Shareholder Activism Industry Report: Restaurants

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Executive Summary

The last couple of years have seen tremendous growth in shareholder activism. After peaking in 2009, the number of activist campaigns declined for the next three years, reaching a multi-year low of 77 in 2012. Last year, there were 92 campaigns, of which 32 went to a shareholder vote. More importantly, activist investors prevailed in 73% of the activist situations last year – the highest success rate in over a decade.

Not surprisingly, activist investing is now an accepted investment class. The inflow of capital coupled with greater acceptance of activist strategy – possibly due to their relatively strong track record – has not only emboldened these investors to target bigger companies but also resulted in emergence of several new ‘activist funds.’ In essence, market cap and sector are no longer an effective defense mechanism.
## Assets under Management by Activist Hedge Funds (US$ Billion)

![Bar chart showing assets under management by activist hedge funds from 2003 to 2014.](chart1.png)

*Source: Hedge Fund Research Inc. and The Wall Street Journal*

## No. of companies targeted with market cap. >$1 Billion

![Bar chart showing the number of companies targeted with market cap. >$1 Billion from 2010 to 2014.](chart2.png)

*Source: FactSet*

### Activist Funds

<table>
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<tr>
<th>Activist Funds</th>
<th>PM’s prior affiliation</th>
<th>Recent campaigns</th>
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</thead>
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<tr>
<td>Convex Management</td>
<td>Icahn Enterprises</td>
<td>Commonwealth REIT, American Realty Corp.</td>
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<tr>
<td>Engaged Capital</td>
<td>Relational Investors</td>
<td>Oplink Communications, Abercrombie &amp; Fitch, Renttech, AeroVironment, Volcano Corporation</td>
</tr>
<tr>
<td>Legion Partners</td>
<td>Shamrock</td>
<td>RCM Technologies, Perry Ellis International</td>
</tr>
</tbody>
</table>

*(received $200mn capital from CalSTRS in Jan. 2014)*
While the number of activist campaigns and the size of targeted companies have been on the rise, it is important to note that the types of activist campaigns used have not changed much over the years. The majority of activist campaigns continue to be for minority board representation – primarily because institutional investors and proxy advisory firms (ISS and Glass Lewis) have a much lower hurdle for supporting minority slate than majority.

Overview of Activism in Restaurant Industry
The overall activism trend has been prominent in the restaurant space as soft consumer spending coupled with promotions/discounts has weighed heavily on restaurant profitability. Since 2010, several name-brand restaurants have been targeted for either board representation or pressure to maximize shareholder value (see table below).

