

FRIDAY MONDAY TUESDAY WEDNESDAY **TODAY**

SEARCH/BACK to search results

Bookmark Reprints

This is the property of the Daily Journal Corporation and fully protected by copyright. It is made available only to Daily Journal subscribers for personal or collaborative purposes and may not be distributed, reproduced, modified, stored or transferred without written permission. Please click "Reprint" to order presentation-ready copies to distribute to clients or use in commercial marketing materials or for permission to post on a website.

Wednesday, January 9, 2013

## Shareholder activism on the rise

*Once largely a concern of mid-cap companies, activists are increasingly putting pressure on big corporations.*

By David Ruiz

Last month during a conference presentation in Manhattan, billionaire investor Bill Ackman held forth for three hours about problems he sees with Herbalife International of America Inc., a nutritional and weight-loss supplement manufacturer. Ultimately, he called it a "pyramid scheme" in explaining why his hedge fund was shorting shares in the company - perhaps \$1 billion worth, according to some media accounts.

That week, Herbalife stock plunged 38 percent.

Leveraging months of research and the power of the media, Ackman demonstrated how powerful shareholder activism has become in recent years. That's why corporate lawyers are advising their clients that if they're not yet prepared to be challenged by their largest investors, they had better gear up.

**'If you wake up Monday morning and an activist investor or a hedge fund has taken position in the company ... and you haven't prepared in advance, you're well behind the curve.'**

- James R. Griffin

An activist shareholder uses the size of its equity stake in a company to pressure the management or board to accomplish a goal. Its motives might be to increase shareholder value through cost-cutting, for example, or to force a policy change such as the adoption of environmentally friendly practices. The pressure can come through publicity, or by forcing an issue to go to a shareholder vote.

Shareholder activism once was a challenge faced largely by mid-cap companies, but lawyers say multibillion-dollar corporations are now equally the targets as shareholders such as hedge funds and private equity funds grow in size and number.

The number of activist campaigns over the past two years has increased nearly twofold, according to FactSet's corporate activism database SharkWatch. The count rose from fewer than 70 campaigns in August 2010 to more than 120 in August 2012. Activity peaked in April 2012 at more than 130 campaigns.

Weil, Gotshal & Manges LLP partner James R. Griffin said the increase parallels the growth in activism-focused investment funds, such as Pershing Square Capital Management, the hedge fund where Ackman is CEO.

"Shareholder activism continues to be a focus of the hedge funds or opportunistic investors looking for situations to generate short-term returns," Griffin said. He said the trend began a few years before the financial crisis when several funds became successful activists with short-term buys.

Palo Alto-based Sheppard, Mullin, Richter & Hampton LLP corporate partner Louis Lehot said he's seen the number of activist funds rise as investors watch others profit

Questions and Comments

Deserve Victory!

-Winston Churchill



**THEODORA ORINGER**  
COUNSELORS AT LAW

Los Angeles Office  
10880 Wilshire Blvd., Suite 1700  
Los Angeles, CA 90024-4101  
310.557.2009

Orange County Office  
535 Anton Blvd., Ninth Floor  
Costa Mesa, CA 92626-7109  
714.549.6200

tocounsel.com

**MICHAEL G. GERNER**

A PROFESSIONAL LAW CORPORATION

- 30+ YEARS EXPERIENCE
- STATE BAR OF CALIFORNIA
- FORMER ASST. CHIEF TRIAL COUNSEL

### STATE BAR DEFENSE

- Attorney Discipline ■ Admissions
- Reinstatements ■ Ethics Consultations
- Conviction Referrals

MGG Ethics

310-556-1300  
mggethics@msn.com

### NON-JUDICIAL FORECLOSURES

Free Attorney to Attorney Consultation

**WITKIN & EISINGER, LLC**

Your Trust Deed Foreclosure Specialists



Richard G. Witkin  
Attorney at Law

We continue to specialize in the non-judicial foreclosure of obligations secured by real property or real and personal property (mixed collateral)

When your client needs a foreclosure done professionally and at the lowest possible cost, give Witkin & Eisinger a call.

NATIONWIDE TOLL-FREE 800-950-6522

from the behavior and perceive the risks to be lower.

Lehot said that as funds proliferate, the larger ones have to focus on big companies to remain profitable.

More profit, more funds. More funds, more activism.

Griffin also said the common shareholder seems to be more receptive to activist publicity - as with the Ackman presentation - and that the recommendations of Institutional Shareholder Services Inc., a research firm that issues pro-shareholder corporate governance guidelines, have gained influence.

Burlingame-based Cotchett, Pitre & McCarthy LLP partner Jordanna G. Thigpen, a shareholder rights lawyer, attributed the increased activism to greater awareness amongst shareholders of corporate governance and its failings, likening the trend to a "populist movement."

"I think there's been a lot of high-profile activity and a lot of mismanagement on the part of hiring executives," Thigpen said. She said she feels that has always been the case, but that there's been a greater "spotlight" on the activity since the 2008 financial crisis.

One thing is clear, corporate lawyers say. Companies have to be prepared for this kind of behavior and understand their options for responding to it.

One method, a classified board, permits only about a third of a board to come up for election in a given year. Griffin said this prevents stockholders from uprooting an entire executive team at once, a tactic sometimes used by activist shareholders to oust a board it disagrees with.

But the practice of classifying a board is controversial.

Thigpen argued that some companies have boards that need to go.

"A lot of these boards are incestuous," Thigpen said. "There are particular people serving on multiple boards, and those people make a career of it."

She said that while many boards have extremely qualified individuals, some executives have "lost touch with the reality of what it means to work for the people."

According to Institutional Shareholder Services's 2012 "Board Practices" study, two-thirds of the companies on the Standard & Poor's 500 index had declassified boards, up from a decade ago, when less than 40 percent had declassified board terms.

Another method for responding to activism prevents shareholders from raising certain business matters at scheduled meetings unless the shareholder has notified the board by a specified date prior to the meeting. These constraints, known as advanced notice bylaw provisions, restrict unexpected elections or nominations.

Lehot said he considers the strongest defense against activism to be having a poison pill ready and a classified board. A poison pill is a response to an individual shareholder's proposed hostile takeover that devalues every shareholder's stock without devaluing the potential bidder's, making a purchase far more expensive.

"It's the most effective one-two punch for boards to fight activists," Lehot said.

Griffin said the best defense against shareholder activism is having a well-performing company that actively listens to its shareholders and consistently prepares for the future. A company in its annual review should discuss governance structure, forward strategy, shareholder outreach and how long its shareholders have been with the company, he said.

"If you wake up Monday morning and an activist investor or a hedge fund has taken a position in the company ... and you haven't prepared in advance, you're well behind the curve," Griffin said. By preparing now, he said, the company will be ready to respond with a well-documented story of the company's activity.

With large companies increasingly under activist scrutiny, Thigpen said she is especially worried about the inevitable push-back from companies. She said forum selection clauses, which require certain shareholder litigation to be handled in a specific state's jurisdiction, are particularly dangerous to shareholders because they enable corporate directors to choose where to settle lawsuits that shareholders bring against them on the company's behalf.

"We just have to be vigilant," Thigpen said.

[david\\_ruiz@dailyjournal.com](mailto:david_ruiz@dailyjournal.com)

[HOME](#) : [MOBILE SITE](#) : [CLASSIFIEDS](#) : [EXPERTS/SERVICES](#) : [MCLE](#) : [DIRECTORIES](#) : [SEARCH](#) : [LOGOUT](#)