

Vinson & Elkins

STRATEGIC ACTIVISM DEFENSE



**When a Proxy Contest Is The Only  
Way to Preserve Long-Term Value**

NACD Texas TriCities Houston, November 3, 2017

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*Sydney Isaacs, Managing Director, Abernathy MacGregor*

*Robert Schweitzer, Director, Blink Charging, PetMeds and OmniComm*

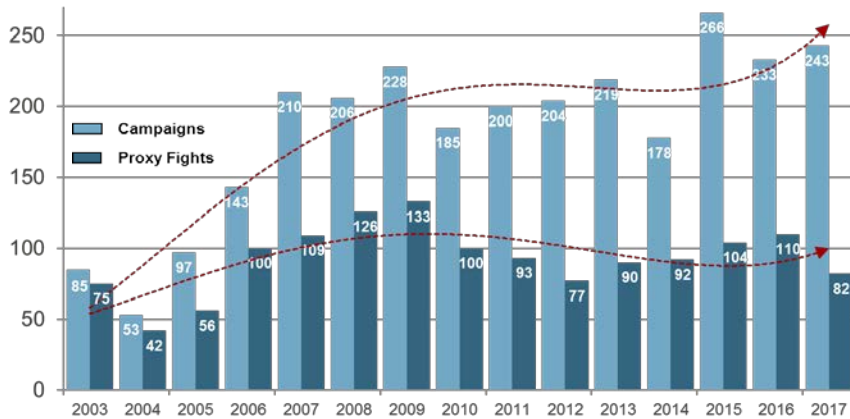
*Joe Zirkman, Former General Counsel, Fiesta Restaurant Group*



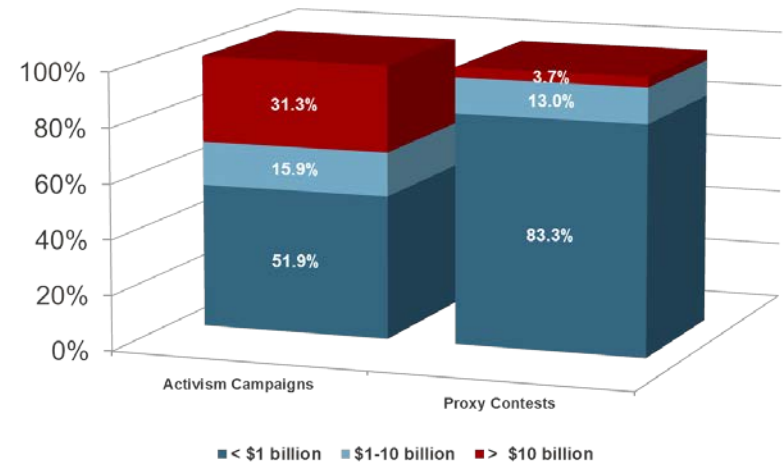
# THE CURRENT ACTIVISM LANDSCAPE

## Recent Data (as of November 1, 2017)

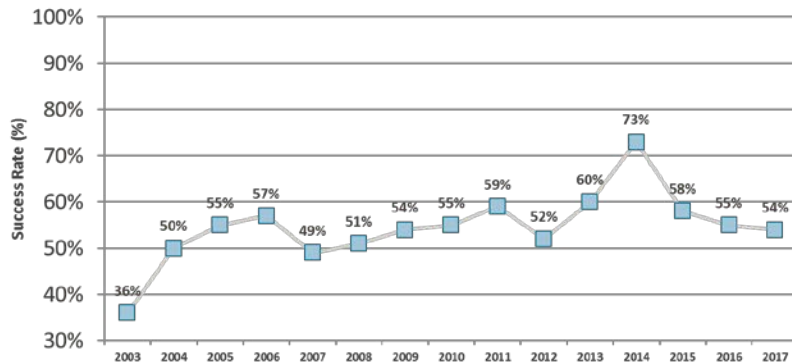
Number of Campaigns and Proxy Contests 2003- 2017 YTD