<table>
<thead>
<tr>
<th>Company</th>
<th>Activist</th>
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</thead>
<tbody>
<tr>
<td>Benihana Inc.</td>
<td>Coliseum Capital Management, LLC, Benihana of Tokyo</td>
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<td>Biglari Holdings Inc.</td>
<td>Groveland Capital, LLC</td>
</tr>
<tr>
<td>BJ's Restaurants, Inc.</td>
<td>Clinton Group, Inc., Luxor Capital and PW Partners</td>
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<tr>
<td>Bob Evans Farms, Inc.</td>
<td>Sandell Asset Management Corp.</td>
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<tr>
<td>Bravo Brio Restaurant Group, Inc.</td>
<td>Red Mountain Capital Partners LLC</td>
</tr>
<tr>
<td>California Pizza Kitchen, Inc.</td>
<td>Clinton Group, Inc.</td>
</tr>
<tr>
<td>Caribou Coffee Company, Inc.</td>
<td>Accretive Capital Partners LLC</td>
</tr>
<tr>
<td>CKE Restaurants, Inc.</td>
<td>Porter Orln LLC</td>
</tr>
<tr>
<td>Cosi, Inc.</td>
<td>BLUM Growth Fund, LLC (Brad Blum), Royce &amp; Associates, Attiva Capital Partners, Lloyd Miller</td>
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<tr>
<td>Darden Restaurants, Inc.</td>
<td>Barrington Capital Group, L.P., Starboard Value</td>
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<tr>
<td>Denny's Corporation</td>
<td>Oak Street Capital Management LLC &amp; Dash Acquisitions, LLC</td>
</tr>
<tr>
<td>DineEquity, Inc.</td>
<td>Marcato Capital Management LLC, Scout Capital Management</td>
</tr>
<tr>
<td>Famous Dave's of America</td>
<td>Blue Clay Capital Management, LLC, Farnam Street Partners, PW Partners</td>
</tr>
<tr>
<td>J. Alexander's Corporation</td>
<td>Privet Fund Management LLC</td>
</tr>
<tr>
<td>Jamba, Inc.</td>
<td>Engaged Capital LLC, JCP Investment Partnership</td>
</tr>
<tr>
<td>Kona Grill, Inc.</td>
<td>Marcus E. Jundt (former CEO and chairman), Mill Road Capital</td>
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<tr>
<td>McCormick &amp; Schmick's Seafood Restaurants, Inc.</td>
<td>Tilman J. Fertitta</td>
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<tr>
<td>Mexican Restaurants Inc.</td>
<td>Cross River Capital Management LLC</td>
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<tr>
<td>O'Charley's Inc.</td>
<td>Wellicap Partners LP</td>
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<tr>
<td>Popeyes Louisiana Kitchen, Inc.</td>
<td>Red Mountain Capital Partners LLC</td>
</tr>
<tr>
<td>Red Robin Gourmet Burgers, Inc.</td>
<td>Oak Street Capital Management LLC, Kovitz Investment Group LLC, Clinton Group, Spotlight Advisors</td>
</tr>
<tr>
<td>Ruby Tuesday, Inc.</td>
<td>Becker Drapkin Management LP and Carlson Capital LP</td>
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Source: FactSet
More importantly, activists have been quite successful in attaining their desired outcome – e.g. board representation or change in management. Activists gained board representation (either through a shareholder vote or settlement) at Benihana Inc., BJ’s Restaurants, Bob Evans, Darden Restaurants, Famous Dave’s, Jamba Inc., Red Robin Gourmet Burgers, and Ruby Tuesday.

Although the activists lost the proxy contest at Denny’s Corporation, the company announced a new CEO within a month of the shareholder vote. Similarly, at Cosi Inc., activist pressure led to the resignation of the Chairman and interim CEO. In Dec. 2014, four months after the election of Sandell Asset Management’s nominees to the board, Bob Evans announced that its CEO was stepping down.

In addition to seeking board representation and/or management changes, the restaurant industry has seen its fair share of shareholder opposition to merger announcements. Since 2010, shareholders have opposed M&A transactions at California Pizza Kitchen, Caribou Coffee, CKE Restaurants, and J. Alexander’s Corp. At CKE Restaurants, shareholder pressure resulted in a 13.5% increase in the offer price, whereas at J. Alexander’s the acquirer raised its offer by approximately 21%.

Source: FactSet
The proxy contest at Darden Restaurants (“Darden”)

Last year’s proxy contest at Darden was unique in several respects. While it started as a simple campaign by Barington Capital to create value through operational changes and business restructuring, it soon morphed into a complex situation with long-term implications for the board and management team.

A critical issue at Darden was its board’s decision to sell Red Lobster to Golden Gate Capital without shareholder approval. Though it is fairly common for companies to so, it appears that shareholders are exerting greater influence on strategic board level decisions involving the sale/divestiture of significant business segments. In 2012, Relational Investors in collaboration with CalSTRS forced The Timken Company to spin off its steel segment through a non-binding shareholder proposal. Similarly, last year Carl Icahn successfully agitated at eBay to separate the PayPal segment.

In hindsight, it seems that Darden underestimated the reaction of proxy advisory firms and other institutional investors to the Red Lobster sale. Here, it is important to note that had it not been for Darden’s shareholder-friendly corporate governance profile – i.e. it allowed shareholders to act by written consent and to call special shareholder meetings – Starboard Value would not have been able to provide an alternative platform for shareholders to voice their opinion on the Red Lobster transaction. The big governance failure was Darden’s refusal to call a special meeting for the Red Lobster transaction after Starboard Value successfully submitted consents representing more than 50% of shareholders requesting the same.

