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Trian and the Bank of New York Mellon

A highly engaged shareowner and a welcoming company

BY 2014, Trian Fund Management, L.P. had become one of the largest shareholders of The Bank of New York Mellon. Many activists are anathema to CEOs, boards of directors, and management teams. Not this time. The firm, which has been labeled as a "highly engaged shareowner", was welcomed by the Chairman and CEO Gerald Hassell, and without a fight Ed Garden, Trian's Chief Investment Officer and a Founding Partner, got a seat on the trust bank's board.

Together, the bank and Trian worked together to increase earnings per share at the bank by more than 40 percent from the end of 2013 to 2016, a time of slow growth, low interest rates and with high margin sectors of the business severely weakened by turns in the banking cycle. They set up three-year plans, rather than quarterly goals. They refreshed the board, as the process of adding and subtracting directors is termed. They revamped management's compensation system.

And there is more. "All this didn't happen by accident," said Trian's Mr. Garden, who founded the firm in 2005 with Nelson Peltz and Peter May. "Our relationship is a unique one," Mr. Hassell said. "It's a good story. If you're willing to embrace change, if you're willing to embrace trying to be best in class at what you do, everybody can have a good outcome. That's the bottom line of our story."

Mr. Hassell has spent his career at the bank, starting off in its management development program, followed by various positions in operations. In 1994, he joined the executive committee and four years later he joined the board and became its president. Since 2011, he has been both chairman and CEO. He also serves on the board of Comcast and is a trustee at Duke University. Mr. Garden is Trian's chief investment officer, which has in excess of $12 billion in assets under management, and has served on the board of The Bank of New York Mellon since late 2014, where he is chair of the Human Resources and Compensation Committee. He is also on the board of Pentair plc, where he is on the Compensation Committee, and has served as a director at Family Dollar Stores, Inc. and The Wendy's Company.

Ethan Klingsberg, of Cleary Gottlieb's New York office, led a discussion at the Tulane conference earlier this spring about this rare and happy long-term relationship between an engaged shareowner and its so-called target. With Mr. Klingsberg as the moderator, Mr. Garden and Mr. Hassell discussed their partnership, from the first dinner to what has evolved into what may become a prototype for such relationships in the future.

Mr. Klingsberg first noted that The Bank of New York Mellon is a global SIFI (GSifi), a global systematically important financial institution subject to piercing regulatory scrutiny. "This is not going to be a tale of proxy contests and angry letters threatening

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to unseat the entire board and fire the CEO with lots of flares being thrown, nor is there going to be a lot of discussion about incurring leverage or pulling apart companies or forcing consolidation for some quick accretion," Mr. Klingsberg add. "When you're dealing with a global SIFI, those types of menu items are not available." What's more, such strategies have also lost favor and to many shareholders are now passé.

This discussion addressed not only the relationship between Bank of New York Mellon and Trian, but also the concept of active shareholder engagement itself and its future in corporate America. "This," said Mr. Klingsberg said, "foreshadows the way change will continue to occur at a lot of publicly traded companies."

Getting to Know You

In 2014, Trian had become one of the largest shareholders at the bank, but constructive aspects of the relationship between the investor and the company all began with a dinner. "My goal at that dinner was to make sure Gerald understood Trian," Mr. Garden said. "What we do, how we do it, our philosophy. We're very long term. We hope to be very constructive. We think that we add a lot of value in the boardroom. What's more, we really loved the business and wanted Bank of New York and Gerald to be successful."

The two men discussed little of the bank business at their first meeting. Instead, it was the beginning of "a period of getting to know you," Mr. Garden said. A second dinner brought in a few more colleagues from each side. It wasn't until they had been together a few times that they began getting in to the analytics—"the nitty gritty, what's bad, what's good, what could change." Six months after the first dinner, Mr. Garden joined the bank's board.

