time. Thus, it appears that ISS voting recommendations are significant, but by no means determinative, of institutional voting in election contests, particularly when we consider that the figures above include many instances where institutional investors voted for fewer nominees than recommended by ISS.

Given how they have voted in U.S. board election contests in the five-year period ended June 2017, it appears that (as a group) mainstream institutional investors remain predisposed to support incumbent board and management teams.

Summary Voting Results

What follows is a brief review of actual voting in board election contests occurring in the U.S., during the five-year period ended June 2017, by:

- Vanguard, BlackRock and State Street, controlling, in the aggregate, more than $7 trillion in equity assets (or about 38% (38.0%)) of the equity assets controlled by the fifty largest institutional investors);

- the ten largest institutional investors (including Vanguard, BlackRock and State Street), controlling, in the aggregate, more than $12 trillion in equity assets (or about 66% (65.5%) of the equity assets controlled by the fifty largest institutional investors); and

- the fifty largest institutional investors, controlling, in the aggregate, about $19 trillion in equity assets.

Vanguard, BlackRock and State Street Have Supported Incumbent Boards Most (i.e., 70+%) of the Time

In U.S. board election contests occurring in the five-year period ended June 2017, as a group, Vanguard, BlackRock and State Street voted for the election of one or more dissident nominees only about 29% of the time (29.3%) and for the election of all dissident nominees only about 10% of the time (10.2%). These investors voted individually for the election of one or more dissident nominees anywhere from only 25% (25.0%) to 34% (34.2%) of the time and for the election of all dissident nominees anywhere from only 7% (6.7%) to 12% (12.2%) of the time.[6]

Size Matters

At companies with a market cap of $2 billion or more, again, as a group, Vanguard, BlackRock and State Street voted for the election of one or more of the dissident's nominees only about 24% of the time (24.1%) and for the election of all dissident nominees about 10% of the time (9.9%). However, at companies with a market cap of less than $2 billion, these investors were more supportive, voting for the election of one or more of the dissident's nominees about 30% of the time (30.5%) and for the election of all dissident nominees about 10% of the time (10.3%).

Control and Minority Platforms Received Similar Baseline Support, but Support for All Members of Minority Slates was More Than Double the Support Level for All Members of Controlling Slates

In control board election contests, again, as a group, Vanguard, BlackRock and State Street voted for the election of one or more of the dissident's nominees only about 28% of the time (28.1%) and for the election of all dissident nominees only about 6% of the time (6.0%). And, in minority-slate board election contests, these investors voted for the election of one or more of the dissident's nominees only about 29% of the time (29.7%) and for the election of all dissident nominees only about 12% of the time (12.3%).

The Top 10 Institutional Investors (including Vanguard, BlackRock and State Street)

In the board election contests studied, the top ten institutional investors (including Vanguard, BlackRock and State Street) were generally more supportive of dissidents than Vanguard, BlackRock and State Street considered alone, but still were not very supportive overall. In fact, as a group, the top ten institutional investors voted for the election of one or more of the dissident's nominees only about 36% of the time (36.2%) and for the election of all dissident nominees only about 20% of the time (19.6%).

At companies with a market cap of $2 billion or more, again, as a group, the top ten institutional investors voted for the election of one or more of the dissident's nominees only about 34% of the time (34.0%) and for the election of all dissident nominees only about 22% of the time (21.6%). However, at companies with a market cap of less than $2 billion, these investors voted for the election of one or more of the dissident's nominees about 39% of the time (38.5%) and for the election of all dissident nominees about 18% of the time (18.5%).

And, in control board election contests generally, as a group, the top ten institutional investors voted for the election of one or more of the dissident's nominees about 37% of the time (37.0%) and for the election of all dissident nominees about 17% of the time (16.7%), while in minority-slate board election contests generally, these investors voted for the election of one or more of the dissident's nominees about 36% of the time (36.3%) and for the election of all dissident nominees only about 21% of the time (20.9%).

The Top 50 Institutional Investors

In the board election contests studied, the top fifty institutional investors voted, as a group, for the election of one or more of the dissident's nominees about 39% of the time (39.3%) and for the election of all dissident nominees about 22% of the time (22.4%).

At companies with a market cap of $2 billion or more, again, as a group, the top fifty institutional investors voted for the election of one or more of the dissident's nominees about 36% of the time (36.3%) and for the election of all dissident nominees about 22% of the time (22.4%). However, at companies with a market cap of less than $2 billion, these investors voted for the election of one or more of the dissident's nominees about 40% of the time (40.6%) and for the election of all dissident nominees about 21% of the time (21.5%).

