

# *M&A in 2012: Proxy Contests*

**Tuesday, October 9, 2012**  
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*M&A in 2012*





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## *Administrative Information*

- ❖ Today's program will be conducted in a listen-only mode. To ask an online question at any time throughout the program, simply click on the question mark icon. We will try to answer your question during the session if time permits.
- ❖ Everything we say today is opinion. We are not dispensing legal advice, and listening does not establish an attorney-client relationship. This discussion is off the record. Anything we say cannot be quoted without our prior express written permission.



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## *Agenda*

- ❖ Basic information about proxy contests
- ❖ Alternate types of proxy contests
- ❖ General trends
- ❖ Steps involved in a proxy contest and applicable laws
- ❖ Fiduciary duties of directors
- ❖ ISS' views in analyzing and making voting recommendations
- ❖ Proactive planning steps for the company
- ❖ Key considerations for winning a proxy contest
- ❖ Closing remarks





*What is a proxy contest and why does it occur?*

- ❖ A campaign waged by one or more persons to solicit votes in opposition to an existing set of directors or Board
- ❖ Proxy contests are adversarial and hotly contested
- ❖ Usually arise in either (i) an M&A context or (ii) with an activist or dissident shareholder
- ❖ In an M&A context, can be preceded or accompanied by other hostile actions, such as “bear hug letters” and tender offers

