

# THE ACTIVIST REPORT

## 13D Monitor

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### You Can't Spell "Anomaly" Without A-O-L

On June 14, 2012, AOL announced that it won its proxy fight against Starboard with all of management's nominees being reelected. As AOL is a high profile company, this proxy fight received considerable media attention on a superficial level, but a deeper look at the intricacies and dynamics of this activist campaign reveal many interesting facets and anomalies with respect to shareholder activism and corporate governance.

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### 13F Confidentiality Update

The Commission is required to delay or prevent disclosure of Form 13F information to the extent necessary to protect the public interest. Confidentiality rules require that the investment manager demonstrate the likelihood of substantial harm to its competitive position by the public disclosure of its securities positions. Activists are often granted confidential treatment of specific holdings because they have an ongoing investment strategy and can demonstrate that disclosure of the securities positions would reveal their investment strategy. To be granted confidential treatment, the program of acquisition or disposition must be ongoing both at the end of the relevant quarter and at the time of the filing, and confidential treatment will be granted only for the limited period of time necessary to effectuate the investment manager's strategy. For the quarter ended March 31, 2012, Trian, Icahn, Relational and Starboard were granted confidential treatment and since their 13F filings, the following has occurred:

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### North Of The Border

A group of investors including Mason Hill Asset Management and Equinox Asset Management have formed a group, Mining Investors for Shareholder Value ("MISV") and filed a 13D on Mag Silver Corp. ("MAG"). MAG is a silver exploration company that in 2002 purchased an 8,000 hectare Juanicipio property located in Zacatecas State, Mexico just outside the mining town of Fresnillo. In 2005, this property became one of the largest silver discoveries in 30 years and the Company ultimately formed a 44/56 joint venture, the Minera Juanicipio Joint Venture (the "JV"), with Fresnillo plc, a UK company that contributed money and mining experience to the joint venture.

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### 10 Questions with Joele Frank

Joele Frank is the founder and managing partner of Joele Frank, Wilkinson Brimmer Katcher, a leading strategic financial corporate communications firm specializing in investor relations, financial public relations, and transaction and crisis communications. Joele has been kind enough to take time out of her busy schedule to sit down with us for this month's edition of 10 Questions.



**13DM:** Your firm has defended many of the largest companies that have been engaged by activist investors. What advice do you give to your corporate clients to prevent an activist from showing up at their doorstep?

**JF:** I am a big believer in the old saying, "the *continued on page 2*

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## 10 Questions with Joele Frank (cont'd. from pg. 1)

best defense is a good offense.”

With respect to shareholder activism, a strong investor relations program is the most effective deterrent. Boards and management teams must articulate a clear strategy and value proposition. Companies that fail to tell a compelling story that resonates with investors during “peace time” are far more likely to become the target of an activist. In addition, it is important for companies to demonstrate progress each quarter in executing against their strategic plan by discussing important accomplishments, milestones achieved and progress against long-term objectives.

That said, even with a robust investor relations program and a clear strategy, a downturn or unexpected event that impacts one company in a sector more than its peers can cause that company to show up on an activist’s radar.

**13DM:** At what point after a company receives a 13D are you contacted and what is the first thing you advise them to do?

**JF:** The sooner we are contacted the better. Increasingly we are brought in before a 13D is filed. We are often retained following a 13F filing, or following the initial call between the company and the activist. In those instances, we work with companies to enhance their communications and investor relations program. Again, “the best defense is a good offense,” so having a crisp, credible message is essential. Each situation is unique and a range of tactical considerations factor

into communications advice once the activist files a 13D, not least of which is the 13D filing itself. That said, our advice to companies dealing with a 13D filing typically includes the following:

- Engage constructively (or continue to) with the activist. In addition to demonstrating that the company’s board and management team are open to ideas from shareholders, discussions with the activist allow the company to be as informed as possible about the activist’s demands.

- Brief the board and management team for what may lie ahead. The more the board and management team know about what to expect, the more effectively the company can respond to an activist. It’s especially important to prepare the board for an attack, since that is frequently part of the activist playbook. We’ve found that inoculating the board is an important early step in helping to establish a constructive dialogue with any shareholder.

