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Anticipating Activist Attacks

The surge in campaigns by [activist hedge funds](#) against companies of varying market caps, industry sectors and governance/structural profiles is not abating. It is unlikely that today's elevated level of activism will be curbed by legislation, regulation or market forces in the near term. While some of these campaigns have been public, there are a number of private campaigns putting pressure on public companies, with more expected heading into 2024. Both well-established and newer so-called "junior varsity" activist funds are setting their sights on old and new targets and sectors. Activist advisors are also seeking to bring non-traditional players and 14a-8 proposal proponents into the fold, training them on proxy contest techniques and proclaiming that "non-traditional activists and even non-profits are exploring the possibility of using the universal proxy card" to run director candidates next year, foreshadowing the possibility that single interest proponents may attempt to use the universal proxy card framework to support their causes.

In an increasingly crowded landscape, the risk of being "swarmed" by multiple activists amid new breeds of "activist wolfpacks" piling on has increased, with companies having to navigate funds with varying time horizons, distinct personalities, and sometimes competing priorities (some of which may be at odds with the interests of long-term investors and the company's preferred strategies). Companies are also striking back, playing offense and reaching favorable outcomes aligned with the views of their long-term investors and minimizing disruptive impact while benefiting from constructive input.

Well-advised public companies can integrate activism preparedness into strategic planning, risk oversight and governance and sustainability hygiene practices by:

1. Preparing the CEO and other directors to deal with direct takeover and activist approaches and handling requests by institutional investors and activists to meet directly with senior management and independent directors by speaking with a single, consistent voice and preventing the activist from driving a wedge between the board and the CEO/senior management;
2. Ensuring that the company's board and management receive regular updates on the activist, takeover and governance environment within the industry, understand their fiduciary duties and responsibilities, implement true "best practices" and are well-positioned to respond and handle an activist situation without missteps;
3. In connection with regular updates to the board, management should review the company's investor relations outreach and understand the feedback that management is receiving from the company's investors as well as other market participants;
4. Executing a measured, year-round program of focused shareholder engagement that reaches portfolio managers, governance/stewardship teams and proxy voting professionals, with the goal of achieving a strong sense of investor priorities and assessing how the company is perceived and whether investors would be inclined to support an activist challenge;
5. Conducting a regular, objective self-assessment of the company and its major operations to identify opportunities for strengthening the company, sustaining value for investors and other stakeholders, mitigating potential vulnerabilities and responding to investor concerns—*i.e.*, being your *own*, long-run-focused "activist" in the best sense of the term;

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6. Ensuring that the company's strategy is refreshed, well-articulated and understood, providing compelling evidence of the company's progress and performance, rebutting misleading or incomplete analyses or criticism and credibly presenting board and CEO performance in the strongest possible light;
7. Paying close attention to execution, management of organizational change, and success in business transformation efforts, especially as activist demands continue to turn towards operations, portfolio and margins in this new era, taking into account the world's need for faster innovation and bold strategic vision, and the impact of social media and increased political polarization on business generally;
8. Anticipating activist tactics and approaches, knowing how to delineate among different activist funds and putting effective "early warning" systems in place;
9. Reviewing the company's governance and structural profile, including the shareholder base, relevant charter and bylaw provisions, board policies and technology that might be kept "on the shelf" (such as a rights plan) and legal developments;
10. Annually considering board composition, experience, expertise and tenure together with the company's strategy to make sure that the board reflects the company's needs while avoiding genuine governance vulnerabilities;
11. As part of the regular corporate governance review, develop and keep current board and executive officer development and succession plans that take into account the objectives and challenges that the company faces while best positioning the company to act in times of crisis;
12. Attracting investors who will support the company's strategies and have investment criteria that line up with the board and management's strategic vision and time horizon;
13. Engaging constructively, prudently and proactively with activists where possible without outsourcing decision-making to the activist;
14. Having a plan for engaging with proxy advisory firms, responding to their recommendations and best positioning the company to convince investors to override adverse ISS and/or Glass Lewis recommendations;
15. Getting ahead of unfavorable activist-friendly press and media dynamics by refreshing media relationships, preparing statements for potential contingencies and cultivating respected third-party voices who can knowledgeably speak on the company's behalf; and
16. Preparing for potential litigation and attempts by an activist to obtain non-public books and records of the company, including board minutes and sensitive analyses, by ensuring good corporate hygiene and prudent email, text and note-taking policies.

Complacency presents opportunities for activists and often provides them with first-mover advantages. In light of the current environment, companies are well-advised to follow closely activist developments in their industries and more broadly, carefully consider the opinions of their major investors, perfect and maintain their engagement activities, regularly review and adjust their plans designed to avoid an activist attack, and refresh their readiness to successfully deal with an activist attack if and when one should occur.

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