While on the one hand Darden’s board ignored shareholders desire to opinie on the Red Lobster deal, on the other hand it seems to have succumbed to shareholder pressure by announcing a CEO change and replacing the majority of the legacy directors prior to the shareholder meeting. Interestingly, the CEO and board changes were announced less than one year after the company announced major strategic initiatives to create shareholder value. Despite new strategic announcements and wholesale board changes, Darden’s shareholders voted in all twelve of Starboard Value nominees. This, we believe, sends a very strong message: making last-minute changes, especially in the midst of a proxy battle, is not an effective defense strategy.

In summary, there are several key takeaways from the Darden contest:

- For companies that do grant shareholders the right to act by written consent or call a special meeting, these rights should be taken seriously.

- Sale of business segments are still the prerogative of the management/board. That said, the sale of a business division at questionable valuation could expose the board to shareholder criticism.

- Strategic plans need to translate into shareholder value creation, otherwise they lose credibility.

- Changes to management and/or the board during a proxy contest are deemed reactionary and are unlikely to provide an effective defense.
Darden Restaurants, Inc. (DRI)

Activism type: Operational
Representation sought: Majority slate
(12 out of 12 seats sought) Outcome: Activist Win

Key Players

- Barington Capital Group (2.8% stake)
- Starboard Value LLP (5.6% stake)

Activist Arguments

- Significant share price underperformance compared to peers.
- History of poor acquisitions and capital expenditure (CapEx). Lagging return on capital.
- Poor operating metrics – declining same store sales, and high SG&A expense.
- Lack of market response to strategic initiatives as reflected in sustained decline in share price.
- Disregard for shareholder rights – failure to hold special meeting for Red Lobster sale despite more than 50% of shareholders submitting consents to do so.
- Failure to establish appropriate management incentives.
- Lack of confidence in incumbent board to lead the company.

Company Response

- Announced a comprehensive plan to enhance shareholder value by reducing CapEx, increasing cost savings, realigning management compensation, and increasing return on capital.
- Initiated a $500 million accelerated share buyback program.
- Began a new CEO search process.
- Made wholesale changes to the board by inducting four new board members and vacating four seats for the activist nominees – management slate had 8 candidates for the 12 member board.

Proxy Advisory Firm Recommendations

- ISS and Glass Lewis recommended FOR all 12 Starboard nominees.

Outcome

- All 12 Starboard nominees elected.

Closing Price

21-Dec-2012 to 26-Jan-2015 (Daily)

Price (Local Currency)

Starboard Value LP - Activist Campaign to Maximize Shareholder Value Announced
Barington Capital - Activist Campaign to Maximize Shareholder Value Announced
Starboard Value LP Activist Campaign Escalated to Formal Proxy Fight Announced
Starboard Value LP - Proxy Fight Announced
All 12 Starboard nominees elected
Key Players
- Luxor Capital Group LP, PW Partners Atlas Fund II LP, Zelman Partners LLC (16% combined stake)
- Clinton Group Inc. (0.5% stake)
- Both activist groups separately sought 5 board seats on a 10-member board.

Activist Arguments
- No detailed arguments presented.

Company Response
- “The Board remains highly focused on creating the optimal conditions to generate long-term value and will continue to take actions that support the interests of all shareholders.”
- Announced $50 million share repurchase program.
- Clinton withdrew and did not nominate any candidates for election.

Proxy Advisory Firm Recommendations
- Not applicable as the fight was settled prior to proxy advisory firm recommendations.

Outcome
- Company settled. Luxor and PW Partners granted 3 seats and board size increased from 10 to 11.
Key Players
- Biglari Holdings Inc./Biglari Capital (stake: 9.9% in 2011, 17.3% in 2012, and 19.8% in 2013). The investor ran three campaigns for board representation at Cracker Barrel.

