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HART-SCOTT-RODINO ACT

ACTIVISM IN NUMBERS

THE EDITOR'S VIEW

ACTIVISM MONTHLY *Lite*

Activist Insight

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Editor's letter

Josh Black, Activist Insight

US markets are a bit more crowded, but there is still room for activism to grow. That is the key message from the 2015 Shareholder Activism Study, a survey carried out by Activist Insight and FTI Consulting this summer. While a rising number of respondents believe it is harder to find undervalued targets given the surge in activist activity, more than eight in ten will be taking advantage of the dramatically improved fundraising climate to bolster their assets in the next year.

Where will all this capital go? Much of it will stay in the US, where economic growth is strongest and an interest rate rise has been delayed. After all, a majority of activists still sees that market as the one most predisposed to activism. Many of the activists I've spoken to about this data are either bullish on the US or loathe to admit that they are short of opportunities. Another answer suggested by the survey is that Europe and Canada may see a revival of activists testing the waters—a suggestion borne out by our data on where activists are making demands.

The last month or so also suggests a returning enthusiasm for M&A activism, which was one of the stand-out predictions from last year's survey. Several companies targeted by activists over an extended period are now seeking private equity partners, although as yet there is no repeat of the PetSmart campaign, which JANA Partners pushed into becoming the largest leveraged buyout of 2014.

> "Rather than simply bulking up their main funds, the largest activists are using co-investment vehicles to lock in current clients"

Platform companies are all the rage too, from Pershing Square Capital Management's affiliation with Martin Franklin down to Lone Star Value Management at ATRM Holdings. In our Campaign in Focus, Sandell Asset Management is pushing Viavi Solutions to either sell itself or transform itself into a platform company to take advantage of large net operating losses.

Elsewhere, I interview one of the most cerebral activists, Eric Knight of Knight Vinke. Although worried about the state of the markets right now, Knight is currently launching an exciting new fund and talked to us about the sectors where he sees the most opportunities in Europe today.

On the short-side, we dive into Cheniere, the liquefied natural gas exporter backed by Carl Icahn and scorned by Jim Chanos. Icahn has the dubious honor, according to Activist Insight data, of having more activist short campaigns at companies where he is a shareholder than any other activist investor. Rarely has such a successful investor faced so many questions about his ability to pick a winner. Cheniere is a situation that owes more to your view of the commodities market and your legal advice on those take or pay contracts, than of activism, but I suspect the arguments will run and run, not least because it will be years before the company starts to turn a profit.

It hardly seems a year ago, but we are not going to let Darden Restaurant's first annual meeting since Starboard Value replaced the company's entire twelve-person board pass without comment. Much was made of the campaign, the outcome of which was unprecedented, but whether it changed activism is a more complex question.

As you are downloading this issue of Activism Monthly, I'll be traveling through North America—stopping in Toronto, Chicago and New York. If you'd like to meet up, please feel free to drop me a line at the address below. Thanks, as ever, for reading. ■

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Activist Insight

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Activist Insight

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Activist Insight

Early warning system

An often-ignored reporting requirement for activists enters the spotlight, raising talk of reform.

The advance notice activists must give of their intention to buy stakes in public companies became a talking point in August, following a settlement between America's Federal Trade Commission (FTC) and hedge fund operator Third Point Partners over the latter's 2011 investment in Yahoo. With activism a rising priority in the nation's ongoing conversation about "quarterly capitalism," some are speculating that the Hart-Scott-Rodino Act (HSR) is due an upgrade.

Under the current HSR rules, investors wishing to buy more than $75 million worth of stock in a public company and intending to intervene in its affairs must give notice to the FTC and wait 30 days before proceeding with their purchases, or opt to notify the company itself, long before it would be obliged to file a Schedule 13D. A fee ranging from $45,000 to $280,000 also applies.