And, in control board election contests generally, as a group, the top fifty institutional investors voted for the election of one or more of the dissident's nominees about 39% of the time (39.4%) and for the election of all dissident nominees about 19% of the time (19.1%), while in minority-slate board election contests generally, these investors voted for the election of one or more of the dissident's nominees about 38% of the time (38.4%) and for the election of all dissident nominees about 22% of the time (22.7%).

What Accounts for the Continuing Success of Activism?

With overall support for dissident nominees among the top fifty institutional investors below 40%, many would ask: How do so many dissident nominees for election as directors get elected?

To one degree or another, the following seven factors are present in successful dissident campaigns to elect board slates: (1) a substantive business platform advanced by the dissident, highlighting what are perceived to be realistic opportunities for appreciation in share value not previously proposed or supported by the incumbent board and management team; (2) significant to substantial dissident share ownership; (3) substantial hedge fund ownership; (4) relatively insignificant retail ownership; (5) endorsements of the dissident's nominee(s) by ISS and/or Glass Lewis; (6) corporate governance shortcomings on the part of the issuer and, importantly, (7) *significant* institutional support (though not a majority of the shares voted by institutional investors) for the slate. Shortfalls in any one of these seven factors can be offset by surpluses in one or more of the remaining six, but experience demonstrates that an activist needs at least a few of these factors working in its favor to elect one or more directors in opposition to an incumbent board.

For example, most activists proposing new directors purport to have a business plan for the issuer, including the promise of share price appreciation in the foreseeable future. And, most activists begin a contested board election with significant to substantial share ownership. Finally, many activist campaigns are supported by substantial hedge fund ownership, where the hedge funds vote almost uniformly for the activist nominees. When combined with significant support from institutional investors (albeit, less than a majority of the shares voted by institutional investors), these three factors often are enough to result in a victory at the polls, particularly when the activist slate is endorsed, in whole or in part, by ISS and/or Glass Lewis, when the retail ownership of the issuer is insignificant (or, at least, not substantial) and when the issuer has suffered from a variety of corporate governance deficiencies.

Earlier this year, Hedge Fund Research, Inc. reported that assets under management by hedge funds exceeded $3 trillion at year-end 2017, up from about $500 billion in 2000.[7] Activist hedge funds control only a fraction of this amount, but it is not unusual to see many hedge funds invested in a single issuer or industry and it takes only one hedge fund activist to lead the charge at any one company.

While individual hedge funds claim unique and complex investment strategies, hedge funds as a group are fundamentally opportunistic investors. As a result, they often converge on companies that have faltered or industries in transition. Because crowding happens, normally passive hedge funds frequently find themselves invested alongside funds whose investment strategies include activism. Correspondingly, activists are likely to find fast allies among hedge funds already invested in the stock of a target company. This convergence of interests and investments has led to concerns about the potential for "wolf packs" of like-minded (or single-purpose) investors intent upon putting the issuer into play.[8] [9]

Thus, hedge funds have fostered shareholder activism by providing a ready base of support for activist investors, lending credibility and momentum to activist campaigns. In fact, the emergence of the hedge fund investor class has coincided with increased shareholder activism and fuels the continuing success of activism as we know it.

Without this built-in support base provided by hedge funds generally, activists would be largely dependent upon mainstream institutional investors for leverage at public companies. But, unlike their hedge fund cousins, the largest mainstream institutional investors generally do not vote as recommended by activists, as indicated by the voting results reported above. We conclude that the single most important factor supporting activism is not mainstream institutional support for the cause, but growth in equity ownership by hedge funds, supplemented by at least some support from mainstream institutional investors (albeit, substantially less than a majority of the votes cast by institutional investors).

Implications for Incumbent Board and Management Teams

Separate and apart from the debate over competing platforms of board and dissident nominees for election as director, the share ownership profile of the issuer determines its overall vulnerability to an activist campaign. But share ownership profiles differ from one issuer to the next.

The share ownership profiles of some issuers make them easy targets for an activist agenda (e.g., insignificant ownership by directors, officers and employees, together with insignificant ownership by retail investors, substantial hedge fund ownership and substantial ownership by institutional investors with a demonstrated propensity to vote for the election of activist nominees), while the share ownership profiles of other issuers present what may be insurmountable challenges for an activist (e.g., substantial ownership by directors, officers and employees, together with substantial ownership by retail investors, insignificant hedge fund ownership and substantial ownership by institutional investors with a demonstrated propensity to vote for the election of nominees proposed by the incumbent board). And, as you might expect, the share ownership profile of most issuers presents some combination of the two extremes described above – not exactly an "easy target" for activists, but not invulnerable either.