Activist Arguments 2011-2014
- Failure to maximize shareholder value as a result of poor management, flawed expansion strategy, low expectations, and deficient accountability.
- Board’s lack of meaningful stock ownership.
- Declining unit-level customer traffic for the past seven consecutive years.
- Lack of financial transparency.
- Failure to close productivity gap in operating income per store.
- Poor capital allocation decision in opening new stores.
- Oppose company’s shareholder rights plan.
- Company should pay $20/share special dividend (2013).
- Submitted non-binding proposal to pursue sale of the company (2014).

Company Response
2011: Company hired a new CEO, announced an internal restructuring plan, nominated three new board members, raised cash dividend and announced a new $65 million share repurchase plan.
2012: Company focused on share price and operating metrics outperformance.

Proxy Advisory Firm Recommendations
- ISS recommended AGAINST the adoption of a poison pill in 2011.
- ISS recommended AGAINST a shareholder proposal for a $20/share special dividend in 2013.
- ISS recommended AGAINST a shareholder proposal to sell the company in 2014.

Outcome
- Company nominees elected in 2011-2013 contests. Shareholder proposals to pay $20/share special dividend and to sell the company defeated.
Bob Evans Farms Inc. (BOBE) 
Activism type: Operational/Balance Sheet 
Representation sought: Majority slate 
(8 out of 12 seats sought) Outcome: Split Win

Key Players
- Sandell Asset Management Corp. (8.8% stake)

Activist Arguments
- Sell or spin off food products business, unlock real estate value through a sale-leaseback transaction, and implement a large self-tender with the proceeds generated from the first two actions.
- Suggested that the company could be worth $73 to $84 per share.

Company Response
- Execute a growth strategy built on a recently completed two-year transformational investment program.
- Build on its track record of returning capital to stockholders.
- Consider other strategic opportunities to benefit stockholders.
- Company nominated 10 candidates for the 12 member board.

Proxy Advisory Firm Recommendations
- ISS recommended FOR four Sandell Asset nominees.
- Glass Lewis recommended FOR six Sandell Asset nominees.

Outcome
- Four Sandell Asset nominees elected.

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Closing Price
01-Jan-2013 to 28-Jan-2015 (Daily) 
Price (Local Currency)

Sandell Asset submitted formal notice to nominate board members
Four Sandell Asset nominees elected

Sandell Asset issued letter to the Board outlining operational/restructuring changes
Famous Dave’s of America (DAVE)  
Activism type: Not disclosed  
Representation sought: Minority slate  
(1 out of 6 seats sought) Outcome: Settlement

Key Players
- PW Partners Capital Management LLC (9.9% stake)

Activist Arguments
- Details not disclosed.

Company Response
- Company settled with PW Partners and nominated Walsh to the board, provided that PW Partners withdrew their nomination and agreed to standstill provision lasting 10 days prior to deadline to submit director nominations.

Proxy Advisory Firm Recommendations
- Not applicable as the fight was settled prior to proxy advisory firm recommendations.

Outcome
- Company settled and added PW Partners’ nominee to the board.

Closing Price
27-Dec-2011 to 26-Jan-2015 (Daily)  
Price (Local Currency)
Activists
- Privet Fund Management LLC (10.1% stake)

Activist Argument
- Company needed to improve operational and financial performance.
- Upon merger announcement, Privet opposed the deal and urged the company to re-open merger discussions with all parties in order to secure the highest price for shareholders. Privet said that it appeared that the deal was not a product of any “robust auction with competitive bidding.”
- Following the merger announcement, Privet submitted notice of its intent to call a special meeting to add two board members.

Company Response
- Company announced an agreement to be acquired by a subsidiary of Fidelity National Financial, Inc. for $12/share in cash or a combination of cash and stock.
- Following opposition by Privet and receipt of higher competing bids, Fidelity National agreed to increase its consideration from $12/share to $13/share and finally to $14.50/share in cash.

Proxy Advisory Firm Recommendations
- No advisory firm recommendations were issued.

