

# IRupdate

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the voice of the investor relations profession

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## Think Like an Activist

A rare look inside an  
activist's playbook.

**10** Surveillance  
2.0

**14** Bread and Circuses  
in Washington

**22** Billion Dollar  
Lessons

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Founded in 1969, the National Investor Relations Institute ([www.niri.org](http://www.niri.org)) is the professional association of corporate officers and investor relations consultants responsible for communication among corporate management, shareholders, securities analysts, and other financial community constituents. NIRI is the largest professional investor relations association in the world, with more than 3,300 members representing over 1,600 publicly held companies and \$9 trillion in stock market capitalization. NIRI is dedicated to advancing the practice of investor relations and the professional competency and stature of its members.

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6

## Think Like an Activist

A rare look inside an activist's playbook.

*By Evan Pondel*



10

## Surveillance 2.0

Activists and advanced analytics are making surveillance a hot topic again.

*By Patrick Gallagher*



14

## Bread and Circuses in Washington

IR teams should start preparing for CEO pay ratio disclosure and other mandates.

*By Ted Allen*



18

## The Value of Career Diversity

NIRI Fellow Keith Mabee has worked and succeeded in corporations, academia, and the military while honing his skills as a strategic change agent and achieving his professional and life goals.

*By Al Rickard*

### DEPARTMENTS

#### 4 At the Bell

Amplifying Our Voice

*By James M. Cudahy, CAE*

#### 22 On the Books

Billion Dollar Lessons:  
Avoiding Killer Business  
Mistakes

*By Beth Kurth*

#### 24 NIRI Now

- Cynthia Skoglund Honored as 2015 NIRI National Volunteer of the Year
- IR Research At-A-Glance
- Professional Development Calendar

#### 25 NIRI Numbers

Metrics on NIRI and the IR profession.

#### 26 Spotlight on Chapters

Creating Frictionless Earnings Releases

*A panel discussion at a NIRI Silicon Valley chapter meeting explores best practices for the quarterly earnings process.*

*By Meghan O'Leary*

# Amplifying Our Voice

Representing the interests of NIRI members in the advocacy arena is an interesting exercise. For starters, the list of advocacy-related issues that rise to the level of “important” to IR professionals is small. That list shrinks a bit more when it is filtered, to some degree, to account for the shared interests of the companies that employ our members.

From there, NIRI’s challenge is at least three-fold. First, our resources are finite...we do not have a financial war chest to match most special-interest groups roaming the corridors in Washington, D.C. Second, our advocacy issues are complicated, and our “side” is nearly always pushing for change and opposed by well-funded groups. Third, IR professionals are busy; channeling your voices to support our advocacy agenda has proven difficult.

Despite what might seem like long odds, NIRI does have clout in the nation’s capital. Leveraging that clout depends on our ability to engage in sustained, methodical efforts to pursue issues relevant to our members. While the pace of change often appears glacial, it is important to familiarize yourself with NIRI’s advocacy agenda, so that when the time comes for NIRI to use of our member influence, you will be ready.

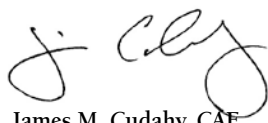
To support our efforts, we have launched a new advocacy ambassador program through NIRI chapters. The intent is to collect perspectives from our members at the grassroots level and generate broader support from individual companies for our regulatory initiatives. To date, 12 chapters have appointed ambassadors, and we expect that other chapters will follow suit.

With an informed membership and our advocacy ambassador program in place, when the appropriate time arrives, we will ask NIRI members to support our efforts in areas such as the following:

- NIRI recently joined with the NYSE Group in a rulemaking petition that asks the SEC to adopt rules to require institutional investment managers to provide public disclosure of short positions.
- NIRI, together with the NYSE and the Society of Corporate Secretaries, also is urging the SEC to modernize its Section 13(f) rules to shorten the time period for institutions to disclose long-position holdings.
- We also are working with the Shareholder Communications Coalition to push for modernization of the proxy voting system, including greater SEC oversight of proxy advisors.

So, stay informed. Get in touch with your chapter’s advocacy ambassador. And, be ready to act when called upon to do so.



  
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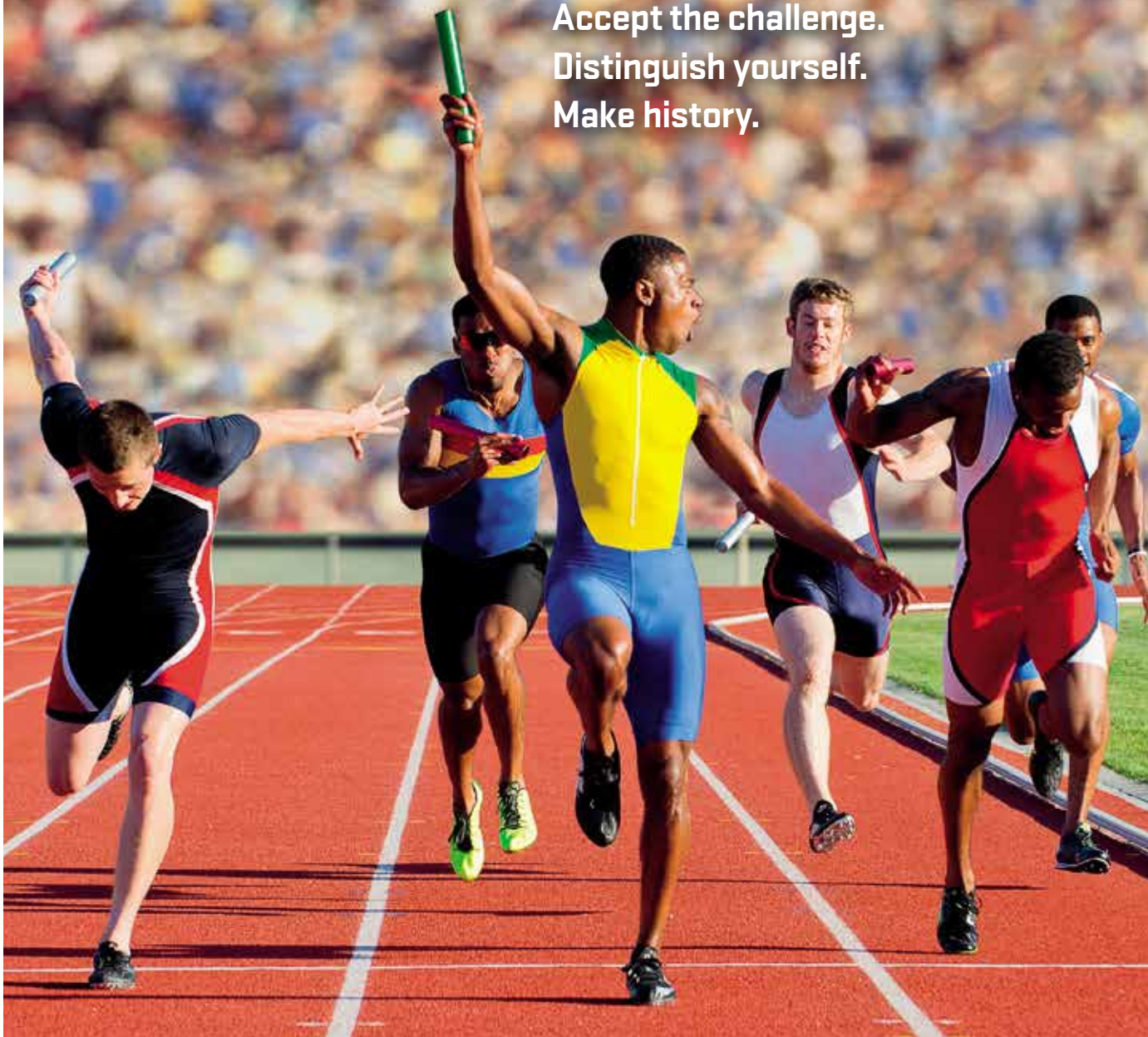
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# Think Like an Activist

A rare look inside an activist's playbook.