Mr. Garden brought to the table Trian's knowledge of the trust bank business model. Trian had invested in State Street from 2010 to 2013, for example, and felt that it had added value to management's work and that of the board through interaction as a large shareholder. More importantly, Mr. Garden said, Trian learned "to appreciate the trust bank model." Not many investors truly understand "what a great business it is."

Firstly, he noted, there is a core group of industry leaders. Also, unlike most banks, trust banks do not take credit risk. It is a safe model, driven by fees, that typically generate "prolific cash." Trust banks also face fundamental challenges, particularly since the financial crisis. Key lines of businesses, foreign exchange and securities lending, for example, have changed forever. As always, change brings both challenges and opportunities, Mr. Garden said.

Mr. Hassell remembered when he first got Mr. Garden's call. Activists can have a certain reputation, he noted. But he also knew that not all activists are alike. "My attitude was if an investor could bring better ideas about how we could be successful, then I'm all ears," Mr. Hassell said. "That's the approach Ed and his team came to the equation with—'We think we've done a thorough analysis of your firm. We think we have some very good ideas about how you can improve your performance. We recognize some of the challenges you've had after the Mellon merger, after the financial crisis and the decline in some of your activities. But that being said, you've got a great franchise that we think should out-perform. And right now you're not.' And by the way? I agreed. That was the start of our journey together. Many of the things that Ed and the team were referring to, particularly as we got to know each other more, it became just that—'I agree. I agree. I agree.' The goal was how can we, together, get a better outcome for shareholders, for employees and for clients."

It all took some time. There were concerns. There were debates. There was a learning curve for the new investor and board member as well as the company. What is the highly engaged shareowner going to bring to the table? What kind of disruption might it cause? "One of my concerns," Mr. Hassell said, "was the fact that we have regulators. We already have an enormous spotlight on our firm. Trian's involvement might make that spotlight brighter and hotter from a regulatory point of view." Trian, for its part, did not break through the city gates demanding beheadings. "We wanted to get the smartest people we could around the table to figure out how to fix problems," Mr. Garden replied. "There was no looking back. It was always looking forward. Our mantra became, 'How do we become best in class.' "

Joining the Board

Trian generally looks to join the board of approximately two-thirds of the companies in which it invests "We think one of our core competencies is being in the board room, working constructively with management and other board members with perfect information/material non-public information and helping the business through its challenges," Mr. Garden said. "We think that we're time-tested in that regard and we think we can add value and contribute to a good long-term outcome. That was our mind-set."

Mr. Klingsberg noted that boards are often less than enthusiastic about a newcomer. Other boards, in Mr. Klingsberg's experience, might have reacted to Mr. Garden as follows: "This guy's going to come in from Trian, which has over fifty employees, he's already been studying the company. Is he going to usurp the role of management? Are we going to have a shadow management?" What's more, an outsider on the board simply can't know as much about the company as those already in senior executives positions. Will management step up to the challenge and use its superior knowledge to move the company forward?" "How did that tension play out? How did you deal with your directors on that issue?" Mr. Klingsberg asked Mr. Hassell.

Board dynamics are complex and critical to the success of a company. Often the first question existing directors will have about a new outside director is whether or not he or she will be an engaged investor or just another new board member. "There is always some level of cynicism or concern around an activist joining the board," Mr. Hassell conceded. Will the existing board up its game? Will they stiff-arm the new director? "I think our board responded generally well, in terms of better information, better analysis, additional thought processes was seen as value-added to the board," Mr. Hassell recalled. "But there are always some interesting dynamics out of the box."

One two-in-the-morning thought came to Mr. Hassell, one of a series of what he called "sometimes wild-ass ideas, some of which work; more often they don't." In this case, Mr. Hassell said, it worked. Before hearing from Mr. Garden, the company had taken a hard look at itself to find out where gaps lay, what needed to be done to excel. "We had a pretty good financial analysis to match up against Ed and his team," Mr. Hassell said. "That was an interesting process—comparing notes." The wild-ass idea was to dig in further on these analyses through the vehicle of a new finance committee of the board on which Mr. Garden would serve along with existing non-management directors, one of whom would chair the committee. "The good news is every member of that finance committee felt challenged and really engaged and stepped up. Now I'm blessed with a four-person committee with the brightest financial people on the planet."