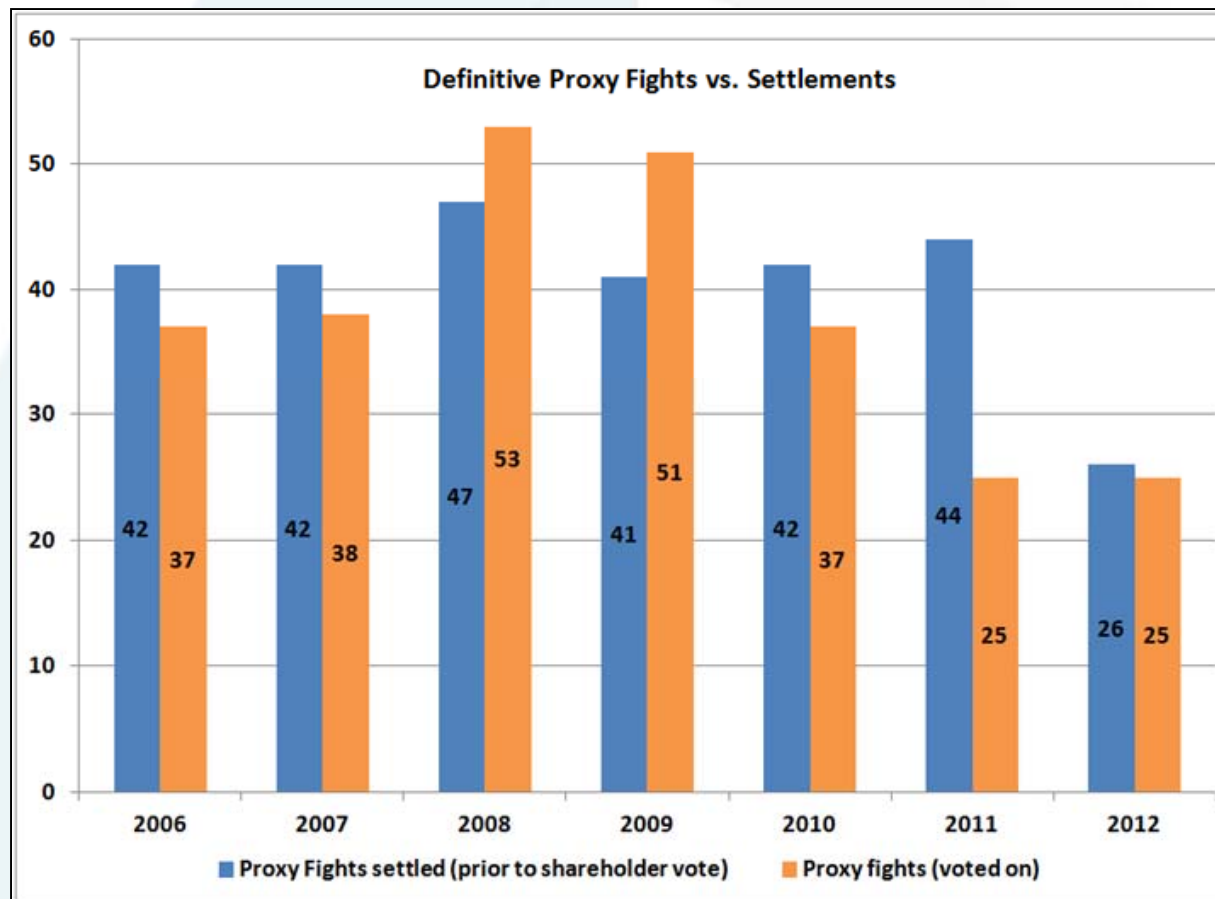


*What is a proxy contest and why does it occur?  
(continued)*

- strategy and action plan are often dictated by specific facts (e.g., rationale for the acquisition, financial position and risk tolerance of the acquirer, any prior discussions, existing takeover defenses, and shareholder composition)
- tender offers require \$
- activist or dissident shareholder scenarios tend to occur in underperforming companies

