

# SHAREHOLDER ACTIVISM HANDBOOK

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JAY W. EISENHOFER

MICHAEL J. BARRY

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**Michael J. Barry**

**Gregg S. Levin**



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# Shareholder Activism Handbook

by Jay W. Eisenhofer, Michael Barry,  
and Gregg S. Levin

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*Shareholder Activism Handbook* is a one-volume, comprehensive guide for attorneys and the shareholders that they represent on all matters relating to shareholder activism. It provides in-depth analysis of the legal ramifications of the emergence of shareholder activism and provides a guideline for activist investors in matters ranging from the establishment of a corporate governance program, proxy fights, and the conduct of annual meetings to the shareholders' role in corporate and securities litigation.

By explaining the legal rights of shareholders, *Shareholder Activism Handbook* provides investors with the knowledge necessary to make educated decisions regarding how best to protect the value of their investments and how to protect and exercise their rights as the owners of companies. The *Handbook* explains shareholders' rights under state law, both modeled under Delaware law and the Model Business Corporations Act, and where appropriate includes national surveys explaining the differences between laws among the various states. In addition, it explains shareholders' rights under federal law in both securities litigation and proxy issues.

## Highlights of the 2007 Supplement

This is the first supplement since the original publication of *Shareholder Activism Handbook*. It brings your book up to date on recent developments in the field, including:

- An expanded discussion of the nature of a director's fiduciary duty, including the duty of loyalty, the duty of care, the duty of good faith, and the duty of candor, in light of recent Delaware Supreme Court rulings (see Chapter 2).

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- New voting statistic information and an updated discussion on the movement to majority voting (see Chapter 9).
- Recent decisions from the Delaware Court of Chancery impacting shareholders' abilities to adopt and amend bylaws (see Chapter 2).
- Additional discussion of issues relating to hedge funds (see Chapter 3).
- Analysis of stock lending or "vote borrowing" issues (see Chapter 9).
- Coverage of SEC settlements and the distribution of funds (SEC "fair funds" distributions) (see Chapter 14).
- An updated discussion of the proxy access debate (see Chapter 7).
- Expanded analysis of the Securities Litigation Uniform Standards Act (SLUSA), including a discussion of the *Dabit* case and holder claims. Also, additional coverage of class action lawsuits (see Chapter 14).
- Discussion of the *American Pipe* decision and opt-outs (see Chapter 13).
- Update on direct/derivative distinction explained by recent authority (see Chapter 13).
- An update on executive compensation claims in light of recent decisions (see Chapter 14).

The Tables and Index have been extensively updated to reflect these additions and changes.

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**FIRST EDITION**

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## ABOUT THE AUTHORS

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**Jay W. Eisenhofer**, founder and managing partner of Grant & Eisenhofer, regularly represents institutional investors in corporate and securities litigation. He has been lead counsel in four of the largest securities class action recoveries in history, including the \$300 million settlements from DaimlerChrysler and Oxford Health and the \$425 million partial settlements in the Global Crossing case. He is currently lead counsel in, among others, the Global Crossing, Tyco, and Marsh McLennan securities class actions. *Treasury and Risk Management* magazine selected Mr. Eisenhofer in June 2005 as one of the 100 Most Influential People in Finance. The prestigious Chambers and Partners 2005 directory of Leading Business Lawyers noted his "phenomenally successful track record owing to his consistently strong courtroom performances." *The Best Lawyers in America* published in 2005 by *Corporate Counsel* and *The American Lawyer* have named Mr. Eisenhofer as one of America's top litigators.

**Michael J. Barry** is a partner at Grant & Eisenhofer. Working with clients in the area of corporate governance, he has developed significant expertise in drafting and reviewing bylaws and lobbying companies for corporate governance improvements. He also is an experienced derivative and securities class action litigator and has extensive experience representing shareholders in appraisal actions arising from cash-out mergers. Mr. Barry is currently part of the Grant & Eisenhofer teams litigating securities claims arising from the collapse of Global Crossing Ltd. and Qwest Communications International, Inc.