Interestingly, the committee meets off-cycle from the normal board meeting "to allow us time to be focused on the financial aspects of running the bank," Mr. Hassell said. Mr. Garden said the scheduling may seem as if it's a small detail, "but at a board meeting there is so much information that you're trying to get through in a couple of days. The fact that we meet off-cycle means you're really focused. You're going into that meeting with unlimited time and we are able to drill down."

In addition to Mr. Garden, the finance committee includes Joseph Echevarria, the CEO of Deloitte from 2011 to 2014; Jeffrey Goldstein, an executive at the private equity firm of Hellman & Friedman and a former under-secretary of the Treasury for domestic finance and counselor to the secretary of the Treasury from 2011 to 2016; and Elizabeth Robinson, the global treasurer at Goldman Sachs from 2005 to 2015.

"You've got a lot of brain power and people who understand financial analysis," says Mr. Garden. "It's worked incredibly well. It always comes down to the people. One of the things that we talked about, which I talk about with CEOs all the time—if you view something like this finance committee as troublesome board members meddling, it's probably not going to work. If you view it the way Gerald did, you acknowledge that the world is changing quickly, that markets are changing quickly, technology is changing, behavior is changing, and that the company needs to navigate through all of that. You want the smart people around the table to know what you know as the CEO, to see them as trusted advisers helping the firm going forward. If you view it that way, it can work terrifically well. That's exactly how you, Gerald, viewed this from the beginning—hand over heart."

Refreshing the Board

Once he joined the boardroom, Mr. Garden became both an example and determined proponent of board refreshment, a delicate process that the company already had on its agenda. This is never an easy accomplishment. "You have people who have worked together for, in this case, decades. They have established close relationships and close friendships," Mr. Garden said. "Now you have some of them saying to others that it's time to move on. It's a very thorny process. I'm proud of the board for doing it because it's not an easy thing. I can understand why it's something you put off for another day. This involves human beings and their feelings."

Few board members, it is safe to say, jump at the chance to be replaced. The Bank of New York Mellon had board members of long-standing, which complicated matters. In addition, the merger with Mellon was a recent memory

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when the combined boards numbered as many as twenty-eight directors. What's more, the board, which stood at around eighteen directors after the merger was complete, had just replaced the bank's CEO. "That's a hard process for the board to do and they then felt they should stick together to make sure it worked," Mr. Hassell said. "That was another reason why they hadn't been willing to start thinking about refreshment."

The bank had started the process and added a few new directors before Mr. Garden joined the board. "I will say with Ed coming onto the board," Mr. Hassell recalled, "we were able to refocus on bringing the board composition back to best in class, and it was very easy to point to the proposition that our board tenure in particular was not best in class. Board members were wonderful people who had been there for a long period of time but boards need to be refreshed just like management teams need to be refreshed. This is where I have to give some credit to Ed and the team for saying, 'Look, we really need to do something here.' That became very helpful in the process because, we could point to statistics, but also an increased will to get there." The bank realized that this was not going to be accomplished "in one night" or "in one year," as Mr. Hassell put it. "We set out a plan that through retirements and new additions and through a recruitment process, we could have a refreshed board over time. That's what we set out to do and I think it has worked."

In the board room, Mr. Garden and Mr. Hassell stressed that refreshment was a responsibility owed to the owners of the company to have the best possible board. "We needed to make that happen," Mr. Garden said. "People in this room [at Tulane] need to make that happen too. What does that mean exactly? It means we need to work to assure that boards have members who are motivated, right? We have a lot of board meetings, we have a lot of off-cycle calls. It's a lot of work being on the board of a GSIFI." The average set of board materals at The Bank of New York Mellon is 1,100 pages long, Mr. Hassell pointed out. "I'm embarrassed to say that." One director was heard to say that it was like having to read *War and Peace* every other month. "And that's true," Mr. Garden said. "It's a ton of work. You need people who can bring something to the table. And you need people who can be truly independent of management. Those were the governing principles as we thought about board refreshment." Now, more than half of the non-management directors on the board have joined since at least 2014.