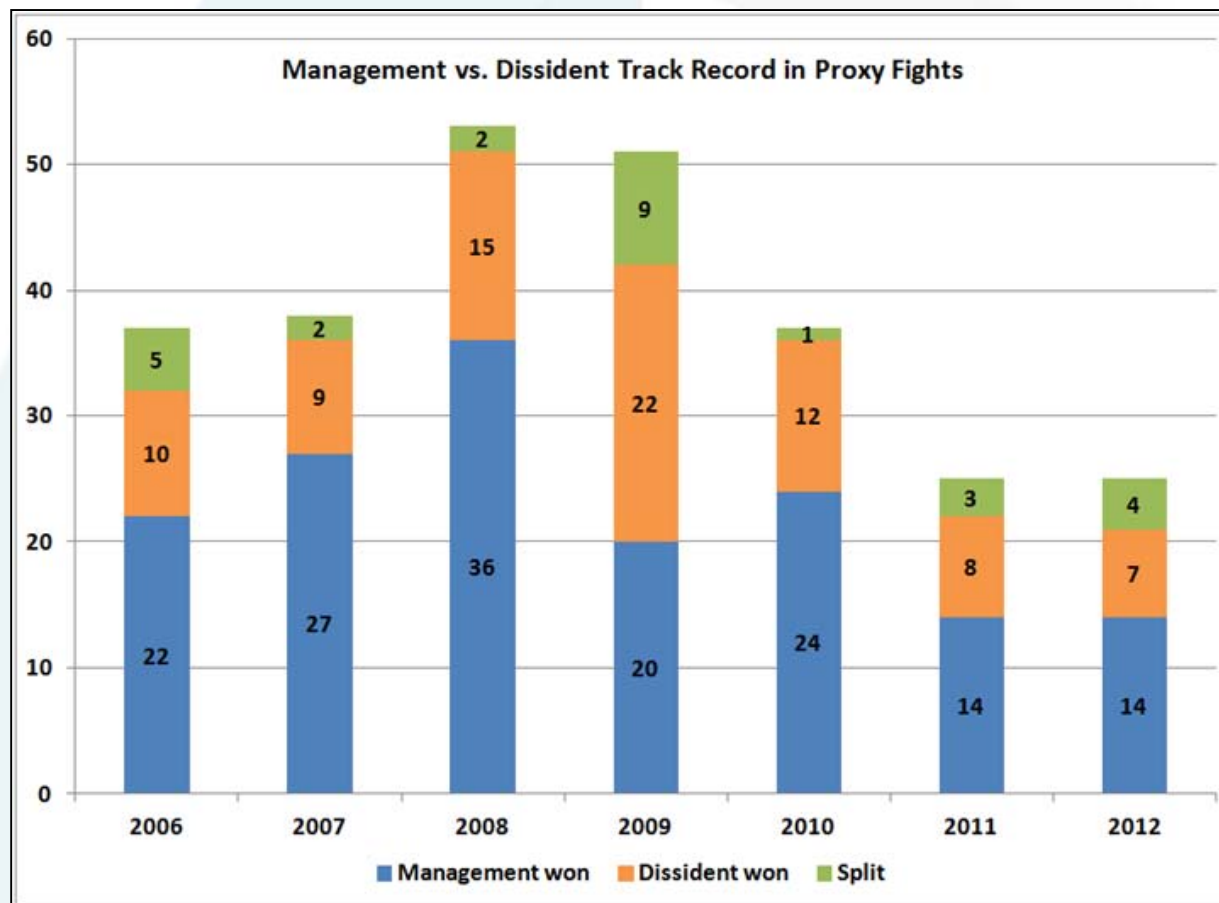


## *A significant portion of potential proxy fights are settled*



Source: FactSet Shark Repellent. Data as of 3 October 2012

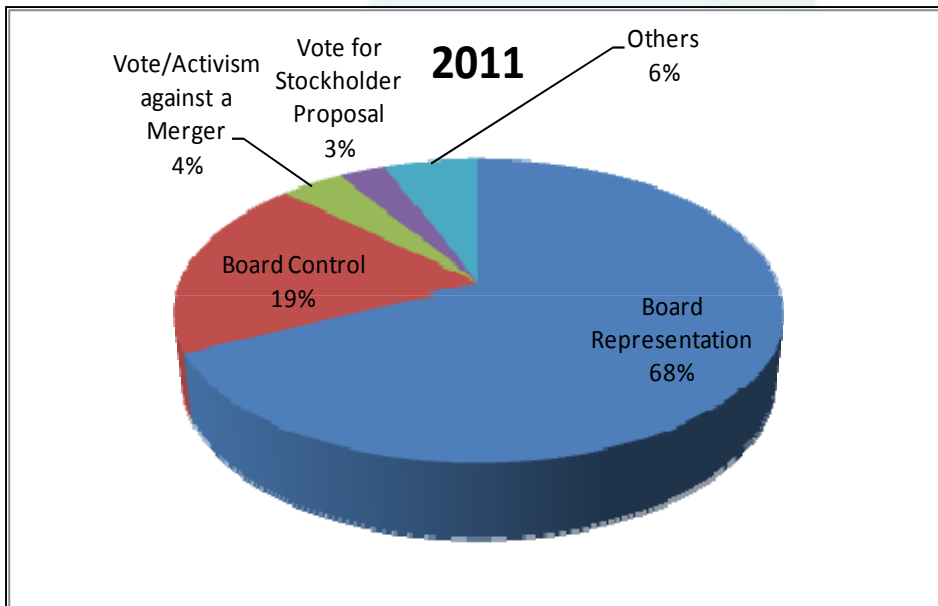
*Overall, management has a high success rate in proxy fights*



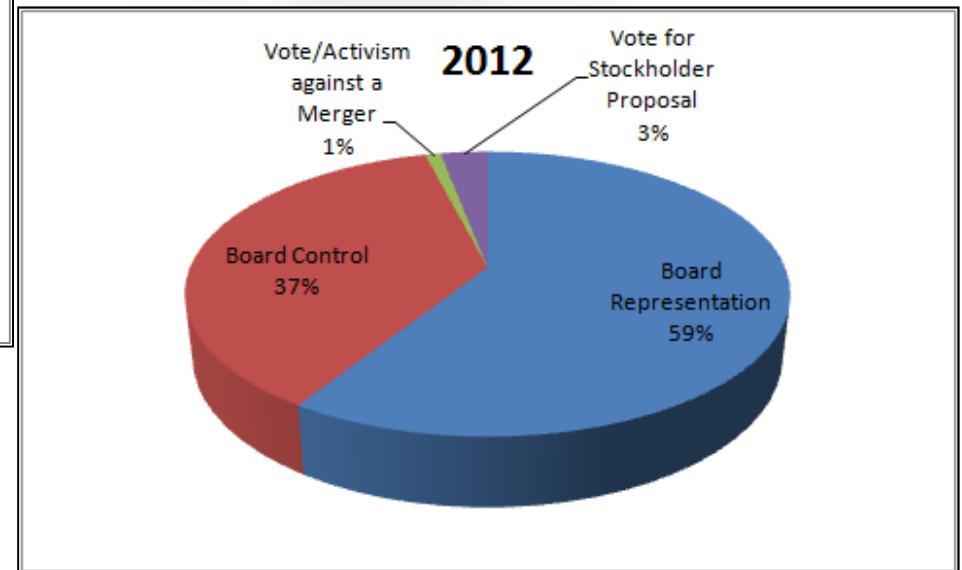
Source: FactSet Shark Repellent. Data as of 3 October 2012



