



COUNSEL TO GREAT COMPANIES

Shareholder Activism

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What is an activist shareholder?

- A shareholder seeking to effect change in a corporation through private or public engagement with management, board of directors and/or shareholders in order to affect share price
- Objectives
 - Increase (decrease) share price
 - Publicity/enhance reputation
 - Attract like-minded investors
- Characteristics
 - Small and large players
 - Single and multiple strategy players
 - Cooperative and aggressive players
 - Sector focused and sector agnostic players

Activism on the Rise

- What is driving rise
 - Fund inflows
 - Attractive returns
 - Large investor alignment
- Size and industry no longer matter
- What makes companies vulnerable
 - Excess cash/low debt (“return capital to shareholders”)
 - Multiple business lines/owned real estate (“unlock value”)
 - Management/Board composition (“entrenchment”)
 - Undervaluation/overvaluation (“sell the company”/“sell the stock”)
 - Strategic actions/inactions (“vote against the deal”/“sell the company”)

Areas of activist focus (combined approaches)

- Governance
 - Add/remove directors
 - Board structure
 - Replace management
 - Compensation
- Capital Structure
 - Return capital/excess cash
 - Increase leverage
- Strategic
 - Strategic direction
 - Sale of the company
 - Divestitures/asset monetization
 - Impact announced M&A deals or strategies (price/process)

The Activist Playbook

- Letter to management – private or public
- Letter to Board – private or public
- 13D filings – ordinary course or messaging; escalating messaging
- White papers – private or public
- Request meetings with management/Board
- Engage other shareholders
- Threaten proxy contest
- Shareholder proposals; consent solicitations
- Call for “strategic alternatives” exploration or outright sale
- Proxy contest for board seats
- Challenge announced transactions

Managing Activists

- Ordinary level of vigilance
 - IR monitoring of changes in positions of known activists
 - Normal pulse taking (investor calls, analyst interaction) particularly before shareholder nomination and proposal deadlines
 - SEC filings (Forms 13D and G)
- Heightened vigilance and response will depend on the activists approach
 - Keep the response team small to lower distraction and risk of leaks
 - The usual team members: CEO, IR/CFO, GC, board (mostly chairman or lead independent director), bankers, outside counsel
 - If activist goes public, add: IR/PR firm, proxy solicitor
- Communication is critical
 - Engagement; establishing a dialogue, understanding what each side desires (public/private, combative/friendly; extended/urgent)
 - CEO communication and rapport with the board

Managing Activists (cont.)

- Defensive priorities – in general
 - Clear corporate strategy/long-term plan
 - Communication strategy – internal and external
 - Designate response team
 - Financial and legal
 - Communications and investor relations
 - Outside investor/public relations firm
 - Outside counsel
 - Financial advisor
 - Proxy solicitor
 - Anticipate externalities
 - Direct costs
 - Strain on resources
 - Distraction of management and board

Managing Activists (cont.)

- Defensive priorities – action plan
 - Board and management preparation
 - Constructive engagement
 - With activist
 - With other shareholders
 - Return of capital
 - Stock repurchase
 - Dividend
 - Spin offs and spin outs
 - Divestitures
 - Investigate “strategic alternatives”
 - Board structure/representation
 - Proxy contest
 - Role of advisory firms
 - Counter publicity

Proxy Contests

- Team
 - Board
 - Senior Management (CEO, CFO, HR & GC, IR)
 - Financial Advisor
 - Proxy Solicitor
 - IR/PR Advisor

Proxy Contests (cont.)

Typical Proxy Fight Timeline

45 to 40 Days (Dec. 15-20)	File definitive proxy materials, issue press release with 1st fight letter; Mail “stop look listen” letter
38 to 32 Days (Dec. 22-28)	Mail 2nd fight letter, issue press release
31 to 24 Days (Dec. 29 - Jan. 6)	Mail 3rd fight letter, issue press release
21 to 14 Days (Jan. 9 -16)	ISS meetings; Glass Lewis outreach; issue press release with 4th fight letter
14 to 7 Days (Jan. 16-23)	ISS, Glass Lewis decisions: Both parties likely to issue press releases upon decisions
10 to 7 Days (Jan. 20-23)	Mail 5th fight letter, issue press release
5 to 2 Day (Jan. 25-28)	Issue open shareholder letters as press releases, as appropriate
Day 0 (Jan. 30)	Shareholder meeting

Proxy Contests (cont.)

- IR/PR Strategy
 - One-on-ones with major stockholders
 - Brief reporters
 - Telephone campaign (if appropriate)
 - Final calls / visits with major investors

Proxy Fight Statistics

- **Proxy Campaigns (2009-2012)**

- 27% Withdrawn
 - 35% Went to a Vote
 - 38% Settled

- **Winner After Vote (2009-2012)**

- 37% Activists
 - 63% Management

- **Proxy Campaigns (2013)**

- 27% Withdrawn
 - 33% Went to a Vote
 - 40% Settled

- **Winner After Vote (2013)**

- 60% Activists
 - 40% Management

Total: 403 Proxy Fights

Total: 141 Votes, 52 Dissident Wins

Increasing Number of Settlements Before a Fight

Implications for Directors

- Know your company
 - Strategic Plan
 - Investor Presentations
 - Compensation
 - Vulnerabilities
 - Operational
 - Financial
 - Compensation
 - Governance

Implications for Directors (cont.)

- Be prepared
 - Review session with management and advisors
 - Board should schedule periodically
 - Communications
 - Know the plan
 - Review periodically
 - Rehearse
 - Directors often singled out
 - Related party transactions
 - Ties to management
 - Attendance record
 - Length of service
 - Committee membership

Implications for Directors (cont.)

- Levels of Engagement
 - Preparation
 - Choosing a course when activist arrives
 - Ongoing engagement

Practical Considerations

- Top Things To Do
 - Be proactive
 - Use objective facts
 - Maintain tight communication – speak with one voice
 - Define your core messages; like a political campaign, sound bites matter
 - Be measured in your response
 - Keep your stockholders close
 - Be prepare for escalation
 - Emphasize Board independence and good corporate governance
 - Show a record of engagement
 - Be nimble

Practical Considerations (cont.)

- Top Things Not To Do
 - Be defensive or engage in personal attacks
 - Create the perception that management dominates the Company and/or the Board is not fully engaged
 - Appear closed to ideas or refuse to interact with the activist
 - Assume that stockholders or the media will see through “the noise”
 - Rely on too broad a set of messages or respond to every attack from the activist
 - Undertake fundamental strategic or financial actions that are not strategically critical during the fight
 - Change governance provisions or take other tactical actions that are viewed to disadvantage the dissident/shareholders
 - Undertake fundamental changes to placate the activist that are inconsistent with the long-term strategic, operational or financial objectives of the Company
 - Assume that a negative recommendation from proxy advisory firms is dispositive