By Evan Pondel

Allergan Inc. had no idea that activist investor William Ackman and Valeant Pharmaceuticals International had the Botox maker in its crosshairs in April 2014 when it received a call from the New York Stock Exchange about halting trading.

"My lunch hit the floor," says former Allergan senior corporate counsel, Scott Akamine, describing his initial reaction

to the news at a recent event on activism hosted by NIRI Los Angeles and the Society of Corporate Secretaries and Governance Professionals. "Fortunately, we had enough gas in the tank with investors when we needed it."

In the end, Ackman and Valeant's bid to acquire Allergan never came to fruition after pharmaceutical heavyweight Actavis offered \$219 a share for the anti-wrinkle company, but many still chalked up Ackman's move as

a victory because it may have instigated the acquisition. This case also highlights the alliances that activists are increasingly forming with companies, public pension funds, and other potential stakeholders that seek to effect change.

For issuers, this all adds up to a greater possibility of confronting an activist campaign. And despite the "shiver in me boots" mentality that many companies harbor toward activists, there has never

been a more critical time to understand activists' motivations and how best to work with them.

"It comes down to a battle of who wins the hearts and minds of shareholders," says Donna Dabney, executive director of the Conference Board. "The key is don't just stiff-arm them (activists)."

And that's for good reason. Activists won 73 percent of proxy fights in 2014, according to data collected by Shark Repellent, FactSet's activism database. At the same time, more than a third of the 40 proxy fights in North America in 2014 settled, as compared with 32 percent in 2013, 20 percent in 2012, and 17 percent in 2011, according to London-based research firm Activist Insight.

But one of the biggest challenges for issuers is actually talking to an activist long before any sort of campaign surfaces. Even finding an activist to go on record for this article was virtually impossible. That was until Chris Kiper, a founder of Legion Partners, returned a phone call and shared his insights.

The following is a rare look into the playbook of an activist.

## Legion's Playbook

Legion Partners has approximately \$250 million in committed capital. The firm made headlines earlier this year when it teamed up with the California State Teachers' Retirement System (CalSTRS) to target clothier Perry Ellis International. Legion also has waged a proxy campaign at RCM Technologies and made investments in Timken Co., Carter's Inc., and Straight Path Communications.

Kiper says the campaign at Perry Ellis was successful because it prompted the company to install new independent board members. Before the campaign started, Kiper and his colleagues applied certain screens to Perry Ellis to ensure it would be a viable target.

"Initially, we're trying to determine if a company is completely impenetrable to an activist intervention," he says. "It's also important to make sure the business has staying power and reasonable barriers to entry."

Other criteria include avoiding situations that lead to binary outcomes. For example, if a drug company is in the last phase of clinical trials on one product, it probably isn't a good target for Legion. Legion prefers target companies to have more than one potential revenue-generating product in the hopper. Another deterrent is insider ownership of more than 25 percent, as well as dual-class shares where it can be difficult to gain enough voting power.

Once Legion identifies a company, grassroots research soon follows. Kiper says the best way to understand the full scope of an issuer is to sit down with a pile of 10-Ks and start reading. It is also helpful to have a relationship with passive money managers who understand what is going on at a company. "They may be happy to send you research, and maybe you can then help them make something happen at a company and get their votes," he says.

Another increasingly popular source of information is Glassdoor, a workplace review website. Kiper uses the site to understand former employees' perspectives and to get a sense if the company's culture is broken. Occasionally, Glassdoor may even lead to a former employee who is willing to talk, but Kiper makes a point that his firm does not talk to current employees.

Conversely, analysts' notes, social media, and the Management Discussion and Analysis (MD&A) sections in annual reports usually are not helpful. Kiper says he often finds MD&As so poorly written that it becomes difficult to get a sense of what is really going on.

Stock price is another factor Kiper considers when deciding to go after a company. From the outset, Legion takes the perspec-

tive of a value investor. If a stock is trading poorly, it is important to understand why the stock is trading so poorly. "It is crucial for us to understand the issues that other investors perceive, and then we can figure out how we can help work on those issues," he says. "At the end of the day, we tend to be constructive and are not looking to beat people over the head."

The easiest way to engage constructively (from Legion's perspective) is to have an exchange of ideas with management and the board. Of the topics exchanged in this dialogue, return on invested capital is generally one of the biggest overriding issues. Kiper breaks it down as follows: It is important to understand what the return is today, what the opportunity is to improve the return, and how the company intends to communicate that vision and story to investors.

## Incentivizing for the Right Reasons

Compensation plans are another issue rife for tug of war with activists. Kiper tries to determine if management teams are being paid to generate shareholder value or are "people being incentivized to do the wrong things. If a plan is well-crafted with short-term incentives and long-term incentives, then shareholder value will be created over the long haul," he says.

Another issue that gets Kiper's attention is compensation for the board of directors, which can be tricky. If directors are mostly compensated with cash, Kiper argues that the board may be less incentivized to seek merger and acquisition deals for the selfish purpose of continuing to receive a paycheck. The same goes if directors receive too much stock. Perhaps the director is looking for a quick pop at the expense of enhancing long-term shareholder value. Kiper recommends that directors own three-to-five times their annual retainers in stock, and directors should have to hold



onto the stock for a certain period after they leave the board.

The number of directors on a board also makes a difference. If they are too big, it is difficult to get people to focus on making decisions. “And too many directors can lead to a lot of deadwood,” he says.

In the case of Perry Ellis, Legion was able to get five new independent directors appointed over an 18-month period. Before Legion was able to get the last two of these five directors replaced, it had to launch a proxy contest. Kiper says it is always important that the board have enough experience in the company’s industry. In the case of Perry Ellis, the last two directors added were practically legends in the apparel industry. He recalls one of the first activist campaigns he worked on where the CEO put his dentist on the board. And no, the company was not in the dental industry.

Kiper also advocates that directors engage with shareholders. Directors are often out of touch with the shareholders they represent, and getting directors to start acting like owners of a company can be a huge advantage.

Among other key focal points for Kiper are succession plans for the executive team. The time horizon for Legion’s target investments is usually two to three years, and having a succession plan in place can help make that period a lot smoother if change is needed for the management team.

Of course, Legion’s time horizon is influenced by its investor partners. CalSTRS is a long-term investor, so Legion is more inclined to engage in a campaign that would enhance shareholder value for the long haul. “Our mandate from CalSTRS is getting companies to perform sustainably better following an activist intervention,” Kiper says.

## PERRY ELLIS BOARD PRACTICES

*By Anita D. Britt*

Perry Ellis International’s practice is and has been to maintain a strong and engaged board of directors. As a matter of practice, when an independent board member retires, the person is replaced with a new independent director who brings a strong skill set to complement the overall board. The company named Alexandra Wilson to its board in February 2014 and J. David Scheiner in June 2014. As a matter of record, Legion Partners filed a [Schedule] 13D reflecting its investment in the company during July 2014.

Subsequently, in December 2014, Perry Ellis named Jane DeFlorio to the board, thereby filling a vacancy upon retirement. The company in July 2015 named Michael W. Rayden and Bruce J. Klatsky to its board to fill two vacancies also due to retirement.

**Anita D. Britt** is chief financial officer of Perry Ellis International; [anita.britt@pery.com](mailto:anita.britt@pery.com).

*The Wall Street Journal* recently published a study that shows that shares of large companies confronted by activists are more likely to outperform their industry peers. However, the *Journal* says only slightly more than half, or 38 of the situations in the study, led to better shareholder returns than industry peers, and the median activist target beat peers by just under 5 percentage points.