Paying Management

The bank not only reconfigured the board of the directors but also the entire system of management compensation. "I always explained to the other shareowners that the goal is not to *not* pay management," Mr. Garden said. "The goal is to make sure that management is incentivized to build the business the right way for the long term, and to make sure that management is not being paid a lot of money just for showing up."

A central principle at The Bank of New York Mellon's compensation system was LTI, or long-term incentive. "That's number one," Mr. Garden said, "Number two is to drive that long-term incentive off of performance. We also wanted to simplify the plan so it would be easy for all the employees to understand the metrics. We wanted management to perform and to be paid well when they did so." Mr. Hassell pointed out that "the *vast* majority of my net worth is one stock." He said that is how it should be. "In running the company I should put my chips on the table every single day."

Federal regulators were also deeply involved, since the bank is a GSIFI, to ensure that whatever was done would not encourage bad behavior and that safety and soundness were paramount. One of the highest hurdles to clear with the regulators was the effort to set up leverage with those the company would be paying. "I think we struck the right balance in order to have some positive leverage and some negative leverage," Mr. Hassell said. "If we out-perform the budget, there is some leverage to that, and if we under-perform there is leverage down. Everyone is highly incentivized to meet a long-term plan without putting the firm at risk and while meeting regulatory standards."

The metrics of the revised compensation system are tied to yet another innovation at The Bank of New York Mellon: three-year performance plans. Mr. Klingsberg noted that in 2014 the firm had an investor day at which it gave three-year targets and operating metrics, with plans for another set of announcements later in 2017. Companies are often reluctant to take such a step. "What went into your thinking there?" Mr. Klingsberg asked. Was it in part a reaction to shareholder pressure? Was that a driver for change?"

Mr. Hassell said the bank had long realized that it was under-performing financially and that it needed to improve its relations with shareholders. "We felt we needed to coalesce around a common set of goals that were easy to understand, that were fully supported by the board, and that were aggressive enough but also executable. You don't want to put out a set of goals that are so false that they are unachievable and that therefore disappoints everyone. We felt that by putting them out there publicly they would become a rallying cry for the management team and for the whole company. It actually made it easier for me to sit in executive meetings, town halls or even walking the halls and to be able to point back to those goals. We then tied compensation to them as well. By putting them out there in the public area, we could be holding ourselves accountable, as would the rest of the world. That's what it's about."

Mr. Klingsberg wondered if this practice of moving past an obsession with reporting of quarterly and annual guidance toward disclosure of longer-term metrics and targets might be a policy Trian would encourage at other companies with which it might invest. "I think it's an important exercise and I'll tell you why," Mr. Garden said. "Number one, it forces management to really think about how they're going to run the business and execute over the next three years. That's a good discipline. It forces you to think through the business. Secondly, it's a platform for the board and the shareholders to hold management accountable. It's great for shareholders to have that algorithm and that transparency and I think it's a healthy thing."

Mr. Klingsberg asked whether Bank of New York Mellon is ever concerned about the potential for conflicts between how long Trian will desire to hold onto its stock and Mr. Garden's representation on the board. Mr. Garden said that Trian hopes to put the company in a good position for decades. What's more, as a long-term investor, Trian, "because of [its] place in the world," can give management cover to take action that might lower results in the short term but benefit the company over time.

Mr. Klingsberg noted that Mr. Garden has not been shy about speaking publicly about the bank or addressing Trian's fellow shareholders, including those who are outspoken. "I can see why in many cases corporate America doesn't like activists," Mr. Garden said. "One of the ways I can add value is by helping management and the rest of the board communicate to the shareholder base because Trian is one of the largest shareholders and because the other shareholders have seen what we have done at other companies we have been involved with. I like to think we have a certain amount of trust and credibility with other shareholders. I like to think that they believe that when we get involved we'll be constructive and we'll make the business a better business for the long term. Our ability to get on the road or get on phone calls and help communicate the vision can be helpful."