# Activists typically seek minority representation



Source: FactSet Shark Repellent. Data as of 3 October 2012



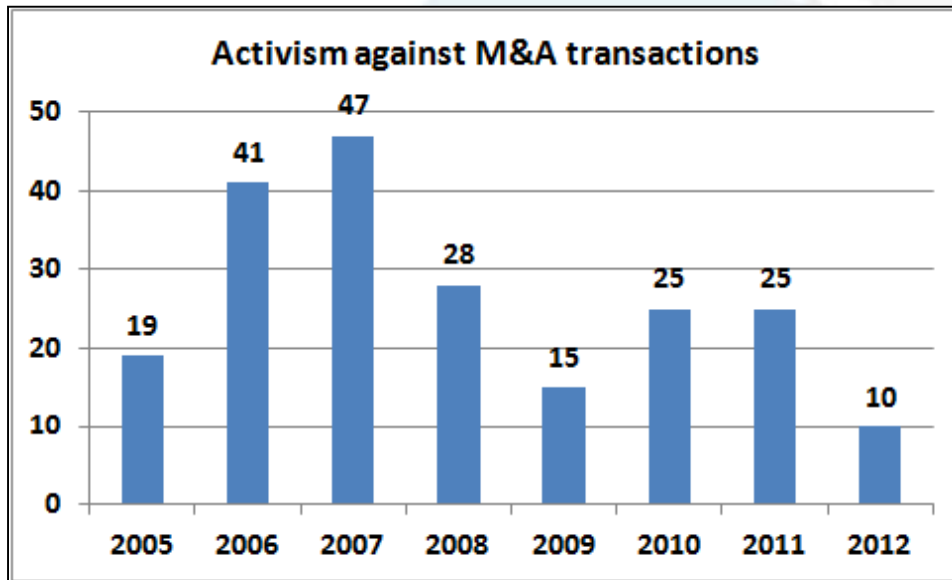


## *Types of Proxy Contests*

- ❖ **Minority Representation**
  - Target, Office Depot, Mentor Graphics, Forest Labs
- ❖ **Majority Representation**
  - Asure Networks, LCA Vision
- ❖ **M&A driven**
  - Airgas/Air Products; IPC Holdings/Validus, Casey's/Couche-Tard
- ❖ **Written Consents (for board seats)**
  - Zoran, Vitacost, Adaptec
- ❖ **Written Consents (merger related)**
  - Cephalon/Valeant Pharmaceuticals, Dynegy/Seneca + Icahn, Emulex/Broadcom, Anheuser/InBev
- ❖ **Vote no campaign + exempt solicitation**



# M&A Activism



Source: FactSet Shark Repellent. Data as of 3 October 2012





## *Contested M&A Transactions*

### ❖ Strategic Acquirors

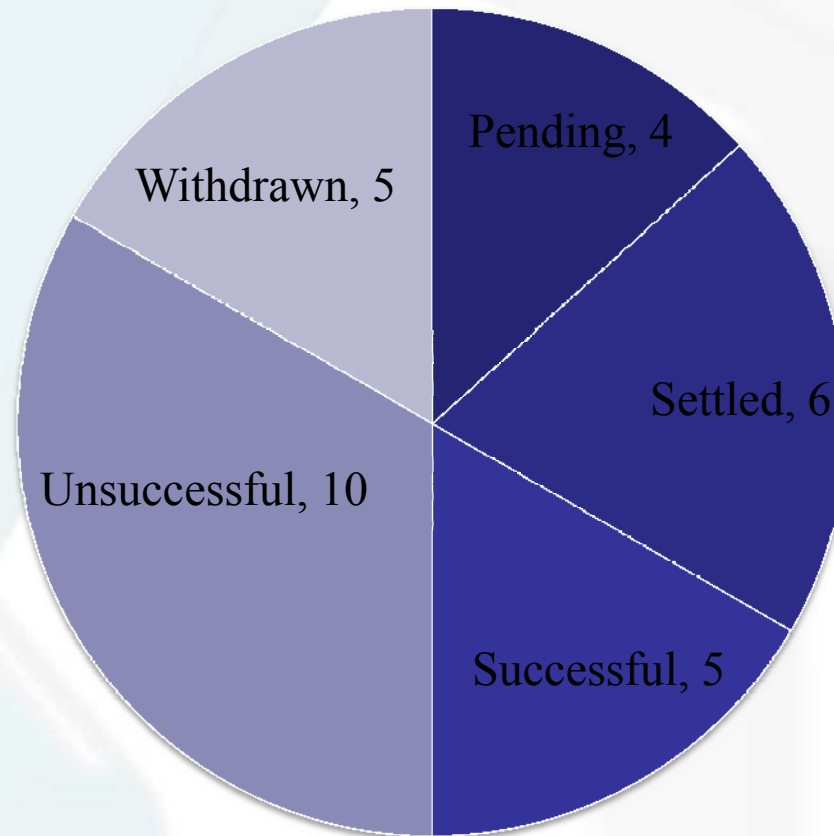
- Airgas/Air Products; IPC Holdings/Validus, Casey's/Couche-Tard
- Transatlantic Holdings/Validus
- Vulcan Materials/Martin Marietta
- Dollar Thrifty/Hertz & Avis
- CF/Agrium/Terra Industries

