



## McMillan National Seminar

Shareholder Activism is on the Rise —  
What you need to know

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# Overview

- Forms of Activism
- Trends
- Objectives of Activists and Responses
- Advance Notice By-laws
- Key Takeaways
  - Be Prepared
  - Communication with Shareholders is critical
  - Protect your assets
  - Litigation is a strong possibility and must be taken into account

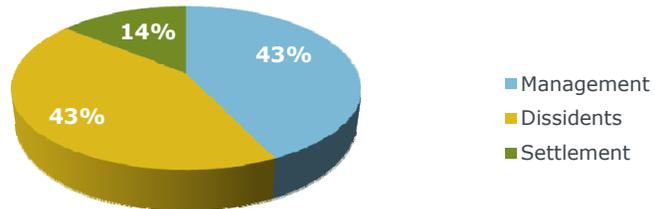
# Forms of Activism

- Private pressure for change
- Public pressure, including shareholder proposals
- Litigation
- Proxy fights

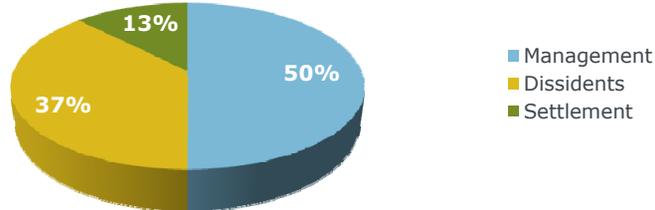
# Trends

## Proxy Fight Statistics

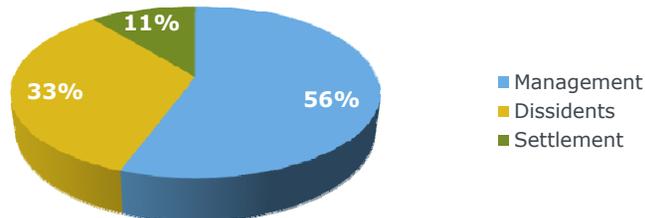
2012 PROXY FIGHT OUTCOMES



2011 PROXY FIGHT OUTCOMES



2010 PROXY FIGHT OUTCOMES

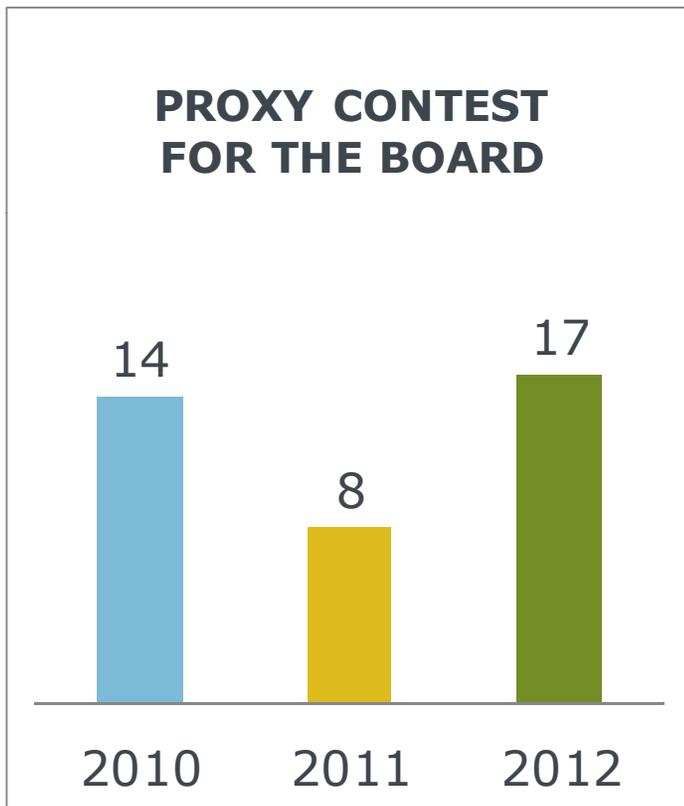


- Increase in shareholder activism
- Statistics indicate dissidents are prevailing and more settlements

*Information provided by CST Phoenix Advisors*

# Trends (cont'd)

## Proxy Contests 2012



- Contests on the rise
- Dissidents are more sophisticated and proving successful