It has become increasingly common for non-management directors to communicate with shareholders. "Ed, as he has pointed out, has skin in the game. He's a repeat player with these shareowners," Mr. Klingsberg noted, turning to Mr. Hassell. The bank has a schedule for directors to meet with major shareholders, with and without management, depending on the issues of concern to a range of investors, Mr. Hassell said. "I think it's good practice," he added. "Sometimes managements, including ourselves, get tone deaf around what investors are really saying and sometimes investors really don't tell us what they really mean but they'll share that information with other directors or, more importantly, they'll share it with other investors. To have another investor who is a board member can add to the equation. You get good honest feedback. Other CEOs should embrace this. Nothing is perfect. They don't always have it right. They have cuckoo ideas sometimes. They go off on tangents and they can have imperfect information, but you should still listen because you will find pearls of wisdom in that process."

Mr. Klingsberg noted the fact that an activist shareholder can show up with certain ideas that are already percolating at the company. "How do you handle who gets credit?" he asked. Mr. Hassell said, "I'll speak for myself—I just want great outcomes. Mr. Garden added: "We let the power of the argument win. Everyone checks their ego at the door."

Trian did its research before buying its stake and found "a lot of common ground" when they got inside the company. Mr. Garden said. "Gerald showed the willingness at the top that we need to rethink how we're doing things, that we need to win. Gerald galvanized an entire organization of fifty thousand people to adopt that attitude. It's a great story." Mr. Hassell described the experience of Trian's arrival at the 232-year-old firm as a welcome jolt that broke a certain sense of inertia and exposed a wide swathe of common ground between the bank and Trian.

"We were able to embrace it."

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Changes in Asset Management

"There's something really big happening."
--Ed Garden, CIO and Founding Partner, Trian Partners

Cleary Gottlieb's Ethan Klingsberg asked the Chief Investment Officer and a Founding Partner of Trian Fund Management, L.P., Ed Garden, and the chairman and CEO of The Bank of New York Mellon, Gerald Hassell, for their views on the future of the asset management industry and what the consequences will be for boards of directors of publicly traded companies.

It turns out the asset management business is changing rapidly and public company directors should be alert to these changes.

Ethan Klingsberg: The Bank of New York Mellon is not just an issuer dealing with your own shareholders but also a business where you host passive-strategy vehicles, such as index funds and ETFs, as well as actively managed funds. There has been this huge increase in investment in passive strategies matched by a correspondingly significant decrease in flows into actively managed funds. This trend is putting pressure on actively managed funds to distinguish themselves in the public's eye and to improve their returns—goals that arguably can be accomplished by being more outspoken in their communications with the companies in which they invest. Meanwhile, if you look at the boards of publicly traded issuers, especially at S&P 500 companies, there are hundreds of new directors taking seats and these new directors tend to be CEO-types, less deferential to management and more receptive to good ideas from shareholders. Compounding this set of circumstances is the increased concentration of the shareholder profile for public companies arising from the shifts in the asset management industry. For example, at this point, Bank of New York Mellon's top ten shareholders hold about forty percent of the voting power and that concentration is increasing. You can easily foresee a near-term future where the actively managed funds consolidate, the leading passive-strategy vehicles grow further, and most publicly traded companies suddenly have at least 55% to 60% of their float held by their top ten shareholders. You combine this landscape with the more receptive boards and it makes for a fertile situation where there a convergence between what Trian has been doing, as a highly engaged shareowner, in its efforts to influence the way companies conduct business and what institutional shareholders of all stripes are able to go out and do. Do you think there will start to be consolidation among the actively managed funds or pressure on the actively managed funds to be more active, more like Trian for instance?