For these reasons, among others, every issuer should know its own share ownership profile – specifically, how many shares are controlled by: officers, directors and employees (including shares controlled by employee plans); retail investors; institutional investors (including the mix of active and passive – or indexed – ownership, as well as the mix of investment strategies employed among the actively managed funds); hedge funds; and, if applicable, known activist investors. In addition, issuers should know the demonstrated voting preferences of their institutional owners (or, at least, the demonstrated voting preferences of their top fifty or top one hundred institutional investors), including the extent to which these investors have adhered to the voting recommendations of ISS and Glass Lewis, based on actual voting and not merely conjecture or hearsay.

In the 83 board election contests studied in this article, notwithstanding the overall institutional voting tallies recited above, actual support for the election of dissident nominees varied widely from one institutional investor to the next, ranging from 0% to 100% of the votes cast, with some institutional investors adhering rigidly to the voting recommendations of ISS or Glass Lewis and others voting largely for activist nominees at companies with a market cap of less than $2 billion and largely for board nominees at companies with a market cap of $2 billion or more. Knowing each investor's demonstrated propensity to support the election of dissident nominees, as well as each investor's demonstrated propensity to vote as recommended by (or contrary to the recommendations of) ISS and Glass Lewis, enhances the accuracy of the vote projection models that can be used in the strategic planning stages of an issuer's response to an actual or threatened proxy contest, and ensures the efficient allocation of board and management resources in a contested election.

For example, when planning an investor meeting program in response to an actual or threatened proxy contest, it makes sense to assign priority to those institutional investors who are most likely to support the incumbent board based upon historical voting on the same or similar issues. And, if ISS and/or Glass Lewis has or have recommended against the incumbent board, it makes sense to adapt to that setback by assigning priority to institutional subscribers who have demonstrated the greatest propensity to vote contrary to the recommendations of ISS or, as the case may be, Glass Lewis.

In situations where performance and/or governance has been less than optimal when compared to peers or the broader market and in situations where the issuer already has been approached by an activist, the issuer's need to know its own share ownership profile is paramount, including knowledge of its institutional investors' demonstrated voting preferences. But the benefits of knowing who owns the issuer and the voting preferences of the issuer's institutional investors are not limited to the activist arena.

A detailed understanding of the issuer's share ownership profile will enhance the issuer's ability to cope with a wide range of challenges (e.g., problematic shareholder proposals) and act on the opportunities presented (e.g., improved engagement with institutional investors). Given the demonstrated predisposition of institutional investors to support incumbent board and management teams, issuers are well advised to nurture this asset by establishing reliable communications with their institutional investors to promote greater understanding and cooperation and to increase investor support for the incumbent board and management team long before a crisis arises.

Depending on their needs, our clients subscribe to periodic share ownership profiles, supplemented by detailed accountings of institutional voting in relevant board election contests, as well as on a wide range of shareholder-sponsored and board-sponsored proposals, including precise measurement of institutional adherence to the voting recommendations of ISS and Glass Lewis. When appropriate, these reports are supplemented by vote simulations based on prior institutional voting on the same or similar issues. Our findings, conclusions and recommendations are highlighted in board presentations and usually are incorporated into the issuer's ongoing investor relations efforts, including enhanced engagement with key investors.

If you would like to learn more about our services, including the advanced analytical tools available for use in assessing institutional investor voting preferences, please contact us. Inquiries are welcome and held in strict confidence.

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[1] Brancato, Carolyn Kay 1990. The Pivotal Role of Institutional Investors in Capital Markets: A Summary of Economic Research at the Columbia Institutional Investor Project. New York: Columbia Institutional Investor Project, Center for Law and Economic Studies, Columbia University School of Law. Also see, Brancato, Carolyn Kay 1991. Institutional Investors and Capital Markets: 1991 Update. New York: Columbia Institutional Investor Project, Center for Law and Economic Studies, Columbia University School of Law.

[2] Many were concerned that these changes would make it easier for dissident shareholders (today's "activists") to elect directors. Concerns along these lines were heightened by a subsequent modification to the bona fide nominee rule, leading to the many short-slate contests preferred by activists. The modification (popularly known as the "Short-Slate Rule") allows a dissident who nominates a short slate (which, if elected, would constitute a minority of the board) to simultaneously seek authority to vote for nominees named in the board's proxy statement, assuring institutional investors, among others, that, if they sign and submit a dissident proxy card, their shares will be voted for a full board slate, rather than just the dissident's minority slate.