There is often a fine line between balancing the short-term demands of investors and the long-term goals of a company. “Some companies make bad public com-

panies,” Kiper says, noting that the toy and media business can be particularly hard to track because there may be a hit product or television show during one quarter and then nothing for several quarters.

## Communication Is Key

The best way to help investors strike this balance is substantive communication. Kiper acknowledges that management teams and directors may be reluctant to talk to activists, although incurring fees to fight an activist campaign isn’t necessarily enhancing shareholder value, either.

Indeed, the best way to persuade an activist to go away is by getting the stock price to go up, but as Kiper suggests, it’s not always that simple, and boards are usually talking about issues that are stifling the stock long before activists have raised them.

And while exchanging ideas and collaborating are not always easy with an activist, they are among the more practical ways to avoid wasting a company’s time and resources on a proxy fight. Kiper says ensuring that investor relations officers are up to speed on a company’s story and not simply parroting a conference call script are critical for that initial touch point with an activist.

“When we speak to IR folks, there is not much value if they are serving as a gatekeeper and making it difficult for us to get real answers about a company,” He adds that if an IRO has to repeatedly say, “I will get back to you with an answer,” it can be frustrating although promptly calling back with the answer certainly helps.

Perhaps what isn’t frustrating is that Perry Ellis’ stock price has made steady gains since 2014. As for Legion’s next target – all you have to do is apply his firm’s playbook. **IRU**

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# SURVEILLANCE 2.0

Activists and advanced analytics are making surveillance a hot topic again.

By Patrick Gallagher



Stock surveillance and shareholder identification through Depository Trust Company settlement information has been a core investor relations tool for going on 25 years. According to a January 2014 survey by Rivel, 64 percent of the North American companies surveyed use a surveillance vendor, including 83 percent of large-cap companies, 66 percent of mid-caps, and 44 percent of small caps.

Yet despite its widespread use, surveillance is a hot topic again. Industry consolidation, new entrants, evolving capital markets, and advanced analytics are ushering in a new era of more holistic, more predictive

market intelligence in combination with traditional ownership identification.

These developments are thanks in large part to the upsurge in shareholder activism. Activists' success in increasing share value in many cases has produced an unprecedented flow of money into their coffers, which has put even more companies in their sights.

"I'm on the road pretty much every week visiting with clients and potential clients," says Marc Greene, managing director at capital markets data provider Ipreo. "Three, four years ago, activism was rare. It was the other guy, some other company. Now just about every single conversation I have with a surveillance client or potential client, they are making sure we are looking at

the options market, looking at any kind of investment opportunity that an activist could be using to get a foothold. A few years ago that just wasn't on people's radar."

## Increased Use of Options

In fact, activists have been flying under the surveillance radar for more than a few years. Way back in 2006, Pershing Square's William Ackman quietly built a 4.9 percent activist stake in McDonald's Corporation "largely through deep in-the-money, long-dated OTC options," according to *Institutional Investor* magazine. Since then, Ackman and other activists have become expert at using options, swaps, carefully timed stock purchases, and seeking waivers

from the SEC to stealthily build equity positions in target companies.

“There has been a prolific increase in the use of options by activist investors,” says Adam Frederick, senior vice president of intelligence at Q4 Web Systems and a cofounder of Oxford Intelligence Partners, which was recently acquired by Q4. “Options limit the amount of upfront capital they need to commit, make it easier to hide the activity, and minimize the share price impact while they are building their position.”

For example, when the activist hedge fund Starboard Value announced a 5.1 percent position in office supplies retailer Staples in December 2014, about half of it was held in options. Including swap positions, the stake in Staples was closer to 6 percent.

“More and more activists are using options, and not just straightforward options, but over-the counter options, which are almost impossible to track,” says Ipreo’s Greene. “But they all leave tiny footprints that we are getting more adept at recognizing. Each activist has a different strategy and ways of going about what they do.”

When Carl Icahn disclosed in June 2011 that he had amassed a 9.9 percent position in vehicle manufacturer Oshkosh, the news sent the stock through the roof in after-market trading. About 70 percent of the position was represented by call options. “We were unaware of Carl building a position,” recalls Patrick Davidson, vice president of investor relations at Oshkosh. “He wanted to hide it and he did.”

“Intelligence used to be only about who is buying and selling your stock,” says Tyson McCabe, senior director at Nasdaq. “We are seeing an evolution in our offering into something more consultative, more sophisticated. There are a lot of data points we have access to as we look broadly across our business. Today, we’re incorporating options ownership, fund flows and fixed income into our anal-

ysis, as well as using big databases and advanced analytics to maximize the value of our surveillance programs.”

“It’s not just what’s happening in the equity market,” says Ipreo’s Greene. “Clients want to know what’s happening with their fixed-income investors, options-related activity, and corporate governance issues. Most importantly, they want to understand what to do with this information. So the days of just providing a shareholder list are over.”

At the forefront of the quantitative analytics wave is ModernIR, which came on the scene 10 years ago with a very different approach to market intelligence.

“We are entirely about proprietary mathematical models,” says founder and CEO Tim Quast. “We know every day what percentage of volume is being driven by different market behaviors so we can see what is really setting the stock price. Most of the time, it’s got nothing to do with fundamentals. Index funds, ETFs, and high-frequency traders account for most of the volume today. They don’t listen to earnings calls or build financial models, but they do set prices.”

Clients use this “rational price” intelligence to separate noise from substance in their trading activity, gauge near-term sentiment, adjust the focus of their targeting efforts, and measure the effectiveness of their IR programs, he says.

ModernIR applies other automated measures to generate options intelligence and assess activist movement in the market. “We track derivatives-related trading by measuring counterparty activity and correlating it to discrete investment and trading behaviors to understand the derivative activity,” he explains. “We detect activist footprints because our models know what event-driven behavior looks like in trade-execution data. You can’t hide it if it involves a counterparty.”

Appreciation for the predictive power of options was the inspiration behind the formation of Oxford Intelligence Partners in 2014. As Frederick explains, “Options trading is an often overlooked segment of market activity that can provide predictive insights into market sentiment, expected relative peer performance, proactive IR communications, and activist accumulations.

“We do the surveillance ‘blocking and tackling’ of who is buying and selling,” Frederick says. “But we focus a lot on options intelligence -- not just reporting on how many calls and puts you had and monitoring for unusual activity, but taking it a step further with algorithmic models that enable us to score forward-looking sentiment quantitatively. By analyzing options pricing, we can quantify what portion of a stock price’s movement and volume is driven by stock specific activity versus the sector and broader market trends.”

## Measuring IR Effectiveness

Ipreo’s Greene views the impact of activists and options as the No. 1 trend, but not far behind at No. 2, he believes, is the use of surveillance to match up IR efforts with IR results. “What did we get for those 300 meetings and 15 conferences we did? Are we being as effective as we can in reaching out to investors? Are we making the best use of management’s time?”

Lisa Curran, vice president of investor relations at Ecolab, concurs. “The real value of surveillance is to help determine the effectiveness of our marketing. We are aggressive in terms of conferences and non-deal roadshows. It helps us determine if we are headed in the right direction, leading with the right people,” she said. “You can see some trading activity after a meeting with an investor, somebody coming into the stock. I don’t know how you’d do that without surveillance. The [Form] 13F [institutional ownership] information is so



dated. Somebody could already be in and out by the time you see the filings.”

“It’s probably the holy grail to measure the effectiveness of all the meetings and other things you do,” says Oshkosh IRO Davidson. “Surveillance is certainly not an exact science, but in my mind, it is a good investment for getting the best available information about who may be buying and selling your stock. It increases your chances of being successful. You may not get anything for a while, but if someone is building a position, I think it is helpful to know that.”

Overall, IROs appear to be reasonably well satisfied with their surveillance service.