**13DM:** You have advised hundreds of officers and directors over the past five years with respect to proxy fights. How have their perceptions of activists changed over time?

**JF:** Generally speaking, the activists today are better informed and better advised than ever before. For example, the more sophisticated activists often do extensive research, hire industry experts, legal, financial, proxy and PR advisors, and issue white papers. In addition, the director candidates nominated by activists today are often more credible

than in years past. This increased professionalism has earned the activists greater respect in many boardrooms.

Perceptions of activists have also changed over the last several years as larger companies, once thought untouchable, have been the targets of activist campaigns. In recent years we’ve worked with companies such as Target and Clorox – companies that were somewhat safe from activism just a few years ago because of their large market capitalizations. Today, however, no company is insulated from an activist showing up in their stock, and when that happens, the activist is usually taken seriously, both by the company and other shareholders.

Perception of activists has also shifted because the demands of activists have changed. In the past, activists often pushed for some form of financial engineering: levering up and buying back shares, divesting assets, putting the company up for sale, etc. Nowadays, we’re seeing more and more activists undertaking campaigns focused on improving a company’s operational and financial performance, and seeking representation on the board with the mandate of working to improve performance or effect changes to the company’s strategy from the inside.

**13DM:** As activism has become more accepted in the marketplace, has the message management delivers to its shareholders changed when defending a proxy fight?

**JF:** The messaging of companies has

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## 10 Questions with Joele Frank (cont'd. from pg. 2)

definitely changed – it really comes down to the fact that boards and management teams now view activism as something that must be taken seriously. Years ago, if an activist shareholder took a position in a company, the response from many boards and management teams was to ignore or be dismissive of the activist – or to criticize the activist’s credibility (or perceived lack thereof).

As activism has gained clout and become an accepted and successful practice for many hedge funds and investors, management’s message has shifted to rearticulating a company’s strategy, record of performance and execution, a commitment to enhancing shareholder

returns, as well as critiquing the plans or suggestions put forth by the activist as not in the best interests of the company or its shareholders. It’s no longer enough for a company to simply show why the activist’s nominees should not be elected – there needs to be a well-articulated, credible and supportable plan that management (with the full support of the board) is executing in order to create shareholder value. In general, if a company is able to convince its shareholders that it has the right plan to create shareholder value, the right management team and the right board in place, then its chances of holding off an activist slate of nominees are greatly improved.

In addition, management must send the message to all of its shareholders that it is open to listening to and considering alternative views and perspectives that might serve to enhance value. By

immediately engaging (or continuing to engage) with its investors, a company has an important opportunity to demonstrate its commitment to acting in the best interest of all shareholders. At the same time, engaging with an activist helps ensure that the strategic plan to address the activist’s demands is as informed as possible from the get-go, allowing for consistent messaging throughout a potential contest.

**13DM:** What is the biggest thing that Boards could do to be viewed as

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shareholder friendly?

**JF:** The best thing a board and management team can do is present a solid, credible strategic plan to enhance value creation through balanced growth, stock price appreciation, dividends and/or share repurchases. Beyond that, however, there is no silver bullet. Boards are evaluated by shareholders based on the entirety of their record – including attracting and retaining effective managers, adopting best practice governance and executive compensation policies, effectively overseeing management’s execution of the company’s strategic plan and regularly refreshing its own membership with qualified, independent directors who have relevant expertise.

**13DM:** When advising corporate clients, how important is the track record and history of the activist? Does your advice

change depending on who the activist is? Does management distinguish between activists?

**JF:** Absolutely – the credibility and track record of the activist are of enormous importance.

Some activists have “earned their stripes,” whereas other, less experienced activists still have something to prove. Generally speaking, newer, less battle-tested activists are less predictable because they have not established a modus

operandi for how they engage with companies, shareholders and the media. Often newer activists are more eager to take a contest to a vote

because the publicity of a “win” can help with fundraising, not to mention raise their profile in the press. While less experienced activists may not have the reputation of a Bill Ackman or a Ralph Whitworth, we have found that many newer activists are willing to lay the groundwork well in advance of going public in a proxy contest, which results in a higher level of sophistication.