### ❖ Opposition to deal announcement by hedge funds

- Alpha Natural Resources/Foundation Coal – Duquesne Capital
- Charles River/Wuxi – Jana Partners
- Cedar Fair going private – Q Funding
- Dynegy going private– Seneca Capital and Icahn



*Many proxy contests are settled or withdrawn – 2012 year to date*



Source: Capital IQ. Data as of 4 October 2012



## *Steps in proxy contests vary*

- ❖ Different types of proxy contests may invoke different bylaw provisions, state corporate laws and federal securities laws
  - Annual meeting
  - Special meeting
  - Written consent of shareholders
- ❖ Different state corporate laws (Delaware, others) apply to different companies
- ❖ Company bylaw provisions vary (staggered board, advance notice)
- ❖ Tender offer in tandem with proxy contest
- ❖ Sophistication and resourcefulness of dissidents



## *Proxy Contest Defense Team*

- ❖ Senior executives
- ❖ Directors and management's director nominees
- ❖ Investor relations department/firm
- ❖ Legal counsel
- ❖ Public relations firm
- ❖ Proxy advisory firm/proxy solicitor
- ❖ Investment bankers

## *Federal securities laws govern “proxy solicitations”*

- ❖ Exchange Act Section 14(a) and Regulation 14A regulate “proxy solicitations”
- ❖ Section 14(a) empowers the SEC to regulate proxy solicitations from holders of the following securities:
  - Equity securities traded on a national securities exchange (NYSE, NASDAQ)
  - Widely held (500+ holders) equity securities of Section 12(g) issuers
- ❖ Foreign private issuers are not subject to U.S. proxy solicitation rules—home country rules apply



## *Proxies and Proxy Solicitations*

- ❖ “Proxy” refers to a document in which one person authorizes another to act on his behalf (i.e., shareholders often authorize company officers to cast votes using a proxy card)
- ❖ “Proxy solicitation” broadly includes communications that:
  - Request a proxy
  - Request execution or non-execution of a proxy or revocation of a proxy
  - Are “reasonably calculated” to result in the procurement, withholding or revocation of a proxy



## *“Proxy solicitation” triggers SEC requirements*

- ❖ File communications with the SEC
- ❖ File a proxy statement with the SEC that meets the SEC’s disclosure requirements
- ❖ Anti-fraud rules apply (Rule 14a-9)
- ❖ SEC timetables apply





## *“Proxy solicitation” exemptions*

### Rule 14a-1 exemptions include:

- ❖ A communication by a security holder who does not otherwise engage in a proxy solicitation...stating how the security holder intends to vote and the reasons therefor, provided that the communication:
  - is made by means of speeches in public forums, press releases, published or broadcast opinions, statements, or advertisements appearing in a broadcast media, or newspaper, magazine or other bona fide publication disseminated on a regular basis,
  - is directed to persons to whom the security holder owes a fiduciary duty in connection with the voting of securities of a registrant held by the security holder, or
  - is made in response to unsolicited requests for additional information with respect to a prior communication by the security holder

### Rule 14a-2 exemptions (anti-fraud rules under Rule 14a-9 apply) include:

- ❖ Solicitations of not more than 10 people (issuer not eligible for this exemption)
- ❖ Proxy voting advice furnished by an investment advisor
- ❖ Certain solicitations that do not seek proxy authorization or furnish a form of authorization (issuer not eligible for this exemption)



## *SEC filings at or before a proxy solicitation for a contested election*

- ❖ The issuer and the dissident must file separate proxy statements and forms of proxies with the SEC at the time of or before the solicitation occurs.
- ❖ Proxy materials must be filed publicly on the SEC's EDGAR system.
- ❖ An election contest is a “non-routine” matter.
- ❖ Preliminary proxy statement and form of proxy must be filed at least 10 calendar days before the distribution of definitive materials.
  - The preliminary materials must be clearly marked as such and indicate when they are intended for release.
  - SEC will be able to review and provide comments.
  - If issuer or the dissident files revised materials that are fundamentally different than those originally filed, a new 10-day period would commence.
- ❖ Definitive proxy statement must be filed upon first use.
- ❖ Other soliciting materials such as “fight letters” setting forth proxy contest campaign messages must also be filed upon first use (if on a non-business day, must file on the following business day)—no SEC preclearance.



