



## TAKE-TWO TAKEDOWN

**A**fter a unique board overthrow in 2007, and now a buyout offer in 2008, Take-Two Interactive's shareowners may see their boardroom as a continual work in process.

The March 2007 board takeover at Take-Two Interactive Software provided a glimpse of the unique methods employed by the increasingly activist investment community. A coalition of several hedge funds, and most notably a mutual fund (Oppenheimer Funds), took the bold step of voting their own directors into power with no proxy fight needed. In an interesting twist to an ongoing story, Take-Two's new board recently eliminated the very shareowner access that allowed for their election to the board less than one year prior. In early 2007, Take-Two's board faced an abrupt challenge and ultimately was replaced as shareowners elected the new slate of directors. Approximately one year later, Take-Two's new board was presented with a buyout offer from competitor, Electronic Arts, at more than a 60% premium to the stock's recent trading range. Take-Two's board rejected the offer as insufficient, but the latest board challenge is only expected to heat up. A comparison of the 2007 board overthrow with the potential for the same in 2008, provides a unique example of how rapidly shareowner options can change.

The Take-Two bylaws, as they existed in early 2007, created an opportunity for shareowners to submit new directors for election without a protracted advance notice process. Voting in a new slate of directors without a proxy contest is not a possibility at most companies. But the fact that such a maneuver was carried out with the assistance of mutual fund participation is a sign that investors of all classes are less inclined to remain passive in the face of poor performance, and that the use of such innovative measures may become more frequent.

As the Take-Two annual meeting of 2007 approached, there was no advance notice provision in place for shareowners. Such a provision typically requires board nominations to be filed several months prior to the annual meeting. Instead, the new directors were nominated by a small group of top shareowners at the annual meeting itself. Ap-

proximately 80% of the top 2,000 companies have advance notice provisions that would prevent such a maneuver, according to a 2005 ISS survey. A more recent query (December 2007) of Board Analyst data revealed similar results, with 78% of companies including advance notice provisions in their bylaws. When considering companies in the computer software industry, Take-Two was even more of an exception, with 88% of such companies including advance notice requirements.

The degree of shareowner access to directors is significantly affected by such advance notice provisions. Few appreciated this more than Take-Two's current directors and management, as they used the lack of such provisions to gain quick shareowner election in 2007. However, as of February 14, 2008, the board ensured that such short-notice shareowner access would not be applied thereafter. As of that board decision, Take-Two's by-laws were amended to add considerable advance notice provisions for any "nominations or other business to be properly brought before an annual meeting by a stockholder..."

In the 2007 Take-Two overthrow, the fact that a large percentage of shares were concentrated among a few investors aided the takeover effort. Widespread solicitation of shareowner proxies generally requires filing a formal proxy statement. However, due to their few members and significant holdings, the dissident shareowner group was not required to file early notice of their intention to provide an alternative slate of directors. The group filed notice four days after Take-Two's proxy filing.

The shareowner uprising was led by Strauss Zelnick, of ZelnickMedia, who brought together the coalition of top shareowners in order to overthrow management at Take-Two. The coalition of investors consisted of the mutual fund, Oppenheimer Funds, and several hedge funds, D.E. Shaw, S.A.C. Capital Advisors, and Tudor Investment Corp. An environment of shareowner discontent had been growing at Take-

### TOP 10 TAKE-TWO SHAREOWNERS AS OF THE 2007 BOARD OVERTHROW

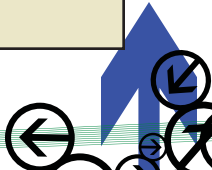
	<u>% Owned</u>
1. Oppenheimer Funds*	24.55%
2. Fidelity Management	13.99%
3. D.E. Shaw & Co.*	8.95%
4. Legg Mason Capital Mgmt.	7.43%
5. Glenview Capital Mgmt.	6.70%
6. Barclays Global Investors	4.93%
7. Tudor Investment Corp.*	4.77%
8. OFI Institutional Asset Mgmt	4.01%
9. S.A.C. Capital Advisors*	3.71%
10. Schneider Capital Mgmt.	3.53%