According to a January 2015 Rivel survey of 190 North American IROs who use a surveillance vendor, more than 60 percent said they are highly satisfied with their provider for their empathy, expertise, report quality, and for being proactive. The “highly satisfied” rating declined to 51 percent on “accuracy of information received” and 47 percent on “value for the money.”

For surveillance clients who are less than satisfied with the quality of the information they are receiving, many suggest closer interaction with the surveillance firm analyst may be the remedy.

“We really like to engage in a two-way dialogue with our clients,” says Nasdaq’s McCabe. “It’s a nuance-y business. A whole lot can get lost if you don’t pick up the phone.”

“The client can really help out,” says Frank Testa, senior vice president, Alliance Advisors’ market surveillance group. “We view our relationship as a partnership. Oftentimes information that a client is presenting in front of several institutions is helpful in pinpointing the entities behind the trading. We can match the institutions that the client is interacting with to our institution/custodian database that is maintained by institutional proxy voting. In addi-

tion, by letting the analyst know when you are going out to talk with institutions, we can also help prioritize the list based on the institution’s ability to make a meaningful investment and its activist history.”

## A Luxury for Smaller Companies

As to why some companies don’t use a surveillance service, it seems to be primarily due to size, resources, or situation.

Ecolab’s Curran notes that for smaller companies it often depends a lot on how aggressive the IR plan is, and what the level of interest is from the board and the CEO. “It may be hard to make the case for surveillance when there is not an activist situation and it is not a priority for the CEO,” he says.

She reminds IROs that the annual listing fees of both the NYSE and Nasdaq include access to certain market intelligence services. These subsidies can make surveillance possible for issuers that might not otherwise be able to fit it into their budget.

“Historically it has typically been hard to justify surveillance if your market cap is very small, your trading volume is less than 50,000 shares a day, or you have low turnover in your top 20 shareholders,” says Q4’s Frederick. “But as we as an industry get more into quantitative analytics and beyond just ownership information, that is only going to expand our addressable market.”


Gregg Lampf, vice president of investor relations at telecommunications equipment maker Ciena, had never before used a surveillance firm in his prior IR positions. “It just wasn’t in the budget. It is an expensive service, and some companies just cannot afford it. I compensated for the lack of it by doing my own surveillance -- reaching out to the sell side and the buy side and our market makers and our peers to triangulate information.”

Today, Lampf uses two surveillance firms, one for the equity market and one that he feels does a particularly good job for the options market, and he still does some surveillance on his own.

“It takes time, but I’ve made it part of my routine,” he says. He reviews the surveillance firm reports against the 13F ownership information each quarter to see if it matches up, but he cautions that “you are looking for directional accuracy, not necessarily absolute precision.”

Shortening the 45-day 13F reporting deadline is a long-standing regulatory reform priority for NIRI and its allies NYSE Group and the Society of Corporate Secretaries and Governance Professionals. Such a reform, if realized, would significantly reduce, if not eliminate, the need for traditional ownership identification. But it would hardly be the end of surveillance, according to industry representatives. In some ways, the future of surveillance is already here.

“Markets have become fragmented and increasingly sophisticated,” says Nasdaq’s McCabe. “We’ve seen substantial growth in the number of exchanges as well as a proliferation of dark pools. Given this continued evolution of markets, surveillance has gotten more relevant than ever as IROs turn to providers who are positioned to understand the inflows and outflows of a given stock.”

“Keep in mind,” adds ModernIR’s Quast, “that the buy side and sell side have spent billions creating technologies to make an elephant tiptoeing across a putting green look like a flock of birds, or whatever. They are trying to hide what they do. It’s not immediately apparent, but when you understand all of the pieces that fit in the puzzle, you can see what they are telling you about institutional movement.” 

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# BREAD & CIRCUSES IN WASHINGTON

IR teams should start preparing for CEO pay ratio disclosure and other mandates.

By Ted Allen

Washington, D.C., can be seen as a three-ring circus.

Amid the pie fights on cable TV over the Iran nuclear agreement, Hillary Clinton's e-mails, the Freedom Caucus revolt in Congress, and the rise of unconventional presidential candidates in both major parties, you shouldn't overlook the significant regulatory developments in 2015 that will affect how companies interact with their investors.

Most notably, the Securities and Exchange Commission (SEC) took action this year on four new executive compensation disclosure rules that are mandated by the Dodd-Frank Act. The most controversial of these new regulations is the CEO pay ratio disclosure rule, which the SEC adopted in August.

Under this mandate, most companies will have to disclose the median of the annual total compensation of all employees of the company, and the ratio of that median to the annual total compensation of its CEO. This rule will likely lead to messaging challenges for IR professionals at companies with relatively high pay ratios, such as those in the retail, hospitality, and entertainment industries, as well as those issuers with a significant number of non-U.S. employees.

Here are the key elements of the final pay ratio rule:

- Issuers will have to provide their first pay ratio disclosures for compensation paid in the first fiscal year starting on or after Jan. 1, 2017, which means that many companies would make their first disclosures in the spring of 2018.

- About 3,600 U.S. companies will be subject to this rule, which exempts emerging growth companies, smaller reporting companies, and foreign private issuers.

- With a few exceptions, the pay ratio determination will include all employees, including non-U.S., full-time, part-time, temporary, and seasonal workers employed by the company or any of its consolidated subsidiaries. A company may exclude up to 5 percent of its total workers who are non-U.S. employees.

The SEC's two Republican commissioners, Daniel Gallagher and Michael Piwowar, opposed the pay ratio rule and argued that it will only benefit labor activists who wish to "name and shame" companies into cutting executive pay. The commissioners warned that U.S. companies would initially have to spend \$1.3 billion to comply, and said the agency should have





done more to reduce compliance costs, such as by limiting this rule to full-time, U.S.-based employees, which NIRI and other corporate groups proposed. Gallagher also argued that this mandate may violate companies' First Amendment speech rights. A federal appeals court has invalidated part of another controversial SEC rule about conflict minerals disclosure on similar grounds.

The U.S. Chamber of Commerce, which has successfully challenged the SEC's market-wide proxy access rule and other high-profile regulations, said in October that it would not pursue a lawsuit over the pay ratio rule at that time and instead would focus its attention on the ongoing litigation over the conflict minerals rule. Assuming that the conflict minerals ruling is not overturned or scaled back on appeal, the Chamber and other business groups could use the appeals court's reasoning in that case to support a future suit over the pay ratio rule.

Several bills have been introduced in the House of Representatives to repeal the pay ratio mandate, but it appears unlikely that such a bill could win enough support in the Senate to overcome a likely Democratic filibuster or override an expected presidential veto. While the prospects for repeal would improve if Republicans win the White House in 2016, public companies should not count on receiving political or judicial relief and should start thinking about how they will comply with this rule.

"You cannot underestimate the importance of this issue," compensation consultant Mark Borges said during an October conference hosted by the Society of Corporate Secretaries and Governance Professionals.

As companies prepare to comply with this rule, their IR teams should consider their potential messaging to investors if the pay ratio is expected to be higher than the company's peers. Issuers also will have to develop messaging for their own employees, some of whom may be upset when they learn that

they earn less than the company's median compensation, noted Sharon Podstupka of Pearl Meyer & Partners. "You should take the time to sit down with your HR, legal, and finance teams to figure out the number you will present and what the reaction may be," she said at the Society conference.

## Procession of New Mandates

In April, the SEC voted 3-2 to propose a new "pay versus performance" rule that would require most issuers to include a new chart in their proxy materials that would include the compensation received by its named executives, the company's one-year total shareholder return, and a comparison with corporate peers. Commissioners Piwowar and Gallagher argued that companies should have more flexibility to use alternative performance measures and longer time periods. In comment letters, NIRI, BlackRock, CFA Institute, and others said the rule was too prescriptive and could result in disclosures that are not useful to most investors. The SEC has not publicly stated when it will finalize this rule, but it's unlikely that companies would have to provide these disclosures before the 2017 proxy season.