Gerald Hassell: I think we are going through truly secular changes in the asset management industry and particularly the actively managed aspects of it. The dramatic change in flows from active funds to passive funds, whether they're ETFs or index, is extraordinary, truly extraordinary. Much of the conversation now with investors when choosing which funds to go into is what's your expense ratio. Not what your return is. Not what is your risk-adjusted return, which is the right question. So, the active managers, since they're having a very hard time meeting benchmarks or the median for index funds, don't have a good answer. The first thing they have to do, besides trying to out-perform, which is always hard, is they've got to look at their structural costs. Actually, that's where our firm is benefiting because we're one of the biggest providers of infrastructure—mid-office services, back office, clearing, custody, settlement, *et cetera*—and we have enormous scale, whereas investment managers shouldn't be doing those things themselves, they should leverage our capabilities. So we're actually on one side of the house benefiting from that trend, and on the other side of the house we do have a number of traditional high-conviction active managers. They're challenged. We also benefit from the fact that one of our boutiques is a very large index fund. We do have some balance in our own portfolio. That's the good news. But the active managers are under enormous pressure. When it comes to voting, I think the index funds are still figuring out how to not just vote for governance reasons, but how to vote based on the performance of the company. They are very challenged to figure that out. So I do think that *active* active managers will still get a lot of flows where they can differentiate from either the style or the performance. Middle-of-the-road active managers are going to be extraordinarily challenged and index funds and ETFs will continue to grow.

Ed Garden: This is a little bit of a tangent. But I think there is something really big happening. And here's my observation—for the last hundred years or so, the way the public equity markets worked, what became conventional thinking, is that if you, as an owner, didn't like what was happening, you had one option: sell your shares. Now think about that dynamic versus private equity. The other end of this spectrum is private equity, where the ownership of the company *is* the board. Managements report to a board, and the board are the owners. And by the way, they have a lot of skin in the game and they are very well-informed. I would also submit to you that over the last forty years there has been a transfer of wealth from public shareowners to private equity limited partners. For some reason, that dynamic of having the ownership in the boardroom has created really good results. But the erroneous theory that emerged from the success of private equity is that you can't fix a company by staying public. You need to take it private, fix it out of the public spotlight. Now we are witnessing a consolidation in the public shareowner base. You just mentioned that at The Bank of New York Mellon our top ten shareowners own forty or fifty percent. Those shareowners are very sophisticated. They know the industries. They understand the nuances and subtleties of the businesses. And all of that—that convergence of factors—has created, and I think we're at the forefront of this, an ownership mentality in the boardrooms of *public* companies. The owners of public companies no longer think, 'If I don't like what's happening, I need to sell.' They now think, 'Along with others, I own this company and I have a responsibility and a right to make sure this business prospers. And I want to see that happen.' That's why we believe institutional shareholders are receptive to learning about Trian's operating and strategic initiatives to enhance long-term shareholder value.

Ethan Klingsberg: Is there an argument, though, that when you're able to have your top ten shareholders in one room and they own the majority of the company and you have these boards who reflect this sense of ownership such that they're not deferential to management necessarily, you don't really need a Trian at that point?

Ed Garden: The issue is, Ethan, that, while a lot of these groups no longer feel that they're only option is to sell, they still don't necessarily have the skill set, the locked up capital, the temperament to go into board rooms and for the next five, six, seven, ten years to get sales up and expenses down.

Ethan Klingsberg: As the shareholder base changes and the passive strategies become stronger, how does that impact support for what Trian is doing? As Gerald was pointing out, some of these passive strategy investors have trouble figuring out what they're really after. Are they after governance? Are they after performance? How does that impact the ability of Trian to get support from the shareholder base?

Ed Garden: The index funds, the passive strategies have put in a lot of time and energy into making sure that they're contributing to strong corporate governance. And not just on the traditional governance measures like board refreshment, but really having a point of view on things like operational issues. It's hard because, for example, the index fund complexes may hold in excess of 1,000 different stocks and it's hard to have industry expertise on every public company. Do you agree with that, Gerald?