Mr. Barry is a graduate of Carnegie Mellon University (1990) and the University of Pittsburgh School of Law (*summa cum laude* 1993), where he was an Executive Editor of *The University of Pittsburgh Law Review* and a member of the Order of the Coif.

**Gregg S. Levin** is an associate at Grant & Eisenhofer. Prior to joining the firm, Mr. Levin served as Corporate Counsel for a Delaware Valley based retailer. In that role, his responsibilities included advising senior management on regulatory compliance, commercial law, and employment matters and developing internal policies, procedures, and guidelines. He also conducted internal corporate investigations and managed litigation matters affecting the corporation. At Grant & Eisenhofer, Mr. Levin is a member of teams representing institutional investors in the *Enron*, *Tyco*, and *Global Crossing* cases. Since joining the firm, Mr. Levin

also has co-authored (with Jay Eisenhofer) several articles of interest to shareholders, including “*In Re Walt Disney Co. Deriv. Litig. and the Duty of Good Faith under Delaware Corporate Law*” (*Bank and Corporate Governance Law Reporter*, September 2006) and “Does Corporate Governance Matter to Investment Returns?” (*Corporate Accountability Report*, September 23, 2005). Mr. Levin is a 1987 graduate of the Vanderbilt University School of Law and a 1984 graduate of the University of Rochester (Phi Beta Kappa, *magna cum laude*).

# PREFACE

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In recent years, the investor community has taken an increasingly active role in the governance of the corporations they own. Through shareholder resolutions, “vote no” and proxy campaigns, litigation, and dialogue, activist shareholders have made great strides in protecting and furthering shareholder rights. *Shareholder Activism Handbook* gathers in a single source the various tools that shareholders may employ to influence and protect the value of their investments.

Active participation by shareholders in the corporation they own serves as an important check on corporate management and boards. As the corporate scandals of recent years demonstrate, a lack of oversight by shareholders can have disastrous consequences. All too often, however, shareholders are unaware of their legal rights and as a result fail to exercise those rights in such a manner as to preserve, and increase, the value of their investments.

This book provides shareholders with a resource regarding their legal rights as the owners of American corporations. The *Handbook* explains the often contentious relationship between shareholders and the management of the companies they own and outlines the legal rights of shareholders in matters such as corporate governance, derivative litigation, class action litigation, and merger transactions. It provides clear answers to many common questions faced by investors and investment managers in a variety of situations, such as:

- How can I develop a corporate governance program, and is it worth the investment?
- How can I communicate with other shareholders and how can I get access to corporate materials?
- What are the requirements for bringing a derivative or class action as a shareholder?
- My corporation is merging; can I exercise dissenters’ rights, and how can I do it?
- How can I offer a resolution to be considered by other shareholders?
- What are my rights at the annual meeting?
- The value of my stock has collapsed amid disclosures of accounting fraud; what are my rights?

The following chapters answer these and many other questions. By explaining the legal rights of shareholders, this book will provide every investor with the knowledge necessary to make educated decisions regarding how best to protect the value of their investments and how to protect and exercise their rights as an owner of companies. This *Handbook* explains shareholders' rights under state law, both modeled under Delaware law and the Model Business Corporations Act, and where appropriate includes national surveys explaining the differences between laws among the various states. In addition, this *Handbook* explains shareholders' rights under federal law in both securities litigation and proxy issues. No single resource can provide definitive answers to every question that may arise in connection with shareholders' rights, but the following chapters should provide investors with a basic understanding of their rights.

The authors express their sincere gratitude to the hard working attorneys and staff at the law firm of Grant & Eisenhofer, P.A., without whom the publication of this book would not have been possible. In particular, the authors wish to recognize the efforts of Geoffrey C. Jarvis, Esq., and Gregg S. Levin, Esq., who provided invaluable assistance in the writing and editing of many chapters. Thank you.

Jay W. Eisenhofer  
Michael J. Barry  
Gregg S. Levin  
October 2006

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