As required by Dodd-Frank, the SEC has drafted a new rule that asks companies to annually disclose whether they permit employees and board members to engage in hedging transactions with company stock. In July, the SEC proposed another rule that would direct the national exchanges to adopt listing standards to mandate stricter and more expansive "claw back" policies to recoup incentive-based compensation after restatements. According to its regulatory agenda, the SEC expects to finalize both rules by April. However, most companies probably will not have to comply with the "claw back" mandate until at least 2017 because the exchanges would need time to draft new listing standards, solicit public

comment, and obtain final SEC approval.

Meanwhile, the SEC is working to revive another Dodd-Frank disclosure rule that would require oil and gas companies to disclose resource extraction payments to foreign governments. A federal court struck down this regulation in 2013, but an advocacy group obtained a court order that directs the agency to prepare a new rule by June 2016.

As directed by the JOBS Act, the SEC approved a long-awaited pilot program in May to assess whether companies should be allowed to use wider "tick" size increments (such as 5 cents). The SEC will consider whether wider tick sizes would stimulate greater market-making activities in small-cap stocks, attract more investors, and improve liquidity and research coverage. The agency also adopted final Regulation A+ regulations and new "crowdfunding" rules, which are intended to provide capital-raising alternatives for small private companies and startups.

## Proxy Battles

In June, SEC Chair Mary Jo White directed the SEC staff to prepare recommendations for a "universal proxy ballot" rule that would require companies to provide a single ballot during proxy contests that lists management and dissident nominees. Such a ballot would likely make it easier for dissidents to obtain board seats in short-slate contests. This measure has been endorsed by the Council of Institutional Investors, which represents public pension systems and labor funds, and is a priority of Democratic Commissioner Kara Stein.

In October, the SEC released a new staff legal bulletin about shareholder proposals. In that guidance, the agency said companies may no longer exclude a competing resolution filed by an investor that would conflict with a management bylaw proposal if shareholders could reasonably vote for both measures. As a result, companies will have more difficulty keeping proxy access resolutions off

their annual meeting ballots, and IR teams should expect to see more of these proposals in 2016 and 2017. Proxy access resolutions went to a vote at more than 80 companies in 2015, and most earned majority support. “If you’re a big company, you should be thinking about proxy access,” says Beth Ising, a partner with the law firm of Gibson, Dunn & Crutcher. “Either you have received a proposal, or you will soon.”

## Political Theatre

During the Obama administration, there has been an uptick in politicization at the SEC, as evidenced by repeated 3-2 votes on key rulemakings and continued fights over the agency’s agenda. On conflict minerals, CEO pay ratio, and other controversial rules, the SEC’s two Democratic commissioners have joined with Chair White in supporting these new mandates over the vociferous objections of the Republican commissioners.

Over the past year, commissioners on both sides of the aisle have become willing to openly air their dissatisfaction with the priorities of Chair White, who oversees the agency’s allocation of staff resources. Although enforcement cases typically are discussed behind closed doors, Stein publicly objected to waivers granted to several financial firms that were accused of rigging foreign exchange rates. Before leaving the SEC in October, Gallagher publicly called for greater oversight of proxy advisors, curbs on activism, and reform of the shareholder proposal rules, but the SEC has done little to address these concerns.

Meanwhile, White has faced growing criticism — including online petitions and a subway ad campaign — from activist groups and Democrats for her reluctance to force companies to disclose their spending on corporate political activities. Forty-four Senate Democrats and 58 House members have written White and urged her to propose

such a rule. At the same time, Republican lawmakers in House have warned White not to proceed with such a mandate, which they view as “a waste of the SEC’s finite resources.” White also was publicly rebuked in June by Senator Elizabeth Warren, a Massachusetts Democrat, for not moving more quickly to finalize the pay ratio rule.

Unfortunately, it appears that the political squabbling at the SEC will continue. As of presstime, the nominees for two SEC vacancies were law professors with contrasting world views — the Republican nominee, Hester Peirce, is a former Senate staffer who has written papers that questioned Dodd-Frank, while the Democratic nominee, Lisa Fairfax, is a longtime proponent of shareholder democracy and board diversity. According to news reports, President Obama originally planned to nominate a well-regarded corporate lawyer (and a former SEC staffer) as the Democratic nominee, but Warren and activists objected to his representation of companies.

## NIRI’s Regulatory Priorities


In October, NIRI joined with the NYSE Group in a rulemaking petition that asks the SEC to implement Dodd-Frank provisions that call for institutional investment managers to disclose their short positions. Public disclosure of short-selling would help IR professionals better analyze market movements in their companies’ securities and react to malicious rumors.

In addition, NIRI has renewed its efforts to require 13F filers to provide more timely disclosure of their long-positions. Under rules adopted more than 30 years ago, fund managers can wait until 45 days after the end of a quarter to report their holdings. NIRI, along with the NYSE and the Society of Corporate Secretaries, filed a rulemaking petition in 2013 that calls for a two-day reporting deadline. NIRI’s Board met with SEC staffers in September and were encouraged that the staff

appears to be more willing to consider alternatives to the current 13F regime.

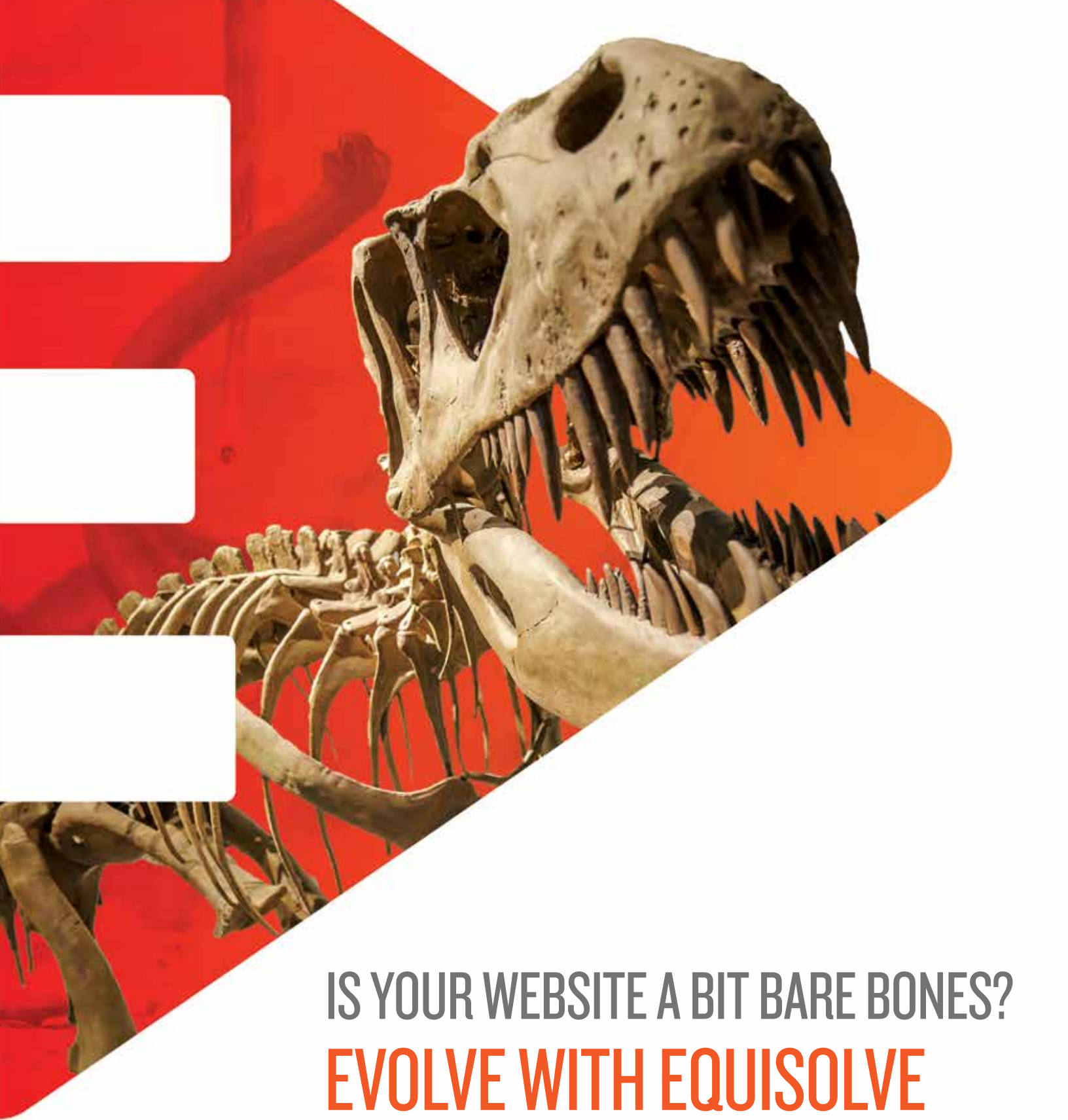
NIRI also remains hopeful that the SEC will adopt rules in 2016 to require 13F filers to disclose their votes on compensation matters. Currently, only mutual funds have to disclose their proxy votes. The agency released draft rules in October 2010 to implement this Dodd-Frank provision, but this matter has languished since then.