Gerald Hassell: Yes, I would agree. I would also add that I think the index funds, particularly given their structure and their inability to truly analyze companies, like the fact that someone as engaged as Trian is there, and can have positive influence on companies where they [the index funds] don't have the time or the energy or the ability to do so. So I actually think in many cases the index funds like to see this kind of engagement.

Ethan Klingsberg: Thanks to both of you for helping us to understand what's going on with the big picture of the shareholder and board landscapes. From the macro-perspective, as Ed said, there's something really big happening right now.

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The Mensch or the Schmuck

Adventures in activism

Wachtell's David Katz and his fellow panelists this spring at Tulane's Corporate Law Institute examined activism today and how the ecosystem of companies and those who seek to transform them is itself constantly evolving. The panelists included Dan Burch, the chairman, CEO and co-founder of MacKenzie Partners, Inc.; Chris Cernich, a founder partner of Strategic Governance Advisors; Joele Frank, the founder and managing partner of Joele Frank, Wilkinson Brimmer Katcher; Brian Schorr, a partner, chief legal officer and a member of the investment team of Trian Fund Management, L.P.; and Steve Wolosky of Olshan's Shareholder Activism Practice Group.

Mr. Katz opened the discussion by asking Mr. Burch what has changed over the past ten years. The size of the targets is one of the most important recent developments. Mr. Burch said. There are now far more $5-billion-plus targets and a growing number with market caps over $100 billion. Many of these shareholders are not required to file 13Ds for these positions and so it is difficult to know how many situations are resolved and not counted before they go public. Although the number of activist interventions slipped slightly in 2016 from the previous year, the 400 cited in 2016 is still extremely significant. What's more, he said, many last longer than a single year, so there may be between 600 and 800 situations underway over a two-year period. "That is quite a number of companies that are under siege by an activist campaign on an annual basis," Mr. Burch noted.

A New Cooperation

A company's size or performance no longer preclude an attack, Mr. Katz pointed out. Why, he asked, are activists targeting ever larger companies even though they have ever smaller stakes on a percentage basis? Activism, Mr. Wolosky said, has become an acceptable asset class. There is a growing number of funds that are focused on long-term investment who have decided that activism is now a tool they can legitimately deploy. Mr. Wolosky estimated that such campaigns now account for around 25 percent of the total.

Corporate governance has taken over from economic activism as the strategy of the day. Activists are no longer exclusively focused on corporate balance sheets, but are also attacking takeover defense bylaws and classified boards, and are increasingly focused on the composition of boards and how long each director has served. Management succession was the topic du jour not so long ago, that has now been replaced by the question of whether boards of directors appear entrenched or too homogeneous with no plan to reach diversity.

An intriguing change that Joele Frank has seen in her practice in the last year is a turn towards more cooperative and congenial settlement negotiations between activists and the companies in which they invest. However, Ms Frank went on to say, an activist that takes a friendly stance with one target can just as easily become quite aggressive with another. "The problem is I don't know whether I'm going to get the mensch or the schmuck." After cooperating with one company, the same activist can become what she termed "very, very, very, VERY difficult" on the next encounter. There is a new congeniality but at times, little consistency.

Activists can feel the same way about companies, another panel member pointed out, when they are dismissed with a wave of the corporate hand toward the door of the investor relations department. "You can pick up the phone and you can have a very good dialogue, and the CEO says, 'I want to meet with you'," said Steve Wolosky of Olshan's Shareholder Activism Practice Group.

"But at other times you can pick up the phone and no matter how large your stake in the company you don't feel you're treated with respect." At which point, he said, "you just figure, 'Hey, we'll go at this a different way.' "

Still, Ms Frank said she is impressed with the change in attitude among activists. "This year, more than any year in my experience, companies have been willing to work with activists, and activists are willing to work with companies. [The latter] is where the [most dramatic] change is, to be honest—activists have been willing to work with companies. We've had some very positive closures, and for me to say that? I mean, come on. It's been major. It's huge."