## *Proxy Statement Content (Schedule 14A)*

- ❖ Provide information regarding proxy contest participants, including director nominees, soliciting group members and parties financing the solicitation
- ❖ Provide standard proxy statement information for annual meeting involving director election, such as:
  - Information regarding directors and officers
  - Information about board of directors committees
  - Information concerning director independence
  - To be accompanied by an Annual Report to Shareholders
- ❖ May contain proxy contest voting recommendation but generally will not include proxy contest campaign rhetoric, which will appear in “fight letters” filed separately



## *Proxy Card Requirements*

- ❖ Must identify person on whose behalf the solicitation is made
- ❖ Impartially identify each matter to be acted upon (no “fight” messages)
- ❖ Blank space for the date of the proxy
- ❖ For director election, means to withhold authority to vote for each nominee, and means to vote for or against (if permitted under state law) each nominee
- ❖ Person conducting solicitation must provide the shareholder a definitive proxy statement before or concurrently with furnishing a proxy card



## *Distribution of Materials*

- ❖ Upon written request by a shareholder, the company must, at its option:
  - Mail the shareholder's proxy materials; or
  - Furnish a shareholder list to enable the shareholder to complete the mailing.
- ❖ If company elects to mail materials for the shareholder, it must use a reasonably prompt method of distribution.
- ❖ Shareholder must reimburse the company's reasonable distribution expenses.



# Illustrative Proxy Contest Chronology

(Adapted from Practical Law Company "What's Market" summary and Capital IQ "Campaign Details" overview)

- ❖ Target company: Forest Laboratories, Inc.
- ❖ Dissident shareholder: Carl Icahn and affiliates
- ❖ *May 30: Carl Icahn and his affiliates, already 10% shareholders, file a Schedule 13D amendment, stating their intention to launch a proxy contest to elect a slate of directors to Forest Laboratories' 10-member board at its annual meeting and identifying one planned director nominee. Icahn had undertaken a proxy contest in 2011 as well.*
- ❖ May 30: Forest issues a press release acknowledging Icahn's filing.
- ❖ May 31: Forest sends a letter to employees addressing Icahn's filing.
- ❖ *June 18: Icahn demands to inspect Forest's books and records under Section 220 of the Delaware General Corporation Law.*
- ❖ June 19: Icahn nominates four directors to Forest's board.
- ❖ June 28: Forest files its preliminary proxy statement, with a recommendation against Icahn's nominees and in favor of its own.



## *Illustrative Proxy Contest Chronology (continued)*

- ❖ June 29: Icahn sends a fight letter to Forest's **board**.
- ❖ June 29: Forest's board responds to Icahn's fight letter.
- ❖ July 2: Icahn sends another fight letter to Forest's board.
- ❖ July 2: Forest's board responds to Icahn's second fight letter.
- ❖ July 3: Icahn files his preliminary proxy statement, nominating four directors and including *a shareholder proposal to repeal provisions of Forest's bylaws that are not in the best interest of stockholders*.
- ❖ July 9: Forest files its definitive proxy statement.
- ❖ July 12: Icahn sends letter to Forest's **independent (external) directors**.
- ❖ July 12: Forest's independent directors reply to Icahn's letter.
- ❖ July 16: Icahn sends a fight letter to Forest's **shareholders**.
- ❖ July 17: Forest responds to Icahn's letter to shareholders.
- ❖ July 23: Icahn files his definitive proxy statement.