NIRI is part of the Shareholder Communications Coalition, which includes the Business Roundtable and the Society and is urging the SEC to remove barriers to engagement, modernize the antiquated proxy voting system, and provide greater oversight of proxy advisors. The SEC extensively studied these issues in 2010, but the agency has done little to address proxy voting, which has become more contentious since the surge in hedge fund activism and the arrival of Say-on-Pay and proxy access. The coalition is asking the SEC to repeal its OBO-NOBO rule, which makes it expensive and cumbersome for issuers to communicate with their “street name” investors. Over the past year, the coalition has been working to educate House and Senate staffers and hopes to persuade a bipartisan group of lawmakers to urge Chair White to make these issues a more urgent priority. With universal ballots on the horizon, the proxy system will become more strained unless reforms are made.

NIRI will continue to follow these issues and advocate for regulatory changes that will help public companies. If you have any questions or concerns, we encourage you to contact your chapter’s advocacy ambassador, NIRI Board members, or NIRI staff. Together, we can better understand what to expect next from the circus in Washington. 

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**Ted Allen** is NIRI’s director of regulatory affairs and practice resources; [tallen@niri.org](mailto:tallen@niri.org). For more information, please visit the Regulations Library on the NIRI website.



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# THE VALUE OF CAREER DIVERSITY

NIRI FELLOW KEITH MABEE HAS WORKED AND SUCCEEDED IN CORPORATIONS, ACADEMIA, AND THE MILITARY WHILE HONING HIS SKILLS AS A STRATEGIC CHANGE AGENT AND ACHIEVING HIS PROFESSIONAL AND LIFE GOALS.

By Al Rickard



**Keith Mabee, group president, corporate communications and investor relations at Falls Communications, was named to the 2015 class of NIRI Fellows at the NIRI Annual Conference in June 2015.**

Mabee's career spans more than 40 years in corporate and agency executive IR and PR roles, as well as in academia and military public affairs positions.

Before joining Falls Communications, he was president and later vice chairman at Dix & Eaton. Earlier in his career, he served as vice president, corporate relations at Figgie International; vice president, communications at Industrial Indemnity; senior vice president, corporate communications, government affairs and investor relations at AMFAC; communications specialist at International Paper Company; and public affairs officer for NATO and the U.S. Army in Europe and the Pacific.

He was also a senior lecturer in the Queensland University of Technology College of Management in Australia and served as an organizational effectiveness consultant in Australasia.

Mabee received an MBA from Pepperdine University, an MA in sociology from Wayne State University and a BA in journalism from Bowling Green State University. He is a former president of the San Francisco chapter of NIRI and previously served on the NIRI Board of Directors and as chairman of the NIRI Senior Roundtable.

Mabee was recently appointed as a fellow of the Governance & Accountability Institute and is also a director on New York Community Bank's Ohio Savings Bank Advisory Board and serves on the Board of Business Volunteers Unlimited.

Over the years, Mabee has shared his views and expertise as a speaker for nearly 100 NIRI national and regional conferences, webinars, seminars and educational foundation meetings. He was also a contributor to the first NIRI Standards of Practice publication.

## **What inspired you to enter the field of investor relations?**

My inspiration came from a new CEO who wanted me to take on IR along with my corporate communications and government affairs duties, reporting directly to him. I was with a San Francisco-based asset-rich conglomerate that was going through a major restructuring while fighting off noteworthy activists during the junk bond-infused asset-stripping 1980s. It was a stretch juggling the diverse demands of stakeholders, but the professional experience of being a strategic boundary rider internally and externally was exhilarating. One could be truly catalytic to sound corporate governance and execution.

## **You have quite a diverse professional background. What is the common thread that helped you succeed in these roles?**

I am a behaviorist at heart and I committed early to self-actualization as a career goal. I started my career in New York City, but had an Army ROTC obligation which took me to Germany. After returning to International Paper in New York City, I was recruited for a new academic role in an Australian management school, with consulting engagements in Australasia. I re-entered corporate life in Honolulu before moving to San Francisco. Subsequently, I took a corporate position in Cleveland, and later joined Dix & Eaton there, launching my IR consulting chapter. The common thread was always earning a role as a strategic change agent with key leaders.

## **How important is it for IROs to seek out diverse roles and responsibilities (either within their companies or in new positions) and how can it benefit them as an IRO?**

I think IROs have incredible career-enhancing opportunities and are ideally positioned to broaden their organizational portfolios and responsibilities. Taking a leading role in helping senior management teams and boards grapple with enterprise risk management is one example, as many companies wrestle with the reputational and brand metrics around the potential value diminution

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flowing from a crisis. IROs have the skill sets to identify, assess, and recommend preparedness and mitigation actions. Global environmental, social, and governance trends are another intangible in effective value creation build that IROs increasingly must leverage when articulating their companies' respective distinctive value propositions.

**You have given back to the professions you served in as a volunteer leader in NIRI, the Public Relations Society of America, the Governance & Accountability Institute, and several universities. How have these activities benefited you professionally?**

It is always a humbling and "centering" experience to see the world through diverse perspectives when one gets caught up in the accelerated pace of professional pursuits. I am attracted to a holistic approach to life's journey and stimulated by diverse experiences with a broad array of people, issues, and causes. I've benefited immensely from interacting with many selfless individuals throughout my career and it is only natural and fulfilling to reciprocate that thoughtfulness and support by sharing quality time with others. I love to mentor, coach, and teach, and I always learn more from those experiences than I probably give.

**What do you like most about the IR profession?**

I'm drawn to the stimulating, always-changing pace and range of people and experiences the IR profession encapsulates. One gets to travel the world engaging eclectic professionals of keen intellect, interests, and wit. IROs are also strongly embedded in the inner sanctum of corporate strategy and execution, yet out in the swirling public domain of capital markets, geoeconomic and sociopolitical change, and breaking headlines every week. Peer relationships in IR are some of the strongest

and long-lived that I have had the pleasure to experience, epitomized by NIRI itself.

**What is the biggest change you have seen in investor relations?**

I entered the profession as a corporate officer in 1983 during a heightened period of hostile takeovers and M&A activity. Investment bankers tended to rule in board rooms along with deal-driven securities lawyers and related PR and proxy advisors. Long-term wealth creation during that decade tended to be overridden by short-term purely financial opportunism, too often at the expense of enlightened corporate governance on behalf of all company stakeholders. Today, investor relations is a much more standalone corporate strategic function versus an obligatory finance compliance activity.