Outcome
- 74% of shareholders tendered their shares prior to the annual meeting.
Benihana Inc. (BNHNA)  
Activism type: Corp. Governance  
Representation sought: Minority slate  
2012 (3 out of 9 seats sought) Outcome: Withdrawn

Key Players
- Benihana of Tokyo, Inc. (“BOT”, stakes: 38.1% in 2010, 31% in 2012). The investor ran campaigns in 2010 (proxy fight for 1 board seat), 2011 (proxy fight to oppose reclassification of shares) and 2012 (proxy fight for 3 board seats).
- Coliseum Capital Management (14.9% stake) – sought 1 seat in 2010.

Activist Arguments
- 2010: Board lacked significant number of independent directors and had questionable track record of holding management accountable.
- 2011: BOT announced its opposition to the company’s proposed reclassification of Class A common stock into common stock, to be voted on at an upcoming special meeting. BOT said that such a reclassification would be dilutive to common stockholders.

Company Response
- Proven ability to execute operationally and deliver strong performance results for its stockholders.
- Strong sales momentum, included twenty-three consecutive periods of comparable sales growth as of December 8, 2011.
- Approval of the reclassification proposal in 2011 represented a transformational event for Benihana – one that simplified the Company’s capital structure instantly by creating a single class of Benihana’s Common Stock.

Proxy Advisory Firm Recommendations
- 2011: ISS recommended that shareholders reject the reclassification proposal.
- 2012: No advisory firm recommendations were issued for the proxy contest.

Outcome:
- 2010: Company settled: Granted 1 seat each to BOT and Coliseum Capital.
- 2011: Company’s reclassification proposal passed.
- 2012: BOT withdrew its request seeking three board seats. All management nominees elected.
Ruby Tuesday (RT)

Activism type: Not disclosed
Representation sought: Minority slate
(3 out of 8 seats sought) Outcome: Settlement

Key Players
- Becker Drapkin Management LP (1.4% stake)
- Carlson Capital LP (5.5% stake)

Activist Arguments
- No detailed arguments presented.

Company Response
- “The Board of Directors and management team are committed to maximizing the long-term value of our Company for the benefit of all of our shareholders and are always open to hearing the views and opinions of shareholders as to how the Board and management can continue to create such value.”

Proxy Advisory Firm Recommendations
- No advisory firm recommendations were issued.

Outcome
- Company settled and added two activist nominees to the board. The board size was increased by one to accommodate the activist nominee.

Closing Price
03-Jun-2010 to 26-Jan-2015 (Daily)

Settlement Agreement Disclosed with Becker Drapkin and Carlson Capital

Becker Drapkin and Carlson Capital - Activist Campaign For Board Representation Announced
Key Players
- Tilman J. Fertitta (through Landry’s Restaurants, Inc, 10.1% stake)

Background
- 4 April 2011 – Landry’s Restaurants, Inc. announced its intent to commence a cash tender offer for McCormick & Schmick’s Seafood Restaurants, Inc. at $9.25 per share. Landry’s had been taken private by its CEO Tilman J. Fertitta, who directly owned 10.1% of McCormick shares.
- 7th April 2011 – Fertitta filed a tender offer statement commencing the offer. Since McCormick had not responded to Fertitta’s offer, a week later Fertitta filed a preliminary contested proxy statement announcing a proxy fight to withhold votes at the upcoming annual meeting. Fertitta was of the view that as the deadline to nominate director candidates had passed, withholding votes at the meeting would help prevent a quorum and thereby prevent the company from conducting business at the annual meeting.

Company Response
- Company rejected Fertitta’s initial tender offer and announced a review of strategic alternatives including sale of the company.
- Adopted a one-year poison pill (shareholder rights plan) with a 15% trigger.

Proxy Advisory Firm Recommendations
- No advisory firm recommendations were issued.

Outcome
- On Nov. 8, 2011, Company agreed to be acquired by Landry’s for $8.75 per share.
Key Players
- Oak Street Capital Management LLC (9.0% stake)
- Kovitz Investment Group LLC (4.5% stake)

Activist Arguments
- Remove the poison pill, declassify the board, reduce corporate overhead, implement a temporary moratorium on new unit expansion until sales and profitability are restored at existing locations.
- Redirect operating cash flow towards a $50 million share repurchase program.

