March 31, 2020

Activists Will Show Their True Colors in COVID-19 Pandemic

As a result of the COVID-19 pandemic, a number of public companies have seen their market capitalization and value of their common stock decline precipitously. Fortunately for many companies who are not currently facing an activist attack, director nomination and business matter proposal deadlines for annual meetings have passed for the current proxy season. For those companies, in order for activists to take advantage of depressed stock prices through a proxy fight, the activist will need to focus on the 2021 annual meeting or consider carefully whether running a “withhold the vote” campaign, calling a special meeting of shareholders or taking action by written consent would be well received in the current environment.

However, a number of activist investors continue to over-reach in their private (and public) demands of companies and are seizing the opportunity from reduced valuations to increase their positions in existing targets and build new positions. Recent 13D filings by activists reveal increased accumulations during the past few days and weeks of March as the markets plunged. Many of these activists are out in the market fundraising to have additional firepower in a depressed market. Aggressive buyback demands even continue to be made by activists, and ill-advised attempts to remove key board members and board leaders with the experience and judgment to help the company navigate the current crisis are also underway. In several instances, M&A-related activism has moved to a longer time horizon, with activists seeking to get major private equity funds as well as potential hostile bidders to return their phone calls as they scout future opportunities for a quick sale.

In a few cases, activist investors are engaging more reasonably with companies, re-cutting previously entered into settlement arrangements and standing down even if a company needs to alter prior economic and business commitments that had been entered into with the activist’s support. To this extent, it has been heartening to see some activist investors recognizing that this is a genuine international emergency and affording companies the breathing space to take the adroit management efforts with board support that are required to ensure that they remain solvent in the short term and solidly profitable in the long term while meeting stakeholder needs.

Public companies should take note of statements recently made by two of the major activist-side law firms who represent a significant number of activist funds, highlighting the current pandemic as creating potential opportunities for their clients:

> *The market slump offers a welcome opportunity to economically increase holdings in companies where activists have a high-conviction thesis. Activists have recently continued to attract significant capital and many are*

> *sitting on large war chests, frequently with long duration lockups. This should allow them to weather short-term market turmoil.*
>
> *Once the dust settles and market valuations reflect reality, underperforming companies will be exposed, creating major opportunities for activism. In the short term, investors should position themselves opportunistically to take advantage of this future potential.*
>
> . . . .
>
> *We've seen zero effects of the coronavirus on activist activity this proxy season[.]*
>
> *Our clients are in no way retreating to the sidelines.*

Accordingly, boards and management teams should take a fresh look at our prior advice for anticipating, handling and resolving activist attacks. Activist hedge funds bringing a short-term focus in the current environment should expect to be rightly recognized as mere profiteers opportunistically taking advantage of the COVID-19 pandemic to further line their pockets at the expense of many other stakeholders of the corporation. Activists cannot be successful if institutional shareholders refuse to support their opportunistic forays, and companies should be prepared to resist unreasonable demands and stand resolute when warranted. It would be counter to the interest of diversified, long-term investors, our economy, and of course American workers if undue activist pressure is brought to bear on companies whose focus should be on returning to a fundamentally healthy state so that they can be sustainably profitable for the coming decades.

In the current environment, activist funds who recognize the need to evolve, support long-term, sustainable value creation and engage in constructive, private dialogues with companies will differentiate themselves from those activists focusing on the short term by destabilizing boards and management teams and taking advantage of reduced bandwidth. It will be especially destructive if raiders and activists descend on the industrial sectors most subject to substantial and unavoidable financial harm by the pandemic, because it is precisely those sectors where it may most be necessary for companies to put investments into long-term stability and building rock solid balance sheets with adequate reserves first. Management teams and boards who are destabilized or distracted by an activist campaign will be unable to focus their full efforts on combatting the COVID-19 pandemic to the detriment of all stakeholders, including shareholders. In these turbulent times, promoting stability, rather than opportunistic profiteering or activist brand building, should be the order of the day.

David A. Katz
Sabastian V. Niles