**What is the most important professional lesson you've learned?**

Your professional reputation is everything with investors, media, executive management, your colleagues, and anyone that counts in life. Your knowledge, credibility, and ethics, regardless of the situation, are the absolute keys to your success, and you earn respect – you don't command it by title or who you work for. And don't lose your perspective or sense of humor no matter how difficult a challenge one faces.

**What career advice would you give to someone who is considering entering investor relations?**


I would advise a new entrant to be in love with business as a creative social institution that is measured largely in economic terms. Also realize that well-run and enlightened public companies drive global growth, innovation, job expansion, and wealth creation while contributing to the sociopolitical fabric of diverse cultures. My point is that investor relations practitioners need to be skilled management generalists steeped in financial and capital markets acumen, but they also need

to possess strong communications and marketing skill sets and an adroit personal and organizational engagement style.

**Please talk about a challenging IR situation you faced and how you dealt with it.**

I once had to tell a chairman of my company that he shouldn't put my name on a press release announcing that the board had terminated the CEO I was reporting to over a restructuring plan I believed in and had helped develop. Knowing that my job was on the line, I advised him that the investment community knew I supported the plan and that this board action was going to create serious fallout while leaving all stakeholders confused about the future. I needed to know much more from him to retain credibility with investors if I was going to stay and lead IR and corporate communications. Subsequently, the board quickly named a noteworthy director, who had previously been a CEO, to lead the company and implemented a key component of the proposed restructuring plan, so I committed to help drive the successful execution. Shareholders and other stakeholders were nicely rewarded with the strategic sale of the company 18 months later.

**You earned your master's degree in business administration from Pepperdine University, which overlooks the Pacific Ocean and Malibu Beach. How were you able to focus on your studies in such a beautiful setting?**

It was my second graduate degree on the G.I. Bill, this time while serving as an Army officer in the Pacific. Pepperdine also ran an excellent MBA program in Honolulu, so we got the best professors since they all wanted to teach a semester in Hawaii . . . another beautiful setting. Focus . . . that's what aspiring IROs do best, despite distractions! 

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*Al Rickard, CAE, is the editor-in-chief of IR Update; [arickard@associationvision.com](mailto:arickard@associationvision.com).*



# 61%

Percentage of investors globally who have been prevented from buying a stock because of “poor” governance

## ARE YOU PREPARED?

WHAT YOU DON'T SEE ...

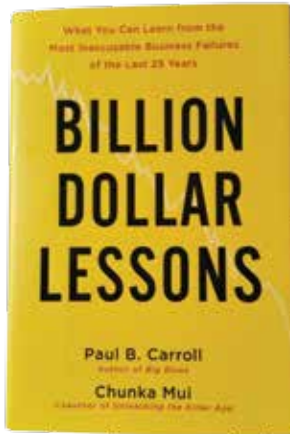
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# Billion Dollar Lessons: Avoiding Killer Business Mistakes

IROs are part of the executive team that must evaluate and position mergers and other business ventures to ensure they are palatable to investors. The book “Billion Dollar Lessons” offers insights gleaned from many business failures.

By Beth Kurth

Extracting lessons from a quarter century of colossal business failures, authors Paul B. Carroll and Chunka Mui have written “Billion Dollar Lessons: What You Can Learn from the Most Inexcusable Business Failures of the Last 25 Years.”

Their research reveals that it is an inability to ask the right questions in the beginning that leads to wrong results in the end. Regardless of industry or experience, executives continuously embark on a new strategy without first questioning the underlying assumptions. The allure of “the new new thing” overpowers honest debate about everything from the downside of innovative accounting to the challenges of entering adjacent markets to the difficulties of introducing new technology.

The authors recount the rise and fall of Green Tree Financial to illustrate the pitfalls of financial innovation. Green Tree used gain-on-sale accounting, which allowed the company to book profits based on internal forecasts of loan performance. As prepayments and defaults came in faster than expected, the company found itself nearing bankruptcy. Green Tree was fortunate to sell itself to Conseco in 1998, in large part causing the company’s bankruptcy filing shortly thereafter. How could Conseco have missed the problems at Green Tree? The CEO of Conseco was so focused on acquiring yet another company (more than 40 had been absorbed in the past 17 years),

he could not accept that Green Tree might be a loser.

The illusions of synergy are demonstrated in the \$5 billion merger of Unum Corporation and Provident Companies in 1999. Unum was a provider of disability insurance for groups, Provident, a provider of the same insurance, but for individuals. With talk of back-office synergy and front-line reach, the logic was assumed to be impeccable. No one asked the question, “What could go wrong?” Everything, as it turned out. On the back end, the combined companies had 34 separate IT systems going into the merger, and six years later had managed to eliminate just four. On the front end, “Customers behaved pretty much the way they always had,” as the book noted. Those who never bought disability insurance continued to avoid it. As of 2003, a new CEO refocused on group plans and took a \$1 billion write-off related to individual policies.

American Standard Companies, a maker of plumbing and other systems, exemplifies the problem with misjudging adjacent markets. American Standard longed for a growth profile rather than the steady returns of being “just a toilet maker.” So the company entered the field of medical devices based on the strategy that the laser technology used in its ceramics manufacturing could also be applied to small diagnostic devices. But the management team lacked experience with the new regulatory environment, and investors had little interest

in the long product development cycles that come with medical devices. Just two years later, and with \$30 million in losses under its belt, the company sold the division and took a \$126 million write-off.

As to underestimating the difficulties of introducing new technology, the authors recount the story of Motorola’s Iridium Satellite Phone System. The system, which cost \$5 billion to develop, went bankrupt less than a year after it began service, and its assets were auctioned for \$25 million.

While the word “business” implies rational thinking and careful analysis, in reality, businesses are comprised of people including their individual emotions, beliefs, and behaviors. Strategy, in particular, can be a very social undertaking with leaders swayed by everything from the latest trend to the loudest advisor. Therefore, financial executives – including IROs and others with a seat at the table – must be prepared to ask the hard questions up front. The authors recommend that executives designate a devil’s advocate, survey a full range of alternatives, examine the risks from different angles, and consider worst-case scenarios. As Carroll and Mui forewarn, “The only thing harder than starting a bold new strategy is killing one after it starts.” **IRU**

**Beth Kurth** leads investor relations at LeMaitre Vascular in Burlington, Massachusetts; [bkurth@lemaitre.com](mailto:bkurth@lemaitre.com).

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## Cynthia Skoglund Honored as 2015 NIRI National Volunteer of the Year



**CYNTHIA SKOGLUND, AN INVESTOR RELATIONS** and communications professional in Orange County, California, received the 2015 NIRI National Volunteer of the Year Award. This award, introduced in 2009, honors a NIRI member who best exemplifies the NIRI mission of “advancing the practice of

investor relations and professional competency and stature NIRI members” at the national level. An active volunteer at both the national and chapter levels, Skoglund has presented at NIRI programs and webinars, participated as a member of the NIRI Annual Conference Committee, and served as president and member of the board of directors for the NIRI Orange County chapter.

She was described at the 2015 NIRI Annual Conference as a person who “has shown the true spirit of volunteerism during 20-plus years of NIRI membership, has generously given a tremendous amount of time and energy to NIRI, and is an everlasting NIRI advocate and volunteer.”

Skoglund spent 35 years at Beckman Coulter, working in investor relations there for nearly 25 years on the full gamut of IR activities ranging from an IPO to the acquisition of the company by Danaher Corporation in 2010.

In 2010, Skoglund became the senior manager in Beckman Coulter’s Corporate Business Development/Strategy group. In this role, she conducted market research studies including competitive intelligence, brand studies, and worked on acquisition activities and deal management.

### Professional Development Calendar

For more information, visit [www.niri.org/calendar](http://www.niri.org/calendar).