\* Led the board and management overthrow at the 2007 annual meeting. (Ownership positions as of 3/31/2007)

### TOP 10 SHAREOWNERS LEADING UP TO THE 2008 TAKEOVER ATTEMPT

	<u>% Owned</u>
1. Oppenheimer Funds**	23.21%
2. Fidelity Management	11.96%
3. Legg Mason Capital Mgmt.	9.92%
4. Neuberger Berman LLC	7.57%
5. Pioneer Investment Mgmt.	6.86%
6. OFI Institutional Asset Mgmt.	5.26%
7. Barclays Global Investors	4.86%
8. Denver Investment Advisors	4.78%
9. D.E. Shaw & Co.**	4.75%
10. Moore Capital Management	4.35%

\*\* Only two leaders of the 2007 overthrow remain for the pending 2008 takeover battle. (Ownership positions as of 12/31/2007)





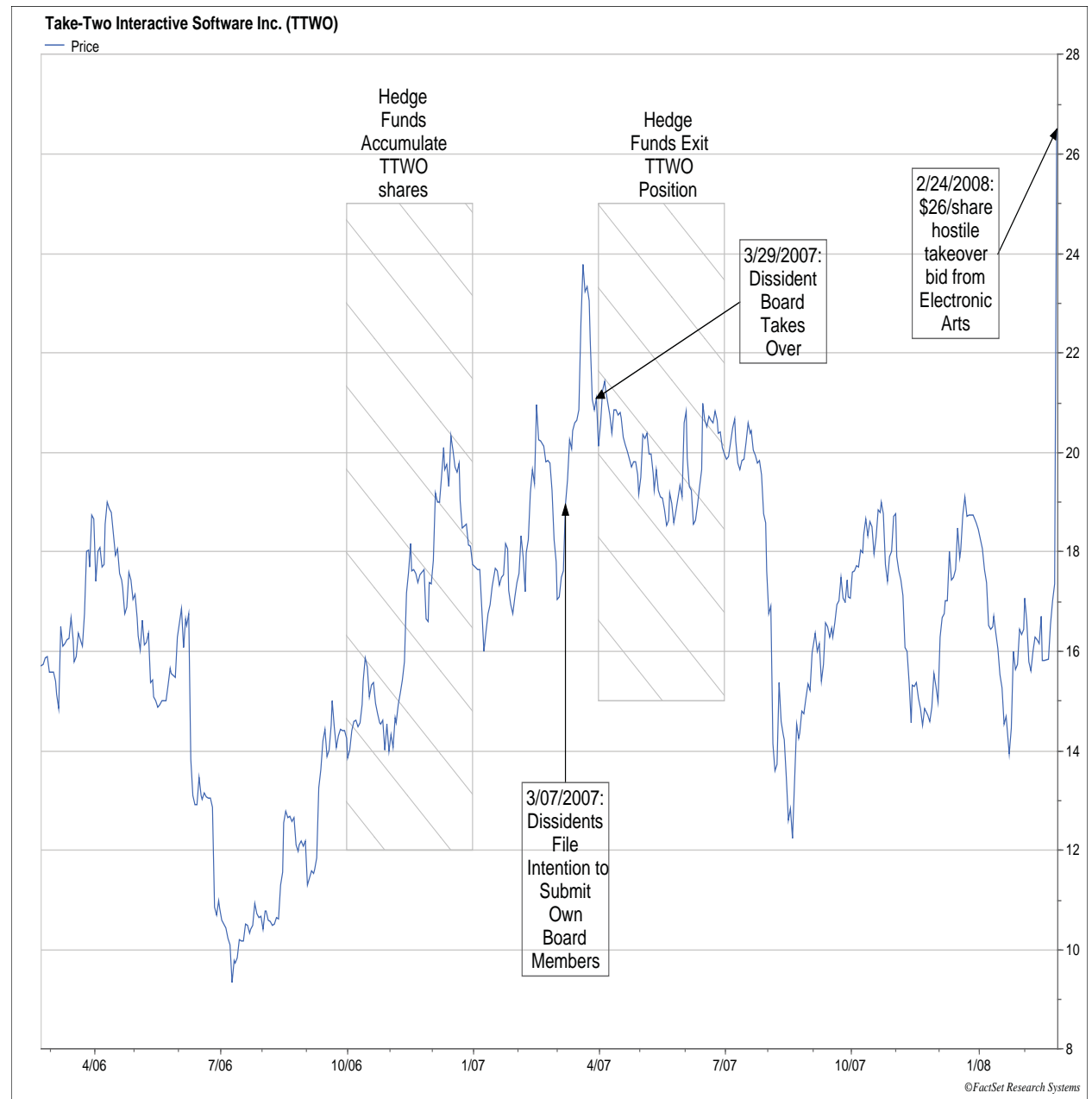
Two due to a succession of governance failures.