Critics of the rule argue the "investment only" exception for notifying the FTC was initially meant to apply only to hostile takeovers that could require review by the Justice Department for reducing competition. The law is "unduly burdensome" in its current form, says Andrew Freedman, a Partner at law firm Olshan Frome Wolosky, which advises activists. "It wasn't meant to ensnare these activists who seek to improve the governance and operations [of their targets]," he says, especially given the range of activities that exceed the "investment only" exception to the obligation to file (see text box). Even activities that would qualify as a passive (i.e. Schedule 13G) investment under Securities and Exchange Commission rules are included, he points out.

The system could well face an upgrade, if the authors of a client memo from law firm Troutman Sanders are correct. They argue the FTC could be considering an exemption for activists, since two members of the FTC's five-person panel dissented from the decision to pursue the enforcement action, arguing instead that the rules could "chill shareholder advocacy" by increasing uncertainty.

As a result, the authors suggest there may have been insufficient votes to impose a monetary penalty, a common feature of such actions. Other investors stung by the FTC for similar offences—including ValueAct Capital Partners and Warren Buffett—have typically paid a financial penalty.

Like many lawyers working for activists, the Troutman Sanders team suggest a blanket exemption for holdings under 10% of a stock (others would like to see the threshold at 20%), or where the investor is merely exploring options that would be less likely to cause a "competitive concern" to the target company. An early termination to the penalties applied to Third Point, which mandate the investor to observe the rules closely for five years, was included in the agreement, in case the rule is reformed before the expiry of that term.

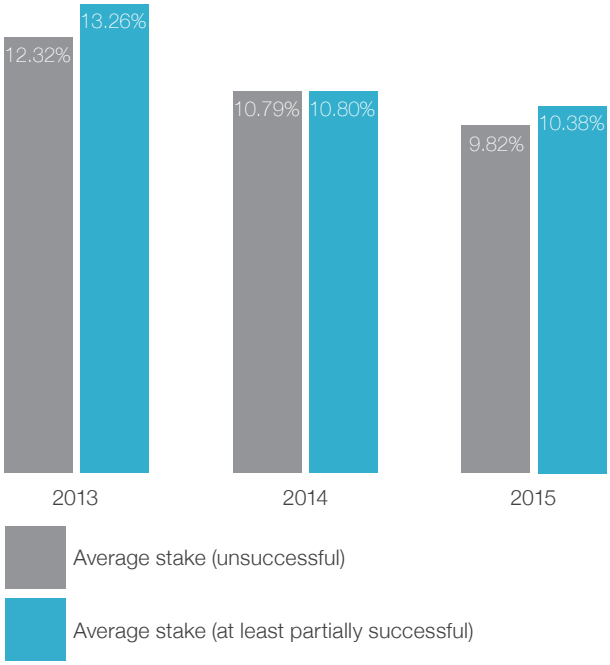
One prominent defense firm doesn't see it that way, however. After the judgement was released, a memo went out from Wachtell, Lipton, Rosen & Katz applauding the FTC enforcement. "Protecting investors and ensuring the integrity and fairness of US public securities markets depend on the rule of law, and would be enhanced not only by all acquirors properly complying with the HSR rules, but also by modernizing the beneficial ownership reporting rules under the federal securities laws, as we have long advocated," the memo said. Even reformers admit that corporate America is likely to lobby hard against any change in the rules. Giving up their early warning system may be a step too far. ■

Actions likely to breach "investment only" criteria for HSR exemption

- Nominating a candidate for the board of directors of the issuer
- Proposing corporate action requiring shareholder approval
- Soliciting proxies with respect to such issuer
- Having a representative serve as an officer or director of the issuer
- Being a competitor of the issuer
- Doing any of the above activities with regard to an entity controlled by the issuer
- Asking third parties about interest in being a candidate for the board or CEO of the issuer, and not abandoning such efforts
- Communicating with the issuer about potential candidates for the board or CEO of the issuer, and not abandoning such efforts
- Assembling a list of possible candidates for the board of directors of the issuer, if done with the knowledge of the CEO

