

April 6, 2020

REIT M&A and Activism:
Preparing for Threats in the COVID-19 Environment

The precipitous drop in REIT stock prices has brought out the activists. While all REITs' first priority should be to focus on dealing with the immediate fallout from the COVID-19 crisis – including tenant, employee, operational, health and safety, liquidity and capital issues – it is also important to protect the enterprise from those who seek to take advantage of the situation. REITs would do well to freshen up their preparedness plans, including:

- Monitoring trading and ownership of the REIT's equity and debt securities (including options, credit default swaps and other derivative products to the extent possible), looking for accumulation or unusual activity by any activists, would-be acquirors or similar players.
- Reviewing (and, if appropriate, updating) structural defenses and governance profiles, including both conventional defenses and REIT-specific "excess share" ownership restrictions and unitholder rights. As discussed below, in most cases it would be prudent to get a rights plan ("poison pill") on the shelf, ready to adopt if circumstances warrant.
- Updating the board on best practices for responding to an activist or bidder, and assembling a team for rapid deployment.
- Taking a fresh look at the company's balance sheet and schedule of debt maturities and, if appropriate, exploring ways to increase liquidity, including drawing any available lines, new facilities, liability management, asset sales, workforce adjustments, and changes to payment and other practices.
- Considering the company's dividend policy, guidance, and COVID-19 disclosure, and their implications for short-termist investors.
- Assessing the risks to any NOLs and how they might be protected.
- Reviewing any Achilles' heels that the REIT might have and how they might be addressed, getting ahead of the activists.
- Engaging with shareholders on governance and strategy, including plans for dealing with the economic and other implications of COVID-19.

Myth and legend notwithstanding, REITs are not "takeover proof" and are susceptible to activist attacks, stealth accumulations, hostile takeover bids and proxy fights, just like other public companies. Although REITs have a number of specific structural features that may have defensive characteristics, discussed below, they should not allow their REIT status to give them a false sense of security.

REITs generally have so-called "ownership limitations" or "excess share" provisions in their charters designed to preserve their tax status. If properly implemented, these provisions

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generally do limit the accumulation of a large position and have a defensive effect. Indeed, some state statutes validate such charter ownership provisions, including for non-tax purposes, and some REITs have specifically disclosed that such provisions may be used for anti-takeover purposes. However, excess share provisions are largely untested as anti-takeover defenses and, in some cases, may be vulnerable because of their grounding in the tax code, or the specific manner in which they are written. In many cases, depending on their specific terms and other factors, they do offer strong protection against takeovers and activists, but they are unlikely to be more powerful or robust than other common takeover defenses such as a rights plan, and often may be less so.

A rights plan remains the single most effective device available to a board to enable the directors to discharge their fiduciary duties, deter stealth accumulations of controlling blocks of stock and maximize leverage regarding the timing and outcome of an unsolicited bid. Properly implemented rights plans can also address the opportunistic use of derivatives and structured economic exposure to a company, limit problematic “group” activity designed to change or influence control of a corporation, and address aggressive share acquisitions by activists.

That is not to say that we are advising all REITs to immediately adopt a rights plan. Rather, as discussed in our firm’s recent [memo](#), we would suggest that REITs consider preparing rights plans and putting them “on the shelf,” ready for rapid deployment if and when advisable based on a nuanced assessment of the threat and the possible costs. Among the factors to be considered in deciding whether to adopt a rights plan will be how robust the REIT’s excess share provision is, whether the rights plan would address the perceived threat, market and proxy advisor reaction, and overall strategy and market position.

Regardless of the specific tools to be deployed, advance preparation is essential. It can often make the difference between success and failure when under attack, in other times of stress or when fast action is necessary to avoid a serious problem. In light of the current uncertain and volatile environment, REIT management and boards of directors are well advised to redouble their efforts toward preparing for the various kinds of dangers we are currently witnessing in the REIT space.

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