Beginning in 2005, Take-Two management struggled with legal issues and product recalls surrounding its most important product, the Grand Theft Auto video game. In addition, the company announced in July 2006 that it was under SEC investigation for options backdating. In January 2007, the audit chairman resigned, the second to do so within a year. Shareowner advisory firms, RiskMetrics Group (RMG) and Glass Lewis, recommended that shareowners withhold votes on three incumbent board members, due to their relations to the options backdating issue. Take-Two's stock price had fallen by approximately 50% from its 2005 high. The many corporate governance issues, and the resulting fall in share value, all seemingly contributed to Oppenheimer's decision to take an unusually activist role.

Oppenheimer was the largest shareowner in Take-Two, with a 24.5% stake. Together with the hedge funds, the group controlled approximately 46% of the shares. With discontent from other shareowners, this was enough to propel the new slate of directors into power.

The SBA withheld votes on the three board nominees involved with the options backdating issue. Two of these directors served on the audit and compensation committees during the time when stock options were backdated. All three nominees

## THE UNUSUAL BATTLE FOR TAKE-TWO: NO PROXY FIGHT AND NO CLEAR SHORT-TERM WINNERS



received backdated stock options, though it was not determined that they knowingly did so. The SBA voted for the other three board nominated directors, as there were no such concerns regarding these nominees. Notably, the dissident shareowners' nominees were presented on such short notice prior to the annual meeting that there was little analysis available regarding their suitability for the board.

Once the new board was in place in March 2007, Zelnick became Chairman of Take-Two and Ben Feder, a partner of ZelnickMedia since 2001, became Chief Executive Officer and Director. While a new board and management were established, the success of the effort for shareowners, especially short term shareowners, was less certain. The stock price, though volatile throughout

“We were surprised when they submitted their S.E.C. filing. Our offer does not reflect those shares. We feel this matter should be between ZelnickMedia and the Take-Two shareholders.”