[3]In October of 2016, the SEC proposed to require the use of universal proxy cards in the election of directors. As proposed, the universal proxy cards would include the names of all nominees (i.e., all board-sponsored nominees and all dissident-sponsored nominees) for election to the board of directors. If adopted, the proposed change effectively would replace the Short-Slate Rule described above.

Opinions regarding the effects of a universal proxy card vary, but the authors believe that, if adopted, this change would make it easier for a dissident to elect a single director, while increasing the difficulties encountered in electing more than one director, primarily because, when institutional investors vote for the election of one or more dissident nominees, they often vote for fewer than all of the dissident's nominees. There is every reason to expect that this trend will continue. In the opinion of the authors, the proposed rule would make it easier for institutional investors that are inclined to support one or more, but fewer than all, dissident nominees to do just that, especially in contested elections for board control.

[4] The SEC requires registered management investment companies, other than small business investment companies registered on Form N-5, to file a report, known as a Form N-PX, with the SEC, not later than August 31 of each year, containing the registrant's proxy voting record for the most recent twelve-month period ended June 30, pursuant to section 30 of the Investment Company Act of 1940 and rule 30b1-4 thereunder (17 CFR 270.30b1-4). Mutual funds were required to file their first Form N-PX not later than August 31, 2004.

[5] In this study, we reviewed institutional voting in U.S. board election contests in the five-year period ended June 2017, as reported in the Form N-PX filings by institutional investors reporting on votes cast over the relevant time period, including the Form N-PX filings reporting on votes cast in the twelve-month period ended June 30, 2017, which were filed with the SEC by August 31, 2017.

A total of 83 proxy contests that went to a vote were studied, including 28 controlling-slate contests and 55 minority-slate contests. Issuers were further subdivided into companies with a market cap of less than $2 billion and companies with a market cap of $2 billion or more at the time that the board election contest occurred. Reported institutional voting was compared to the ISS voting recommendations in each of the board election contest studied to ascertain the degree to which each of the institutional investors adhered to the ISS voting recommendations.

We know that institutional ownership of corporate equity generally is concentrated. For example, of the thousands of institutional investors submitting quarterly Form 13F filings to the SEC, the top fifty institutional investors control, in the aggregate, about $19 trillion of corporate equity. We also know that institutional ownership of corporate equity is even more concentrated among the largest institutional investors. For example, the top ten institutional investors control, in the aggregate, over $12 trillion of corporate equity and the top three institutional investors control, in the aggregate, over $7 trillion of corporate equity). For these reasons, among others, in assessing overall institutional support for the election of activist nominees, we weight the known voting by the top fifty institutional investors (ranked by equity assets under management) by the equity assets under management at each of those investors.

The alternative would be to weight the known voting by each of the institutional investors studied equally by reporting average voting results based only on headcounts. However, with institutional ownership of corporate equity concentrated among a relatively small number of institutional investors, a tally of average voting results may distort perceptions of overall voting by institutional investors in board election contests because it would equate the voting preferences of an institutional investor like Vanguard (with about $3 trillion in equity assets under management) to the voting preferences of institutional investors like Neuberger Berman Investment Advisers LLC, HSBC Global Asset Management (UK) Ltd. and PNC Bank, NA (Investment Management), each with less than $100 billion in equity assets under management. In effect, average voting results for institutional investors skew the overall voting totals toward the demonstrated voting preferences of smaller institutional investors, which tend to rely more than the larger institutional investors on the voting recommendations of proxy advisory firms like ISS and/or Glass Lewis, including many institutional investors that are too small to maintain their own proxy decision making apparatus and that have subcontracted their proxy decision making to third parties like ISS and Glass Lewis.

If the institutional investor voting preferences described herein were tallied on an average basis, we would be reporting that, in the board election contests studied, as a group: Vanguard, BlackRock and State Street voted for the election of one or more dissident nominees about 29% (28.6%) of the time (versus 29% of the time (29.3%), as tallied above, among these three investors); the top ten institutional investors (including Vanguard, BlackRock and State Street) voted for the election of one or more of the dissident's nominees about 40% (39.8%) of the time (versus 36% of the time (36.2%), as tallied above); and the top fifty institutional investors voted for the election of one or more of the dissident's nominees about 44% (44.0%) of the time (versus 39% of the time (39.3%), as tallied above). If we expanded this study from the top fifty institutional investors (ranked by equity assets under management) to the top one hundred, two hundred, four hundred, eight hundred or sixteen hundred institutional investors (again, ranked by equity assets under management), the authors believe that the distortions illustrated in the preceding sentence, would increase, most likely overstating the extent to which institutional investors generally support the election of dissident nominees for election as director and the extent to which institutional investors generally follow the voting recommendations of ISS by increasingly wide margins.