## *Illustrative Proxy Contest Chronology (continued)*

- ❖ June 30: Icahn announces that *an independent proxy voting advisory firm, Egan Jones Proxy Services*, has recommended that stockholders vote for his director nominees.
- ❖ August 1: Icahn announces that *Institutional Shareholder Services (ISS)*, a proxy advisory firm with many institutional investor clients, recommended that stockholders vote for two Icahn director nominees.
- ❖ August 2: Forest announces that *Glass Lewis*, a proxy advisory firm, vote in favor of Forest's director nominees.
- ❖ August 15: Forest's annual meeting occurs. One Icahn director nominee is elected to the Board; nine Forest director nominees are elected.
- ❖ August 27: Forest's board adopts a poison pill in response to Icahn's purchases of stock.

## *Fiduciary Duties of Directors in Proxy Contests*

- ❖ Fiduciary duties of a Board in the context of hostile activity is complex
- ❖ Fact driven analysis, which can include:
  - Board deliberation undertaken and ultimate action
  - when and why actions taken
  - proactive or reactive
  - Shareholder composition
  - impact of the Board action
- ❖ Fiduciary duties of a Board are determined at state level
- ❖ Basic duty of care and duty of loyalty, plus overlay
  - Directors' decisions are generally respected, provided certain conditions are met – business judgment rule
- ❖ Directors must be fully informed before deciding how to respond to a hostile action

## *Fiduciary Duties of Directors in Proxy Contests (continued)*

- ❖ *Unocal* – directors have a “fundamental duty and obligation to protect the corporate enterprise, which includes its stockholders, from harm reasonably perceived, irrespective of its source”
  - Subsequent cases are mixed as to the fiduciary duty to protect stockholders
  - Prudent to consider adoption of defensive measures
- ❖ *Unocal* (cont.) – Apply “enhanced scrutiny” standard when defensive measures are adopted in anticipation of, or in response to, a takeover attempt. Two prong test:
  - reasonable grounds exist to believe there is a danger to corporate policies and effectiveness; and
  - the defensive actions were reasonable in relation to the threat posed.
    - ❖ Courts generally apply a low standard to satisfy first prong of test

## *Fiduciary Duties of Directors in Proxy Contests (continued)*

- ❖ Focus on the anticipated impact of a defensive measure on shareholder voting
  - scrutinize actions that limit right to remove directors
  - higher “compelling justification” standard when the purpose is to thwart a shareholder vote or disenfranchise shareholders
- ❖ Is the defensive measure preclusive by “making it unrealistic for an insurgent to win a proxy contest”
- ❖ Highest “entirely fair” standard applies with interested directors
  - Fairness of both the transaction’s price and the approval process

## *Fiduciary Duties of Directors in Proxy Contests (continued)*

- ❖ Multitude of tests and interpretations make it advisable to assemble a qualified team
- ❖ Some broad principles:
  - reluctance by courts to substitute their business judgment for that of the directors
  - shareholder disenfranchisement is disfavored
  - importance of timing in adopting defensive measures
  - conflicts of interest lead to greater review
  - defensive maneuvers should be measured, in the face of hostile activity
  - follow a good process





## *ISS Framework – Proxy Contests*

- ❖ ISS proxy contest framework for board representation:
  - Prong 1: Have the dissidents met the burden of proving that board change is warranted? And, if so;
  - Prong 2: Will the dissident nominees be more likely to affect positive change (i.e., increase shareholder value) versus the incumbent nominees?
  
- ❖ For majority board representation
  - the dissidents is required to provide a well-reasoned and detailed business plan (including the dissidents' strategic initiatives), a transition plan that describes how the change in control of the company will be effected, and if applicable, identify a qualified and credible new management team



## *ISS Framework – Proxy Contests*

- ❖ For minority board representation
  - the dissident is required to prove that board change is preferable to the status quo; &
  - the dissident director slate will add value to board deliberations including by, among other factors, considering issues from a different viewpoint than the current board members



## *ISS Framework – M&A Proxy Contests*

- ❖ In M&A related proxy contests, ISS focuses on the following:
  - Did the acquirer make a reasonable offer?
  - How did the target board respond to acquirer's offer?
  - Does the target have anti-takeover mechanisms in place?
  - What options do target shareholders have to realize value for themselves?
  - Are acquirer nominees conflicted?
  - Would acquirer nominees likely maximize value for target shareholders?



## *ISS Framework – Contested M&A Transactions*

- ❖ In contested M&A transaction, ISS focuses on the following:
  - Economics of and market response to the offer;
  - The governance and strength of the sales process;
  - The strategic reasons for the merger; and
  - The relative attractiveness of the available alternatives.
  