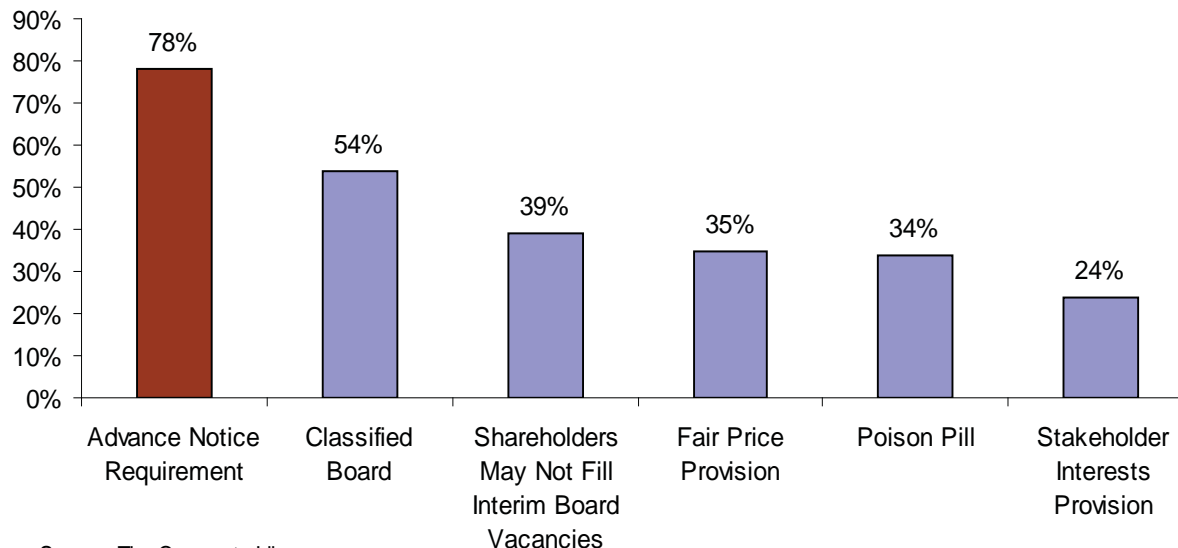
Electronic Arts spokesman, Jeff Brown, speaking to the New York Times. February 27, 2008.

the year, remained in a trading range throughout 2007. D.E. Shaw reduced its holdings from peak levels, but maintained a considerable position in the company. Meanwhile, two of the hedge funds,

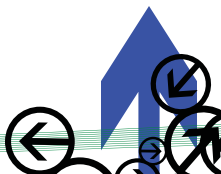
S.A.C. and Tudor, sold their entire holdings in Take-Two, according to regulatory filings as of September 30, 2007. By doing so, they missed what is seemingly becoming an annual fireworks show at Take-Two.

On February 24, 2008, Electronic Arts announced it was seeking a buyout of Take-Two at \$26 per share, a 63% premium over the prior month trading range. The proposal was presented to Take-Two in a letter sent the week earlier and was rejected by Take-Two as opportunistic, due to the highly-anticipated April release of the next version of Grand Theft Auto. Several rejections by Take-Two management led Electronic Arts to go public with its offer and “bring its proposal to the attention of all Take-Two shareholders.” In addition to the typical scrutiny of any hostile takeover bid, the Electronic Arts offer highlighted another significant change at Take-Two. On February 14, 2008, one day before rejecting Electronic Arts offer, Take-Two’s board enacted not only the new advance notice provisions, but also significant changes to management compensation packages. ZelnickMedia, which has provided management consulting since the 2007 board takeover, is now set to receive a three-fold increase in its monthly management fee, and an increased ceiling on its annual bonus from \$750,000 to \$2.5 million. In addition, ZelnickMedia would be entitled to receive a substantial equity award: 600,000 shares of time-based restricted stock and 900,000 shares of performance-based restricted stock. The stock awards are subject to shareowner vote at the upcoming annual meeting. Of interest to shareowners, the restricted stock awards contain change in control provisions which allow accelerated vesting in the event of a change in control of the company. With Take-Two management and directors juggling compensation awards, change in control provisions, advance notice requirements, and a pending buyout offer, the confluence of events has understandably raised concerns.

## ADVANCE NOTICE REQUIREMENTS ARE THE MOST PREVALENT DEFENSE MEASURE



Source: The Corporate Library



## 2007 TAKE-TWO BY-LAWS CONTAINED NO ADVANCE NOTICE PROVISIONS WHEN ZELNICKMEDIA LED THE BOARD ASSAULT IN MARCH:

“...any action which may be taken at any annual or special meeting of such stockholders, *may be taken without a meeting, without prior notice and without a vote*, if a consent in writing, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted.”