#### December 2015

**2-4** NIRI Senior Roundtable Annual Meeting – New Orleans, LA

#### January 2016

**10-13** Fundamentals of Investor Relations – Santa Monica, CA

**13** Keys to Successful Investor Presentations – Santa Monica, CA

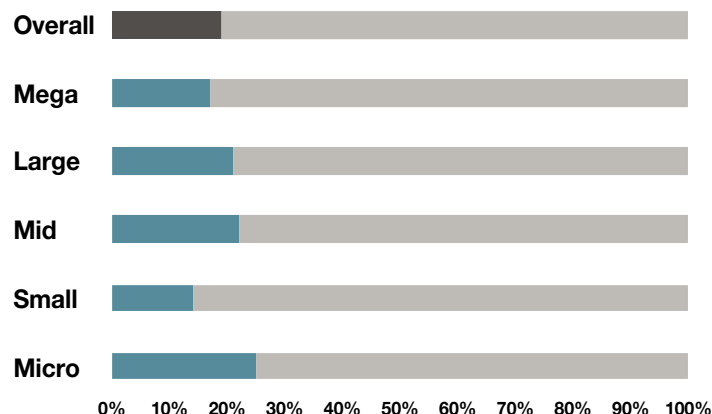
**14-15** Finance Essentials for IR and Corporate Communications – Santa Monica, CA

#### June 2016

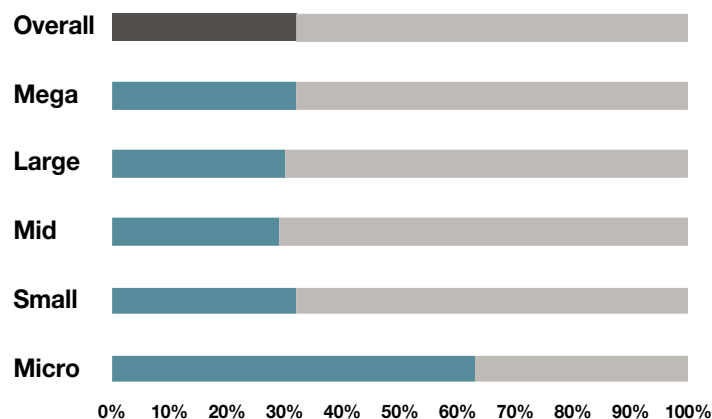
**5-8** NIRI Annual Conference – San Diego, CA

## IR Research At-A-Glance

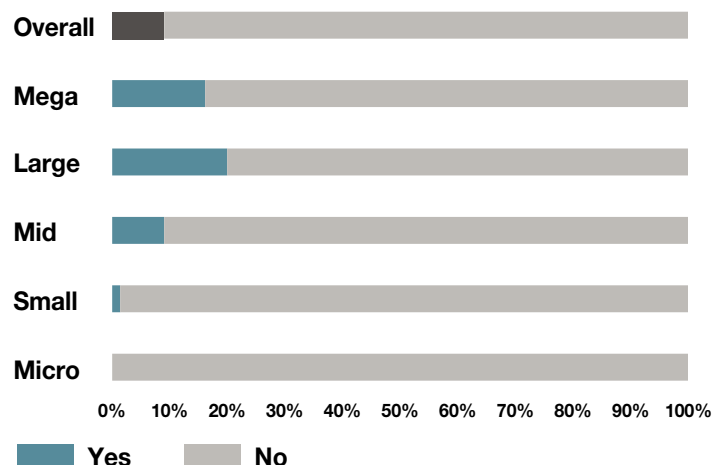
Has your company gone on a NDR with a sponsor who had a sell rating on your company at the time?



In the future, would you go on a NDR with a sponsor who had a sell rating on your company?



Does your company set limits on the number of sell-side analysts who can attend investor meetings?



Source: NIRI Non-Deal Roadshow Survey – 2015. Number of respondents = 258.

# NIRI NUMBERS

## 2015 NIRI Annual Report Survey

Public company **annual report** practices and trends from NIRI's recurring Annual Report (AR) Survey



**88%** produce an annual report in some form



**67%** produce both a **printed** and **electronic** annual report

**10-K Wrap** is the most common format

### What is included in the Annual Report

**87%** CEO letter

**77%** List of directors and officers

**58%** Strategy discussion



**45%**

have between 2-6 pages of narrative



**43%**

have between 1-3 pages of financials



**25%**

incorporate infographics into their AR

### Median Print Budget (including online) of Annual Report by Year

**\$138,800**



1999 2002 2004 2006 2008 2010 2012 2015

### Total 2014 costs compared with 2013

#### Print

⬆ **11%** increased

⬆ **60%** equal

⬇ **29%** decreased

#### Online

⬆ **5%** increased

⬆ **88%** equal

⬇ **7%** decreased

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# Creating Frictionless Earnings Releases

A panel discussion at a NIRI Silicon Valley chapter meeting explores best practices for the quarterly earnings process.

By Meghan O'Leary

IROs gathered at the Four Season Silicon Valley in early October for the NIRI Silicon Valley chapter luncheon on “Frictionless Earnings,” a discussion of best practices for the quarterly earnings process. Kate Scolnick, vice president, investor relations for Seagate Technology and a chapter board member, moderated the panel and was joined by:

- **Joon Huh**, vice president, investor relations, Yahoo!
- **Kate Patterson**, vice president, investor relations, FireEye
- **John Nunziati**, senior director, investor relations, Avaya

## Preparation

The discussion began by focusing the importance of reaching an agreement between senior executives and investor relations on messaging early in the process, as well as the value of multiple script reviews.

Working across departments to prepare for earnings is an “evolving process,” according to panelists. While some rely on individual interviews with key executives to provide color for their earnings scripts, others take their script color from formal quarterly business reviews.

The panel discussed the importance of earnings previews from the sell side as a guide to what investors want them to address in the call. Some IR teams summarize previews on their companies and sectors for management.

Regarding live versus pre-recorded scripts, pre-recording creates a forcing function for

**The best approach for some IROs may be to communicate their long-term objectives and help investors understand and track their quarterly progress toward those.**

finalizing the content ahead of time while live commentary allows companies to create a sense of immediacy on the earnings call. Most panelists indicated their earnings call dates were set a year or two in advance internally but that information is not communicated publicly until a week or two before earnings, to preserve flexibility for the company should things change.

## Guidance

Panelists discussed the challenges of adapting guidance practices to the needs and expectations of the Street. For instance, there is evidence that quarterly guidance can create volatility in a stock, especially when a company is considered “hot.” In addition, in fast-changing technology sectors, it can be challenging to provide accurate guidance 12 months out.

The best approach for some IROs may be to communicate their long-term objectives and help investors understand and track their quarterly progress toward those. IROs may also need to help investors understand the interplay between various parts of the business and key performance indicators so they


are responding to the big picture. In addition, management “color” commentary can help to provide context on a company’s expected performance outside of what is in the official “guidance” section of the script. These approaches can provide insight into the near term while helping analysts understand how to think about the company’s long-term performance, even in a fast-changing industry.

Everyone agreed on the importance of soliciting feedback from the Street – through perception studies, investor surveys, or informal conversations – in determining guidance practices.

## Supporting Materials

The panel discussed the value of providing supporting materials to supplement and amplify the earnings release. These can include a one-page summary or short deck with highlights of the quarter, historical financials, GAAP vs. non-GAAP numbers, descriptions of seasonal items, transcripts and links to webcasts. Timing of such materials is another consideration. While companies that hold their calls after market close have a well-defined window in which to make materials available, IROs with pre-market calls have the option of posting materials after market close the prior evening.

## Post-Call Activities

The panel closed with a discussion of panelists’ post-call routines, which typically focus on call-backs to investors and analysts to answer any questions that did not get addressed on the earnings call. For companies with very large analyst followings, a certain amount of triage is necessary, with management participating in calls with certain large shareholders or influential analysts and IR handling others without management. 

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