- “In the context of one or more competing bids, ISS will look in particular at the desirability of the agreed transaction relative to the other bids, mindful that competing bids must demonstrate not only more favorable economic terms, but also a reasonable certainty target shareholders can realize that value, or a higher value, if they take the risk of voting down the deal in hand.”



## *Proactive planning steps*

- ❖ Monitor stockholder base (Schedule 13D/G filings)
- ❖ Check the company's charter and bylaws
  - Advance notice requirements
  - Information requirements for director nominations
  - Imposition of director qualifications
  - Proxy access bylaws
- ❖ Candid assessment of the company in shareholder activist hot button areas:
  - Share price and financial performance
  - Corporate governance—adoption of best practices
  - Enhancing shareholder value through M&A or changes in operations



## *Winning a proxy contest*

- ❖ Get to know your shareholders
- ❖ Establish relationships with both portfolio managers and proxy voting teams
- ❖ Engage with the activist investor
- ❖ Focus on key issues. Don't try to shoot the messenger instead of focusing on the message.
- ❖ Perform Activist Risk Assessment to identify potential vulnerabilities that an activist investor can exploit in a contested situation

## *Closing remarks*

- ❖ The perfect storm





*Questions? Please contact us.*



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# Biographies

## **Waheed Hassan, CFA – Managing Partner Alliance Advisors, LLC, Bloomfield, NJ**

Waheed Hassan advises clients on corporate governance issues, M&A transactions, proxy contests, and other contested solicitations.

Prior to joining Alliance, Waheed managed the M&A/Proxy Contest research team at Institutional Shareholder Services ("ISS") - a division of MSCI Inc. At ISS, he provided advisory vote recommendations on 100+ contested M&A transactions and proxy contests. Waheed was involved in several high profile proxy fights (Target, Barnes & Noble, NRG Energy, Office Depot), and merger transactions (IPC Holdings/Validus, Xerox/ACS, First Energy/Allegheny Energy).

Previously, Waheed worked as a Senior Research analyst with Indosuez W.I. Carr Securities, UBS Warburg, and Khadim Ali Shah Bukhari (an affiliate of Merrill Lynch).

Waheed is a CFA charter holder and received an MBA with Beta Gamma Sigma honors from Vanderbilt University.

## **Sheldon G. Nussbaum, Partner Fulbright & Jaworski L.L.P., New York, NY**

Sheldon Nussbaum is a partner in the international law firm of Fulbright & Jaworski L.L.P., where he chairs the corporate, banking and business department in the firm's New York office.

Sheldon has over 30 years of experience representing public and private corporations, venture capital and private equity funds, non-profit institutions and large family-owned businesses in their transactional and everyday legal needs, including special expertise in mergers and acquisitions, corporate governance, and public and private financing activities. Sheldon regularly advises public company Boards and various of their standing and special committees, on M&A, governance and other corporate and securities matters, as well as on compliance issues raised by the Sarbanes-Oxley and Dodd-Frank Acts.

With a reputation of being a "business lawyer", Sheldon utilizes a practical, business-driven approach, combined with technical expertise, in advising clients and negotiating transactions.

Mr. Nussbaum was a Harold W. Harper Memorial Scholar to Columbia College, where he graduated after three years with highest honors, and a graduate of Harvard Law School.

## **Manny Rivera, Senior Counsel Fulbright & Jaworski L.L.P., New York, NY**

Manny Rivera has over 15 years of experience as a New York-based corporate and securities lawyer.

His practice focuses on advising middle-market companies in domestic and cross-border mergers and acquisitions, particularly in the technology, retail and energy sectors, and on representing U.S. and non-U.S. issuers in public offerings and private placements of equity, debt and convertible securities, including IPOs, PIPEs, registered directs, at-the-market equity offering programs, Rule 144A offerings, tender offers and exchange offers.

In addition, Manny has guided several dozen U.S. public companies and foreign private issuers in complying with federal securities law periodic reporting requirements, Section 16 rules for corporate insiders, and new regulations including the JOBS Act, the Dodd-Frank Act and the Sarbanes-Oxley Act. He also counsels public companies regarding NYSE and NASDAQ listing and corporate governance standards, as well as ISS and institutional investor proxy voting policies.

Manny is an active member of the Society of Corporate Secretaries & Governance Professionals and the ABA's Mergers & Acquisitions Committee, and was selected as an American Bar Foundation Fellow in 2011. He is a graduate of Yale University and Harvard Law School.



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