## 2008 AMENDMENT TO THE TAKE-TWO BY-LAWS, IMPLEMENTING ADVANCE NOTICE PROVISIONS AT THE SAME TIME THE BOARD OF DIRECTORS WAS CONTEMPLATING ELECTRONIC ARTS' UNSOLICITED BUYOUT

For nominations or other business to be properly brought before an annual meeting by a stockholder pursuant to clause (c) of paragraph (A)(1) of this Section 12, the stockholder must have given timely notice thereof in writing to the secretary of the corporation and such other business must otherwise be a proper matter for stockholder action. **TO BE TIMELY, A STOCKHOLDER'S NOTICE SHALL BE DELIVERED TO THE SECRETARY AT THE PRINCIPAL EXECUTIVE OFFICES OF THE CORPORATION NOT LATER THAN THE CLOSE OF BUSINESS ON THE NINETIETH (90TH) DAY NOR EARLIER THAN THE CLOSE OF BUSINESS ON THE ONE HUNDRED TWENTIETH (120TH) DAY PRIOR TO THE FIRST ANNIVERSARY OF THE DATE OF THE PRECEDING YEAR'S ANNUAL MEETING OF STOCKHOLDERS;** provided, however, that (l) if either (x) the date of the annual meeting is more than thirty (30) days before or more than thirty (30) days after such anniversary date, or (y) no annual meeting of stockholders was held in the previous year, notice by the stockholder to be timely must be so delivered not earlier than the close of business on the one hundred twentieth (120th) day prior to such annual meeting and not later than the close of business on the later of (A) the ninetieth (90th) day prior to such annual meeting and (B) the close of business on the tenth (10th) day following the date on which notice of the date of the meeting is given to stockholders or made public, whichever occurs first, **AND (II) WITH RESPECT TO THE ANNUAL MEETING OF STOCKHOLDERS TO BE HELD IN 2008, NOTICE BY THE STOCKHOLDER TO BE TIMELY MUST BE SO DELIVERED NOT LATER THAN THE CLOSE OF BUSINESS ON THE TENTH (10TH) DAY FOLLOWING THE DATE ON WHICH NOTICE OF THIS AMENDMENT TO THE BY-LAWS WAS MADE PUBLIC.** Such stockholder's notice shall set forth (a) as to each person whom the stockholder proposes to nominate for election or reelection as a director, (i) all information relating to such person that is required to be disclosed in solicitations of proxies for election of directors, or is otherwise required, in each case pursuant to Regulation 14A under the Securities Exchange Act of 1934, as amended (the "Exchange Act") and Rule 14a-11 thereunder; (ii) such person's written consent to being named in the proxy statement as a nominee and to serving as a director if elected. and (iii) a statement whether such person, if elected, intends to tender, promptly following such person's election or re-election, an irrevocable resignation effective upon such person's failure to receive the required vote for re-election at the next meeting at which such person would face re-election and upon acceptance of such resignation by the board of directors, in accordance with the Corporate Governance Guidelines of the corporation; (b) as to any other business that the stockholder proposes to bring before the meeting, the text of the proposal or business (including the text of any resolutions proposed for consideration and in the event that such business includes a proposal to amend (etc...)

Even more than the 2007 meeting, the upcoming Take-Two annual meeting is likely to motivate the activist tendencies in the most passive of shareowners. Oppenheimer remains Take Two's largest shareowner, with 23.5% of company shares outstanding. The new board and management team, which Oppenheimer helped impose, refer to a consideration

of shareowners best interests as they reject the recent buyout offer as insufficient. The recent boost in management fees, equity awards, and accelerated vesting due to any change in control, reveal that management has not forsaken its own interests in the process. Though the methods and players will be different this year, Oppenheimer should have

no trouble finding fellow shareowners interested in change one more time, should they choose such a course of action.