Source: FTC

Activism in numbers



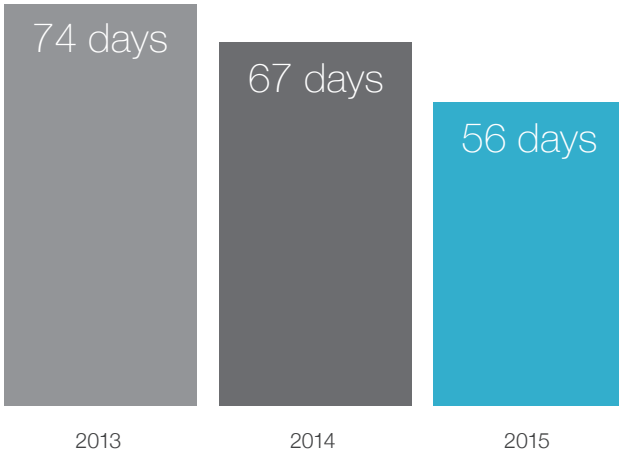
Source: Activist Insight Online

Size matters (but not much)

Activists with larger stakes tend to be more successful when demanding board seats. But the gap has narrowed since 2013, and was barely visible last year. Note: stake taken at date campaign initiated.

Settlements come quicker

On the other hand, it takes less time for activists to win boards seats now than it once did, with the average time between an investor announcing its intention to seek board representation and a settlement falling from 71 to 56 days.



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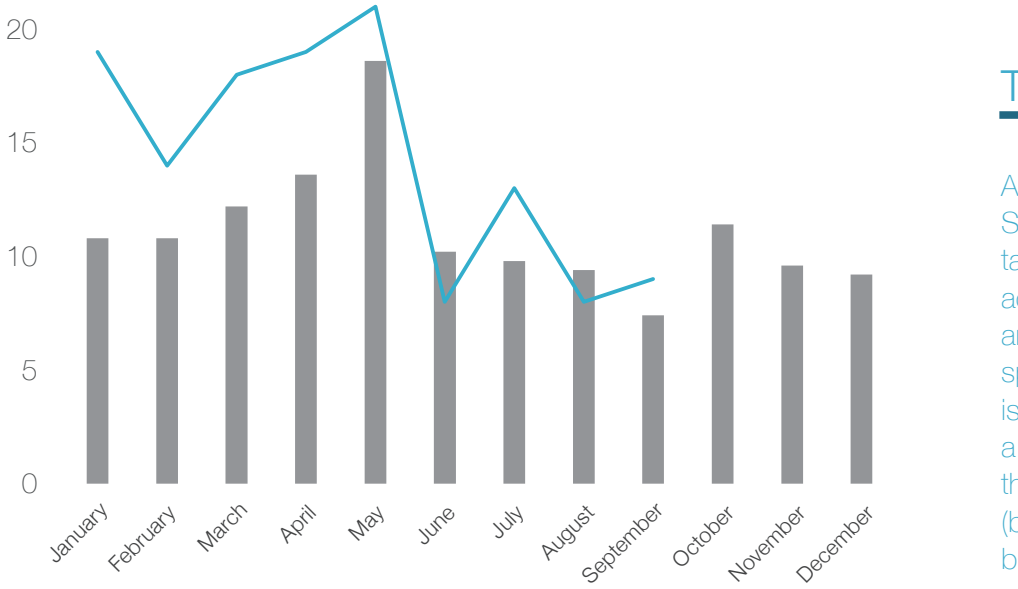

Source: Activist Insight Online

The best is yet to come

Activist Insight data suggest that September sees fewer companies targeted by activists who use activism as a primary strategy than any other month, but there is a big spike in October, making the next issue of Activism Monthly Premium a must-read. 2015 has seen more than average companies targeted (based on 2010-2014 data) in all but two months.