

# THE ACTIVIST REPORT

## 13D Monitor

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### 10 Questions with Doug Rappaport



Douglas A. Rappaport is a Partner at Akin Gump Strauss Hauer & Feld LLP. He is a litigator focusing on complex commercial and securities disputes. In recent years, he has served as counsel in trials involving

disputes over secured assets, partnership interests, securities fraud, breaches of fiduciary duty, trade secrets, options backdating, tax appraisals and the fraudulent sale of securities. He advises clients on matters of regulatory compliance and corporate governance and provides advice on activist investing issues, devising strategies regarding the solicitation of board seats, the displacement of existing corporate management and contests for corporate control. Doug also regularly represents investment funds, corporations and individuals in regulatory and internal investigations. His experience extends to matters before the Securities and Exchange Commission (SEC), the Financial Industry Regulatory Authority (FINRA) and state and foreign securities agencies.

**13DM:** You have been advising activists for more than 20 years. Can you tell us a little about your practice and what type of engagements you represent?

**DR:** I cut my teeth in activism helping litigate and negotiate hostile contests for well-known engaged investors in the

early 2000s. I attempt to bring a problem-solver's orientation to any possible activist initiative – generally supporting an incremental approach where we try to work constructively with the issuer until more forceful action is needed. This approach works well with our client base, which includes well-known constructivists, who will not pursue contentious campaigns, to other well-known engaged investors, who are prepared to use every tool in the activist's toolbox even if it requires a more contentious posture. I personally, and we as a firm, also have a deep background and experience working through thorny regulatory and compliance issues associated with activist campaigns, which gives our clients a measure of comfort regardless of the specific context.

**13DM:** There has been a lot of talk about the intersection of ESG and activism. How has the intersection of ESG and activism impacted your advice to clients?

**DR:** When we talk about ESG, we need to be thoughtful about what it means. The "G" – for "governance" – has historically been part of the activist game plan. Issuers with strong business models but weak internal governance have always been ripe for activist intervention to effectuate change and create value. However, in the past decade, we have seen greater focus on the "E" and the "S," and we have clients who are interested in advancing the ball in these areas as well. At the end of the day, however, linking ESG to value creation for investors, as

well as possibly other stakeholders, is a key element for our clients. Working with investors with an ESG-orientation is particularly rewarding, as it provides an opportunity to possibly do "good" along with doing "well."

**13DM:** When advising clients, how much relative emphasis do you place on ESG? Do you interpret proxy fights like Exxon as the beginning of a trend or a one-off?

**DR:** It is largely situational – some campaigns and initiatives may have a particular ESG focus while it is simply less central for other companies. One area that is at least potentially present regardless of the issuer's business model is diversity. Any issuer who has not sought to diversify its board is doing a disservice to its investors and rendering itself vulnerable to activist attack. And when we talk about diversity, we are not just talking about diversity of background or culture, but also diversity of experience and perspective.

**13DM:** The SEC has proposed several new rule amendments, including a.) reducing the time investors have to file a 13D from 10 days to five, b.) shortening the time investors have to file Schedule 13D amendments to one business day; and c.) redefining the definition of beneficial ownership to include certain derivatives, such as cash settled swaps. What is your view of these proposals?

**DR:** To put it charitably, these proposals are perplexing. While the SEC has paid

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lip service to supporting the interests of investors, the proposals shortening the deadlines for Schedule 13D initial filings and amendments appear to undermine the protection of shareholder interests and creation of shareholder value through engaged investing. Expanding the beneficial ownership definition appears to contradict the core purpose of that concept – to voting interest, as opposed to mere economic interest. Some aspects of these proposed rules seem to come straight from the playbooks of entrenched managers and their advisors, and would appear to upset the careful balance of interests between fulsome disclosure and making sure engaged investors are incentivized to initiate campaigns. We have been advising various parties who are advocating to modify these proposed rules before they become final.

**13DM:** There have been a lot of majority control proxy contests this season. Is this something you expect to see more of or is it just an anomaly?

**DR:** Yes, I think we will continue to see broader variation and flexibility in the types of campaigns and contests we will see, including majority control contests.

**13DM:** There was a lull in activism during the pandemic and it seems like the activists are now working through a backlog. Do you feel this too?

**DR:** I think that is true. The pandemic and resultant quarantine posed numer-

ous strategic and logistical challenges to activists and activism. Like any significant market-shaking event, however, there will be boards and managers who will have navigated the challenges of the pandemic better than others. Activists can provide insight for those who need better direction or to refine strategies for a post-pandemic world.

**13DM:** How do you see the SPAC market affecting activism and activists? Many activists have their own SPACs and at the same time SPACs that are less than two years old are already being targeted by activists. What effect will SPACs have on activism over the next several years?

**DR:** Many activists have discovered that the essential skills that serve their engaged investing can be applied successfully to the SPAC space. Like any other investment trend, there will be folks who apply these skills better than others. But if applied thoughtfully, the SPAC vehicle can be an effective and efficient way to provide formerly private companies with access to the capital markets without the intensity of the IPO process. Like any other under-performing issuers, however, some SPAC-merger entities that do not meet expectations may find themselves vulnerable to activist campaign.

**13DM:** 15 years ago activists were all about shareholder return, often short term, and were viewed negatively by many market participants. They evolved into more long-term minded

shareholders and began to be viewed more positively in the market. Now they are often ESG-oriented and we even see Carl Icahn running a purely ESG campaign at McDonalds. Are activists finally wearing the white hats? Is the burden shifting a little in activist campaigns?

**DR:** Some of us believe that true activists have almost always worn the white hats in that they seek to create value for shareholders when issuers left to their own devices have failed to do so. But as a matter of perception, it appears that the investing public, and even Corporate America, now better understand that activists have a role to play in seeking to optimize the performance and operations of issuers and, more broadly, the markets.

**13DM:** What does shareholder activism look like ten years from now?

**DR:** I hope and expect that more investors will seek out ways to engage with issuers in an effort to create shareholder value and enhance the role that issuers in our economic and social fabric. I also expect that we will continue to see expanded activist initiatives outside the US, as investors in other markets realize engaging with issuers can effectuate change and create value. Issuers in turn will hopefully perceive activists as potentially valuable partners in seeking to serve the interests of shareholders and potentially other stakeholders.

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