

# Insights Focus: Key Observations for Directors and Senior Executives

Skadden

January 2015

This article is from Skadden's *2015 Insights* and is available at [skadden.com/insights](http://skadden.com/insights).

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Although *Insights* is intended to cover a wide range of issues, there are a number of topics we believe will be of particular interest to directors and senior corporate executives. Below is an introduction to these topics and a link to the Insights articles that address them in greater detail.

## The Return of M&A

In 2014, an improved economic environment, combined with financial market support for well-constructed mergers, relatively low market volatility, the absence of significant political or economic shocks and the momentum effect of an increasingly active M&A environment, led more confident boards and management teams to move forward with transactions, some long-contemplated.

The use of aggressive techniques, including hostile or unsolicited bids, continues to be acceptable in the corporate world. Companies have not hesitated to move on strategic targets — which may have led to a surge in announced but later withdrawn transactions. The dismantling of corporate defenses as a result of institutional shareholder pressure and the positive attitudes of investors to favorable bids helped propel this activity. In addition, corporate players have shown continued willingness to intervene in an announced transaction when a desirable acquisition target is engaging in a transaction with another party. (See [“M&A Activity Jumps to Levels Unseen Since Before Global Financial Crisis.”](#))

## Corporate Governance

**Activism.** For a number of years, the message for directors of U.S. public companies has been that their decisions face greater and greater scrutiny. One of the principal sources of this scrutiny has been investors, including activist investors, governance activists such as state and labor pension funds, mutual funds and other long investors. This trend is part of the paradigm shift from a more deferential, board-centric model of corporate governance for public companies to a more skeptical, shareholder-centric model. (See [“US Corporate Governance: Boards of Directors Remain Under the Microscope—Shareholder Activism.”](#))

**Impact on M&A.** The impact of activism on M&A is profound — its presence is now viewed as an integral part of the corporate landscape. As importantly, boards are attuned to the desire of institutional shareholders and other investors for corporate focus on shareholder value in the near- to medium-term and are in many instances taking proactive steps to achieve increased value even before or without the public appearance of an activist. (See [“M&A Activity Jumps to Levels Unseen Since Before Global Financial Crisis—Strategic Decisionmaking and Impact of Activism.”](#))

**Shareholder Engagement.** The relationship of the board with the shareholder base is changing. With the topic of “shareholder liaison committees” on some institutional investors’ agendas, the topic of shareholder engagement is of key importance. (See [“US Corporate Governance: Boards of Directors Remain Under the Microscope—Where Do We Go From Here.”](#))

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**Proxy Access.** With the advent of “proxy access,” governance activists are on the verge of causing another major change to the framework of director elections. (See “[US Corporate Governance: Boards of Directors Remain Under the Microscope—Governance Activism and Proxy Access.](#)”)

**Other Governance Issues.** Boards will continue to face scrutiny on a number of other governance issues, including compensation policy, diversity and tenure (“board refreshment”). (See “[US Corporate Governance: Boards of Directors Remain Under the Microscope—Board Composition](#)” and “[Overwhelming Majority of Say-on-Pay Proposals Continue to Garner Support.](#)”)

**The Role of the Board in the M&A Process.** Delaware courts have made it clear that they expect active board involvement and oversight in the M&A process. (See “[M&A Activity Jumps to Levels Unseen Since Before Global Financial Crisis—Sales Processes.](#)”) A number of other developments, including multiforum litigation in M&A transactions and the possible advent of fee-shifting bylaws requiring unsuccessful stockholder plaintiffs to pay the adversaries’ legal fees, may be of interest. (See “[Fee-Shifting, Financial Advisor Liability Among Likely Delaware Law Issues for 2015.](#)”)

## Risk Management

**Duty of Oversight.** The duty of a board to oversee risk management arises primarily from its fiduciary duty of oversight established under state law. A board should continually assess, monitor and oversee the corporation’s risk profile. In addition to cybersecurity (discussed below), areas of focus could include risks in financial markets, including commodities, derivatives or currencies, climate change and privacy issues (including consumer and employee). Fundamentally, risk analysis should focus on risks inherent in the enterprise as well as new external trends or events that could create new risks. (See “[US Corporate Governance: Boards of Directors Remain Under the Microscope—Risk Oversight.](#)”)

**Cybersecurity.** One of the key risk issues corporations face is cybersecurity. Five of our partners explore this issue in “[Insights Conversations: Cybersecurity.](#)”

**The Global Government Enforcement Landscape.** In the global criminal and regulatory enforcement arena, robust enforcement actions against multinational companies are likely to continue worldwide in 2015. U.S. authorities continue to aggressively pursue cross-border investigations and to scrutinize closely the compliance programs of multinational corporations. Investigative activity by U.S. authorities in 2014 was particularly intense in the areas of market abuse, corrupt practices and bribery, and tax fraud, and that activity is anticipated to extend into 2015, perhaps with an even broader geographical reach. In Europe, Asia and South America, with criminal investigations and prosecutions across multiple areas, regulators are working together to comprehensively target alleged misconduct of global corporations and financial institutions. (See “[Robust Action Dominates Global Government Enforcement Landscape.](#)”)