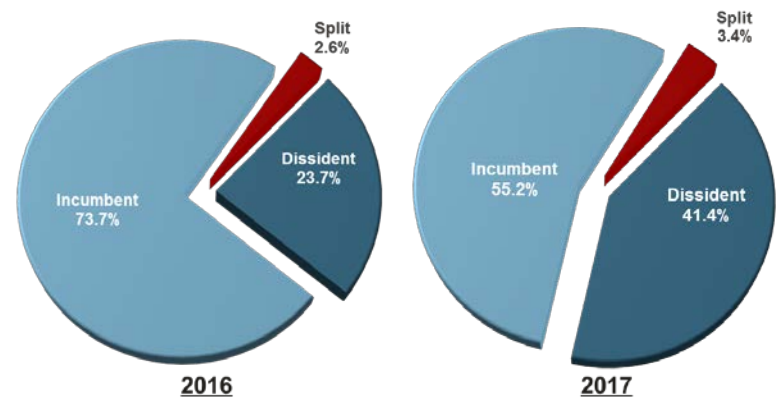
Target Market Caps in 2017



Activist Board Seat Success Rate 2003-2017 YTD



Proxy Contest Outcomes in 2016 & 2017



## MOCK PROXY FIGHT

### Phase #1 Initial Contact

- The investor relations officer of America Company (“**America Company**”) receives a call from a junior analyst at a known activist fund (“**Activist Capital**”). The **analyst asks for a telephonic meeting** with one of the principals of Activist Capital.
- The investor relations officer schedules a **call between Activist Capital and the CFO** of the Company. On the call, Activist Capital says that it holds a “**significant position**” but **declines to state how much**.
- During the call, Activist Capital **asks many pointed questions** about the performance, strategy and corporate governance of America Company.

## MOCK PROXY FIGHT

### Phase #1 Private Engagement

- A fairly new hedge fund (“**Activist Capital**”) **privately sends a formal letter to the Board of Directors** of your Company (“**America Company**”). In its letter, Activist Capital claims to own an “**economic interest**” of **4.9%** in America Company.
- Citing conversations with “a majority of the Company’s shareholders”, the letter contains a **litany of criticisms of performance metrics, corporate governance issues and executive compensation**.
- Activist Capital believes that America Company should “immediately” **initiate a review of strategic alternatives**, including a sale of America Company. Additionally, it advises that America Company should consider **adding “shareholder representatives”** to the Board.
- **Activist Capital requests a “urgent” meeting** with the independent directors of the Board to discuss its demands.
- As it turns out, **management had already a few meetings with Activist Capital**, without notifying the Board.

## MOCK PROXY FIGHT

### Phase #2 Public Fight

- After private discussions do not resolve the situation, Activist **Capital files a Schedule 13D, disclosing a 9.8% stake** in America Company.
- Simultaneously with the Schedule 13D filing, Activist Capital issues a **public letter to the Board** that criticizes America Company's performance, strategy and corporate governance.
- Activist Capital **threatens to pursue a proxy fight** unless the Company **replaces the CEO** with Activist Capital's hand-picked CEO candidate, **gives Activist Capital 3 seats** on the 9-member Board, and **formally commences a process to explore strategic alternatives** and includes an Activist Capital designee as **chair of the special committee leading that process**.
- The stock price of America Company **trades up 12% on 4x average volume**, and America Company receives **dozens of calls from the media and investors**.

## MOCK PROXY FIGHT

### Phase #3 Nomination Notice

- **Activist Capital submits a notice of its intent to nominate an opposing slate** of directors to **replace 5 directors of the 9-member Board** at the next annual meeting – specifically seeking control and targeting the CEO.
- Concurrently with the nomination notice, Activist Capital amends its **Schedule 13D**, disclosing a **stake increase to 12.2%**, and **issues a press release**. The press release announces the launch of a proxy contest. Activist Capital makes clear that Activist Capital intends to **sell the Company upon taking control**.
- Activist Capital also **launches a campaign website** called “MakeAmericaGreatAgain.com.”
- On the same day, Activist Capital’s attorneys submit a **demand for the shareholder list** of America Company.

## MOCK PROXY FIGHT

### Phase #4 Proxy Contest

- Both parties file their proxy materials with the SEC. Activist Capital's proxy statement contains numerous **inaccuracies and incendiary comments** about the directors and officers of the Company
- After the parties' proxy statements go definitive, **both parties start sending out fight letters** to the shareholders of America Company.
- Three weeks prior to the annual meeting, **each party meets with ISS**. They have also phone **calls with Glass Lewis and Egan Jones**. The **proxy advisory firms issue their recommendations** two weeks prior to the annual meeting:
  - **ISS** supports the entire slate of Activist Capital.
  - **Glass Lewis** recommends voting on the Board's proxy card, but recommends a "withhold" regarding two directors of America Company.
  - **Egan Jones** supports the entire slate of the Board.
- Following the recommendations, the **parties quietly resume settlement negotiations** behind the scenes.

# MOCK PROXY FIGHT

## Phase #0 Advance Preparation

- **Nothing** has happened.
- Everything is just **great**.
- **No activist is interested** in your Company. Or so it seems...