Companies often face what is known as an ankle-biter, a first-time activist tracking a smaller company, who can turn out to be nothing more than press-hungry arrivistes. The aim of this species is usually to get on the board at any cost, Wachtell's David Katz said. Ms Frank jumped in: "Or to get press." Rather than focus on whether the company is doing well or poorly, Mr. Katz said, such activists can choose a weak target with limited resources that is not as capable as larger prey of fighting back. It becomes more about an activist's quest for glory than any problems that need to be addressed at the company.

Trian: An Unusual Firm

An investment firm that is diametrically opposed to an anklebiter is Trian, founded by Nelson Peltz, Peter May and Ed Garden. Mr. Katz called Trian's relationship with Bank of New York Mellon a "love fest," described in our cover story in this issue. Mr. Katz asked Ms Frank how often she has seen such a long-term cooperative strategic partnership between an activist and its target. After a long pause: "I think it's a very unusual situation. I think it's ideal. I'm very happy for them. May they go together forever. But it's not the norm. If you're a fairly large, sophisticated company that has made changes over time and has moved with the times, and whose performance is decent, and still have people knocking on the door, the reaction is much more likely to be incredulous than welcoming."

Not in the case of Trian and Bank of New York Mellon. Brian Schorr, Trian's chief legal officer, a partner and a member of the investment team, explained that his firm's typical business model is to spend up to six months in an intensive due diligence examination of a company seen as a potential target. Armed with confidence in a set of strategic and operating initiatives, Trian makes its move, usually with the aim of gaining a seat on the board of directors for one of its partners. The firm invests in approximately six to 10 companies at one time, with representation on the board at roughly two-thirds of those investments.

The firm's background, its DNA, as Mr. Schorr put it, is in running companies. Its founding partners have long experience in how to invest a company's resources, how to meet payroll, how to allocate capital, when and where to open plants, and how to manage operations across the globe. Trian's founders, he mentioned, bought Snapple from Quaker Oats while running publicly traded Triarc Companies, and then sold it to Cadbury Schweppes, after what Mr. Schorr described as an impressive turnaround which became a Harvard Business School case study. "When we look at companies," he said, "we look at them from a long term operational perspective."

Trian has been involved in only two proxy contests in 11 years. The last proxy contest was almost two years ago at DuPont, and even in that case, Trian had been in the stock for 18 months. "That proxy contest was a last resort for us." Mr. Schorr recalled. "The way we like to get things accomplished is through the power of the argument."

Once on a board, Trian, on average, is a shareholder for more than 5 years, far longer than the typical hold of the largest categories of equity mutual funds which have an average holding period of approximately a year-and-a-half. Trian has been on ten boards over the past eleven years and has seats at present on five boards — Sysco; Mondelēz; BNY Mellon; Pentair; and Wendy's.

"We do not typically set out to dominate a board. Ours is a different business model than most others," Mr. Schorr said. "The goal for us is to have a voice in the board room, to be able to be on the inside, to understand what's happening, to stimulate a robust conversation in the boardroom, and to use all that information to help grow the company for the long term. Once in the boardroom, you have a fiduciary responsibility to all shareholders and board members have to take that responsibility very seriously. We're trying to create sustainable value over the long term, not the short term."

Rapid Transformation

A company's size or performance no longer preclude an attack, Mr. Katz pointed out. Activism, Mr. Wolosky said, has become an acceptable asset class. There is a growing number of funds that are focused on long-term investment who have decided that activism is now a tool they can legitimately deploy. Mr. Wolosky estimated that such campaigns now account for

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around 25 percent of the total.

The size and power of activist funds, the ever-growing sophistication among boards of directors and management teams about the business of activism as well as increasing acceptance on both sides that they can work together, are all signs of a positive transformation. "The world of activism has changed in the last five years. In fact, I think it has changed dramatically in just the last three years," MacKenzie Partners' Dan Burch said. "Companies are trying to do the right thing. Can they get ahead of the curve? I don't know. But they are trying to make changes on their own. The number of dollars under activist management makes everybody a target."

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