**13DM:** Your firm has chosen not to represent professional activists. But if you did, what advice would you give an activist trying to get a board seat at a company?

**JF:** Engage constructively. When vying for the support of shareholders, it is as important for the activist as it is for any board and management team to demonstrate that they are open-minded and committed to pursuing whatever course is most likely to enhance value

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## 10 Questions with Joele Frank (cont'd. from pg. 3)

for all shareholders. We have won many proxy fights by demonstrating that an activist was only seeking to advance his or her own agenda, to the detriment of longer-term investors.

**13DM:** Your firm has been involved in hundreds of campaigns. What is the main factor that distinguishes a winning campaign from a losing campaign?

**JF:** A strong investor relations program that presents a credible plan to create superior value for shareholders is the best way to win. It also helps to have a proven track record of outstanding performance – though this isn't required, and in many cases

it is not sufficient to keep an activist at bay. As I mentioned earlier, if a company can demonstrate to its shareholders that it has the right

plan to create shareholder value, the right management team, and the right board in place, its chances of prevailing in a proxy contest are greatly improved.

Beyond that, the most important differentiating factor at a company is often the investor relations representative. The credibility of a company's investor relations program often begins with this individual, and many companies have been enhancing the quality of their IR teams as a result.

**13DM:** You represented Target and Canadian Pacific, both versus Pershing Square. Target was a big victory for the company and Canadian Pacific a victory for the activist. What were the major differing dynamics in those two situations that led to such opposite results?

**JF:** Each company brings with it a unique track record and set of facts

and circumstances that influence the outcome of any proxy contest. That's why a robust IR program and a strong team of advisors are so essential to successfully navigating a contest.

With respect to Target and CP, the credibility of the respective management teams was different, as Target was seen as a company with a stellar management team and CP was viewed as a company that was in need of a change. In each of these situations, however, the fight came down to how well the company was able to present a credible plan to create superior value for its shareholders by either leveraging its reputation and

**“Activism isn't going away. In fact, recent governance trends have only made companies more vulnerable to activism.”**

track record or by highlighting how things were changing for the benefit of its shareholders.

**13DM:** Do you see the level of shareholder activism increasing or decreasing over the next five to ten years?

**JF:** Activism isn't going away. In fact, recent governance trends have only made companies more vulnerable to activism. Majority voting has now been adopted by 70% of S&P 500 companies, and there are fewer classified boards and far fewer shareholder rights plans than ever before. Also, the elimination of broker discretionary voting in uncontested elections makes securing a majority of votes cast easier for activists where they are seeking governance changes rather than board representation. And, of course there are the say-on-pay and frequency-of-pay “hot buttons” associated with Dodd-Frank.

Additionally, the volatile markets of the past few years have resulted in uneven performance across different sectors, driving increased activism. Whereas a booming economy may mask issues, resulting in fewer activist campaigns, when times are tough potential activists are more likely to make their grievances public.

We enjoy working with companies to help them communicate with their shareholders and it looks like the activists are going to continue to keep us busy.

## 13F Update (cont'd. from pg. 1)

*Starboard:* disclosed in a 13F amendment that it had a .50% position in Compuware Corporation (CPWR). Compuware is a \$2 billion corporation and likely not the target of a future Starboard 13D.

*Triam:* disclosed in a 13F amendment ownership of 5.6 million shares of Lazard Ltd. However, they have also publicly revealed that they own 5.1% of Lazard and released a presentation touting the stock and its support for management. Since they have not filed a 13D in the required ten day period, this is presumably going to be a 13G filing.

*Relational:* disclosed in a 13F amendment ownership of 2 million shares of Flowserve Corporation. This was disclosed contemporaneously with Relational's 13D filing on Flowserve disclosing ownership of 3 million shares (5.65%) and outlining Relational's potential concerns (See The One to Watch on pg. 7).

*Carl Icahn:* has not filed an amended 13F as of this date.

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