The top fifty institutional investors, measured by equity assets under management, were identified with data provided by FactSet Research Systems Inc., 601 Merritt 7, 3rd Floor, Norwalk, CT 06851, website: www.factset.com.

The content of Forms N-PX filed with the SEC by the institutional investors studied was obtained from Proxy Insight, 1350 Avenue of the Americas, Floor 3, New York, NY 10019, website: www.proxyinsight.com,

[6] In all U.S. board election contests occurring in the five-year period ended June 2017, Vanguard voted for the election of one or more dissident nominees only about 27% of the time (26.5%) and for the election of all dissident nominees only about 10% of the time (9.6%), while BlackRock voted for the election of one or more dissident nominees only about 34% of the time (34.2%) and for the election of all dissident nominees only about 12% of the time (12.1%) and State Street voted for the election of one or more dissident nominees only about 25% of the time (25.0%) and for the election of all dissident nominees only about 7% of the time (6.7%).

[7] Hedge Fund Research, Inc. Also see Hedge Fund Research, Inc., *Investor Inflows Accelerate as Hedge Fund Capital Eclipses Milestone, Highest inflows since 2Q15 drive assets to record $3.2 trillion*, January 19, 2018.

[8] Researchers at Northeastern University and the University of North Carolina recently demonstrated that activism targets were six to eight times more likely to receive a takeover bid relative to issuers in which the same activist

hedge funds had passive ownership stakes. (Nicole M. Boyson, Nickolay Gantchev and Anil Shivdasani, *Activism Mergers*, November 2015.) And, in 2009, Robin M. Greenwood of the Harvard Business School and Michael Schor of Morgan Stanley observed that activism measurably increases the likelihood that an undervalued target is ultimately taken over and that, from the perspective of value creation, activists are most successful at creating value when they can effect a change in control of the issuer. (Michael Schor and Robin M. Greenwood, *Investor Activism and Takeovers,* 2009.) If activists are most successful at creating value when they can effect a change in control of the issuer and assuming that activists seek to maximize value, some may argue that most shareholder activism is, ultimately, merger activism, which overlaps with an important segment of the hedge fund industry, including many event-driven funds.

[9] A variant of merger activism dubbed "deal activism" demonstrates just how transaction-focused hedge funds can be. With deal activism, it is the announcement of a transaction that precipitates the activism. Hedge funds pile into the stock of the company being acquired and sometimes into the stock of the acquirer. Their goals range from pressuring the acquirer to raise its offer to scuttling the deal and shopping one or both of the parties to the proposed merger. One of the more dramatic examples of this was seen some years ago, when U.S. mining giant Phelps Dodge bid for Canadian miners Inco Limited and Falconbridge Ltd. Owning 9.97% of Phelps Dodge, Atticus Capital led other hedge fund investors in quashing Phelp's ambitions for both Inco and Falconbridge and independently shopped Phelps, leading to its acquisition by Freeport McMoran.

About Harkins Kovler, LLC

Founded by industry veterans, Harkins Kovler is an independent consulting and proxy solicitation firm specializing in shareholder activism, M&A transactions and proxy contests for board representation and control. Our experience includes many of the most complex and contentious M&A transactions and proxy contests occurring in the U.S. and Europe over the past thirty years.

We provide clients and their advisors with the diagnostics required for accurate assessments of the risks posed by shareholder activism and for the proper planning of investor outreach programs to marshal requisite levels of shareholder support in proxy contests, M&A transactions and other voting matters.

Our strategic advice flows directly from our own due diligence regarding share ownership, including projections of likely voting by shareholders based on, among other things, extensive prior experience in numerous similar campaigns, coupled with comprehensive data regarding the votes cast by institutional investors in proxy contests, on shareholder proposals and other voting matters. Our analyses illustrate the overall nature and scope of the challenges posed, while highlighting alternative paths to optimal outcomes based on likelihood of success.

We also develop, implement and coordinate comprehensive and multifaceted investor outreach programs to maximize shareholder support in proxy contests, M&A transactions and other voting matters. Our campaigns are matched carefully to the individual needs of our clients, and we routinely assist clients and their advisors with timely adaptations to company-specific, industry and market developments and trends, including (importantly) ongoing and anticipated changes in share ownership.

Our services include: Shareholder Activism Consulting; Share Ownership Profiles and Trading Analyses; Vote Projections and Institutional Voting Analyses; Proxy/Consent Solicitations; Corporate Governance and Executive Compensation Consulting; Information Agent Services in Tender/Exchange Offers; Tender/Exchange Offer Response Services; and Litigation Support.

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