*Information provided by CST Phoenix Advisors*

# Trends (cont'd)

## Shareholder Proposals

**2008** – 178 proposals filed

**2009** – 98 proposals filed

**2010** – 49 proposals filed

**2011** – 72 proposals filed

**2012** – 79 proposals filed

- 11 filers
- Filed to 25 Canadian corporations
- 12 proposals withdrawn

SHAREHOLDER PROPOSAL	NUMBER FILED IN 2012
Compensation	36
Governance/Best Practices	20
Board Independence	4
Board Diversity	5
Say-on-Pay	4
Social	4
Environmental	6

*Information provided by CST Phoenix Advisors*

# Trends (cont'd)

## Regulatory Initiatives

- Majority voting policies
- Notice and access
- Regulation of proxy advisory firms
- New regulations on shareholder rights plan

## Recent Jurisprudence

- Advance notice by-laws/policies: *Mundoro Capital* and *Maudore Minerals* decisions
- Telephone voting: *Mosquito* decision
- Empty voting: *Telus* decisions

# Objectives of Activists & Responses

## Objectives

- Change: corporate strategy or management
- It's about money

## Responses

- **Yes**
  - Accept dissident proposal in some form
- **No**
  - Seek to defeat dissident — includes pre-emptive steps
- **Maybe**
  - Negotiate; bide time; fight now and prepare for settlement

# Advance Notice By-laws

- Purpose of an advance notice by-law, as prepared by McMillan, is to provide advance notice to issuers and their shareholders in circumstances where nominations of persons for election to the board of directors of the issuer are made by shareholders (usually at the meeting called to elect directors), other than pursuant to a requisition of a meeting or a shareholder proposal



# Advance Notice By-laws (cont'd)

- Applies to only 2 of the 4 methods available to shareholders to nominate directors at a meeting of shareholders:
  - shareholders' requisition
  - shareholder proposal
  - proxy fight
  - nominations at a meeting



# Advance Notice By-laws (cont'd)

- Not intended to discourage nominations:
  - ensures that all shareholders – including those participating in a meeting by proxy rather than in person – receive adequate notice of nominations
  - allows shareholders to register an informed vote
  - facilitates an orderly and efficient process
  - prevents an “ambush”



## Advance Notice By-laws (cont'd)

- “Commonplace” in the United States
- Endorsed by ISS and Glass Lewis
- We have been genuinely surprised by the rapid rate of adoption of advance notice by-laws over the past year and humbled by the fact that the form of advance notice provisions adopted by Canadian public companies have been based on the form adopted by our clients commencing in October 2011



## Advance Notice By-laws (cont'd)

- Consistent with ISS guidelines, which “support additional efforts by companies to ensure full disclosure of a dissident shareholder’s economic and voting position in the company so long as the informational requirements are reasonable and aimed at providing shareholders with the necessary information to review any proposed director nominees”, we have introduced an enhanced by-law for the 2013 proxy season.



# Advance Notice By-laws (cont'd)

- Our enhanced by-law:
  - provides that all nominees (including management solicited nominees) are required to deliver to the issuer an agreement to abide by all applicable policies of the issuer.
  - requires disclosure of all shares indirectly owned by each nominee and the shareholder making the nomination, including convertible securities and shares owned through derivatives.
  - requires the nominating shareholder to include a statement as to whether each nominee would be “independent” of the issuer (within the meaning of applicable securities laws).



# Key Takeaways

## Be prepared

- First rule — it is never a total surprise
- Communicate with shareholders
- Follow best practices in corporate governance
- Be alert to signs of problems
- Establish a proxy fight team
- Implement an advance notice by-law



## Key Takeaways (cont'd)

### Communication with shareholders is critical

- Important that management monitors shareholders' concerns and activities
- Ongoing and proactive communications with shareholders – particularly institutional shareholders – is critical; investor relations function is important
- In the context of a proxy fight: need a consistent and easily understood story – this is a campaign for votes



# Key Takeaways (cont'd)

## Protect your assets

- In the course of a protracted, personal and hostile fight management may lose sight of the fact that if they win it is important to have something left that was worth fighting over
- Secure key employees
- Pay attention to other key stakeholders



## Key Takeaways (cont'd)

Litigation is a strong possibility and must be taken into account

- Sword or shield
- The facts are critical in any litigation and therefore it is important to appear to be reasonable
- Act as if everything done will be publicly disclosed
- Many legal decisions in this field are not widely reported