The Harvard Law School Forum on Corporate Governance and Financial Regulation
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# Dealing With Activist Hedge Funds

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**Editor's Note:** Martin Lipton is a founding partner of Wachtell, Lipton, Rosen & Katz, specializing in mergers and acquisitions and matters affecting corporate policy and strategy. The following post is based on a Wachtell Lipton memorandum by Mr. Lipton and Sabastian V. Niles.

This year has seen a continuance of the high and increasing level of activist campaigns experienced during the last 14 years, from 27 in 2000 to more than 200 in 2013, in addition to numerous undisclosed behind-the-scenes situations. No company is too big to become the target of an activist, and even companies with sterling corporate governance practices and positive share price performance, including outperformance of peers, may be targeted. Among the major companies that have been attacked are Apple, Microsoft, Sony, Hess, P&G, Transocean, ITW, DuPont, PepsiCo, Kraft and EADS. There are more than 100 hedge funds that have engaged in activism. Activist hedge funds have approximately $100 billion of assets under management. They have become an "asset class" that is attracting investment from major traditional institutional investors.

The major activist hedge funds are very experienced and sophisticated with professional analysts, traders, bankers and senior partners that rival the leading investment banks. They produce detailed analyses ("white papers") of a target's management, operations, capital structure and strategy designed to show that the changes they propose would quickly boost shareholder value. Some activist attacks are designed to facilitate a takeover or to force a sale of the target, such as the failed Icahn attack on Clorox. Prominent institutional investors and strategic acquirors have been working with activists both behind the scenes and by partnering in sponsoring an activist attack such as CalSTRS with Relational in attacking Timken, and Ontario Teachers' Pension Fund with Pershing Square in attacking Canadian Pacific. Major investment banks, law firms, proxy solicitors, and public relations advisors are now representing activists.

Among the attack devices being used by activists are:

- (a) proposing a precatory proxy resolution for specific actions prescribed by the activist or the creation of a special committee of independent directors to undertake a strategic review for the purpose of “maximizing shareholder value”;
- (b) conducting a proxy fight to get board representation (note solicitation for a short slate is very often supported by ISS and when it is, is usually successful) at an annual or special meeting or through action by written consent;
- (c) orchestrating a withhold the vote campaign;
- (d) aggressively criticizing and opposing a company’s announced initiatives and strategic actions;
- (e) seeking to force a sale by leaking or initiating rumors of an unsolicited approach, publicly calling for a sale, acting as an (unauthorized) intermediary with strategic acquirers and private equity funds or making their own “stalking horse” bid;
- (f) rallying institutional investors and sell-side research analysts to support the activist’s program;
- (g) using stock loans, options, derivatives and other devices to increase voting power beyond the activist’s economic equity investment;
- (h) using sophisticated public relations and media campaigns to advance the activist’s arguments;
- (i) hiring private investigators to establish dossiers on directors, management and key employees and otherwise conducting aggressive “diligence”; and
- (j) litigating to obtain board records and materials and to block transactions.

SEC rules do not prevent an activist from secretly accumulating a more than 5% position before being required to make public disclosure and do not prevent activists and institutional investors from privately communicating and cooperating with each other.

*Prevention of, or response to, an activist attack is an art, not a science*. It is essential to be able to mount a defense quickly and to be flexible in responding to changing tactics. To forestall an attack, a company should continuously review its business portfolio and strategy and its governance and executive compensation issues sensibly and in light of its particular needs and circumstances. Companies must regularly adjust strategies and defenses to meet changing market conditions, business dynamics and legal developments.

This outline provides a checklist of matters *to be considered* in putting a company in the best possible position to prevent or respond to hedge fund activism.

**Advance Preparation**

***Create Team to Deal with Hedge Fund Activism*:**

- A small group (2-5) of key officers plus lawyer, investment banker, proxy soliciting firm, and public relations firm
- Continuing contact and periodic meetings of the team are important
- A periodic fire drill with the team is the best way to maintain a state of preparedness; the team should be familiar with the hedge funds that have made activist approaches generally and be particularly focused on those that have approached other companies in the same industry and the tactics each fund has used
- Periodic updates of the company's board of directors

***Shareholder Relations*:**

- The investor relations officer is critical in assessing exposure to an activist attack and in a proxy solicitation. The regard in which the investor relations officer is held by the institutional shareholders has been determinative in a number of proxy solicitations. Candid investor relations assessment of shareholder sentiment should be appropriately communicated to senior management, with periodic briefings provided to the board
- Review capital return policy (dividends and buybacks), analyst and investor presentations and other financial public relations matters (including disclosed metrics and guidance)
- Monitor peer group, sell-side analysts, proxy advisors like ISS, activist institutions like CalPERS and TIAA-CREF, Internet commentary and media reports for opinions or facts that will attract the attention of attackers
- Be consistent with the company's basic strategic message
- Objectively assess input from shareholders—is company receiving candid and direct feedback
- Proactively address reasons for any shortfall versus peer company benchmarks; anticipate key questions and challenges from analysts and activists, and be prepared with answers; build credibility with shareholders and analysts before activists surface and attempt to "educate" the sell-side analysts
- Monitor changes in hedge fund and institutional shareholder holdings on a regular basis; understand the shareholder base, including, to the extent practical, relationships among holders, paying close attention to activist funds that commonly act together or with an institutional investor