Company Response
- Company amended provisions of the poison pill making it more shareholder-friendly.

Proxy Advisory Firm Recommendations
- No advisory firm recommendations were issued.

Outcome
- Company settled by expanding the board by one and appointing two Oak Street nominees to it.
**Key Players**
The Committee to Enhance Denny’s was comprised of several hedge funds including:
- Soundpost Partners LP (2.3% stake), Oak Street Capital Management LLC (2.0% stake)
- Dash Acquisitions LLC (Dash, 1.2%), Murano Partners LP (Murano, 0.8%)
- Lyrical Asset Management LP

**Activist Arguments**
- Poor share price performance.
- Company’s failure to grow system-wide restaurants and loss of market share to IHOP.
- Declining operating trends such as guest traffic.
- Inappropriately high general and administrative expenses.
- Expensive and ineffective marketing strategies.
- Inappropriately high general and administrative expenses.
- Imprudent capital allocation decisions.
- Lack of accountability for management at the board level.
- Marginalization of shareholders and franchisees.

**Company Response**
- Company has a clear strategic plan which the management is aggressively implementing.
- In the past three years, the company has significantly grown its restaurant openings, profitability, free cash flow, and return on assets. During the same time it has significantly reduced its debt, debt leverage ratios, operational and G&A expenses and capital expenditures.

**Proxy Advisory Firm Recommendation**
- ISS recommended FOR one activist nominee.
- Glass Lewis recommended FOR all management nominees.

**Outcome**
- All management nominees elected.
Kona Grill, Inc. (KONA)  
Activism type: M&A related proxy contest  
Representation sought: Minority slate  
(3 out of 7 seats sought) Outcome: Withdrawn

Key Players
- Mill Road Capital (9.8% stake) – nominated 3 candidates
- Marcus E. Jundt (former CEO and chairman, 6.7% stake) – nominated himself

Activist Arguments
- Company suffers from poor governance with consistent pattern of self-dealing.
- Stock price and operational performance lags behind peers.
- Board lacks necessary experience to allow management team to succeed.

Company Response
- Economic downturn had impacted consumer spending.
- Proactively hired a new CEO and inducted a new management team with extensive restaurant experience.
- Significantly reduced costs relating to salary and benefits, travel and consulting services
- Terminated stockholder rights plan in response to shareholder vote at the 2009 Annual Meeting

Proxy Advisory Firm Recommendations
- ISS recommended FOR one Mill Road nominee.
- Glass Lewis recommended FOR all management nominees.

Outcome
- All management nominees elected.
- Marcus Jundt withdrew his self-nomination and no action was taken.

Closing Price
13-Feb-2009 to 26-Jan-2015 (Daily)  
Price (Local Currency)
Alliance Advisors

Alliance Advisors is a multi-faceted shareholder communications and governance advisory firm specializing in proxy solicitation, corporate governance consulting, proxy contests, market surveillance and proxy management. We are an independent, management-owned firm that provides our clientele with year-round consultation and analysis of institutional investors, the proxy advisory firms as well as the ever-changing governance and activist landscape.

Founded in 2005, Alliance has an extensive client roster of more than 400 corporate clients, which includes some of the most prestigious names in international business. We distinguish our firm by having the most tenured staff, former executives from ISS and a complimentary suite of products and services unmatched in the industry today. Our team has vast expertise in dealing with all activists, M&A and corporate actions including: executive compensation, contested elections, shareholder proposals and corporate governance issues. Our success is based on a combination of our dedicated professionals, innovative nature, unmatched service, sophisticated databases and the firm's collective commitment to flawless execution.

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Board Risk Score™

Given our expertise in the area of focus we have developed a predictive model specifically designed to highlight a company’s current vulnerabilities. Our propriety model, Board Risk Score™ (BRS), is the early-warning system that provides an objective and independent assessment of company’s performance and its likelihood to a shareholder activism event.


Podcast on BRS

http://www.deallawyers.com/nonMember/Podcast/2014/10_27_Hassan.htm