- Maintain regular, close contact with major institutional investors; CEO, CFO and independent director participation is very important; regularly engage with portfolio managers as well as proxy-voting departments
- Monitor ISS, GL, CII, TIAA-CREF corporate governance policies; activists try to "piggyback" on process issues to bolster the argument for management or business changes
- Monitor third-party governance ratings and reports for inaccuracies and/or flawed characterization
- Major institutional investors, including BlackRock, Fidelity, State Street and Vanguard have established significant proxy departments that make decisions independent of ISS and GL and warrant careful attention. It is important for a company to know the voting policies and guidelines of its major investors, who the key decision-makers and point-persons are and how best to reach them. It is possible to mount a strong defense against an activist attack that is supported by ISS and GL and gain the support of the major institutional shareholders
- Maintain up-to-date plans for contacts with media, regulatory agencies and political bodies and refresh relationships
- Monitor conference call participants, one-on-one requests and transcript downloads
- Continue regular temperature taking calls pre- and post-earnings and conferences and exercise caution and oversight with respect to large format or "group" investor meetings

***Prepare the Board of Directors to Deal with the Activist Situation*:**

- Maintaining a unified board consensus on key strategic issues is essential to success; in large measure an attack by an activist hedge fund is an attempt to drive a wedge between the board and management by raising doubts about strategy and management performance and to create divisions on the board by advocating that a special committee be formed
- Keep the board informed of options and alternatives analyzed by management, and review with the board basic strategy, capital allocation and the portfolio of businesses in light of possible arguments for spin-offs, share buybacks, increased leverage, special dividends, sale of the company or other structural changes
- Schedule periodic presentations by the lawyer and the investment banker to familiarize directors with the current activist environment
- Directors must guard against subversion of the responsibilities of the full board by the activists or related parties and should refer all approaches to the CEO

- Boardroom debates over business strategy, direction and other matters should be open and vigorous but kept within the boardroom
- Avoid being put in play; recognize that psychological and perception factors may be more important than legal and financial factors in avoiding being singled out as a target
- A company should not wait until it is involved in a contested proxy solicitation to have its institutional shareholders meet its independent directors. A disciplined, thoughtful program for periodic meetings is advisable.
- Scrutiny of board composition is increasing, and boards should self-assess regularly. In a contested proxy solicitation, institutional investors may particularly question the "independence" of directors who are older than 75 or who have served for more than 10 to 15 years

***Monitor Trading, Volume and Other Indicia of Activity*:**

- Employ stock watch service and monitor Schedule 13F filings
- Monitor Schedule 13D and Schedule 13G and Hart-Scott-Rodino Act filings
- Monitor parallel trading and group activity (the activist "wolf pack")
- Monitor activity in corporate debt and other non-equity securities

**The Activist White Paper**

The activist may approach a company with an extensive high-quality analysis of the company's business that supports the activist's recommendations (demands) for:

- Return of capital to shareholders through share repurchase or a special dividend
- Sale or the spin-off of a division
- Change in business strategy
- Improvement of management performance
- Change in executive compensation
- Change in cost structures
- Change in governance: add new directors designated by the activist, separation of CEO and Chairman, declassify the board, remove poison pill and other shark repellants and permit shareholders to call a special meeting and act by consent

The white paper is used by the activist in private meetings with shareholders, sell-side analysts and the media and is ultimately designed for public consumption

**Responding to an Activist Approach**

***Response to Non-Public Communication*:**

- Assemble team and determine initial strategy. *Response is an art, not a science*
- No duty to discuss or negotiate (no outright rejection, try to learn as much as possible by listening and keep in mind that it may be desirable to at some point negotiate with the activist and that developing a framework for private communication and non-public engagement may avoid escalation)
- No duty to disclose unless leak comes from within
- Response to any particular approach must be specially structured; team should confer to decide proper response
- Keep board advised (in some cases it may be advisable to arrange for the activist to present its white paper to the board or a committee or subset of the directors)
- No duty to respond, but failure to respond may have negative consequences
- Be prepared for public disclosure by activist
- Be prepared for the activist to try to engage directly with shareholders, sell-side analysts, business partners, employees and key corporate constituencies

***Response to Public Communication*:**

- Initially, no response other than "the board will consider and welcomes input from its shareholders"
- Assemble team; inform directors
- Call special board meeting to meet with team and consider the communication
- Determine board's response and whether to meet with activist. Failure to meet may be viewed negatively by institutional investors. Meeting may result in activist using the meeting to mischaracterize the company's position.
- Avoid mixed messages and preserve the credibility of the board and management
- Gauge whether the best outcome is to agree upon board representation and/or strategic business change in order to avoid a proxy fight
- Be prepared and willing to defend vigorously
- Appreciate that the public dialogue is often asymmetrical; while activists can, often without consequence, make personal attacks and use aggressive language, the company cannot respond in this manner
- Remain focused on the business; activist approaches can be all-consuming, but continued strong performance of the business, though not an absolute defense, is one of

the best defenses. Maintain the confidence and morale of employees, business partners and key constituencies.

- The 2012 defeat by AOL of an activist short-slate proxy solicitation supported by ISS shows that investors can be persuaded to not blindly follow the recommendation of ISS. When presented with a well-articulated and compelling plan for the long-term success of a company, they are able to cut through the cacophony of short-sighted gains promised by activists touting short-term strategies. The AOL fight showed that when a company's management and directors work together to clearly present a compelling long-term strategy for value creation, investors will listen.