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Some Lessons from DuPont-Trian

The ISS Report on the DuPont-Trian proxy contest calls attention to a number of important insights into ISS policies and practices and those of many of its institutional investor clients. Concomitantly, these policies illustrate the realities of the sharp increase in activist activity and the steps corporations can, and should, take to deal with the activist phenomena.

ISS and major institutional investors will be responsive to and support well-presented attacks on business strategy and operations by activist hedge funds on generally well managed major corporations, even those with an outstanding CEO and board of directors.

Trian Fund Management and its founder, Nelson Peltz, have clearly established credibility and acceptability. So too other well regarded funds like ValueAct. They have become respected members of the financial community.

An activist who attempts to work behind the scenes with a corporation to advise and achieve changes will have more credibility than one who surfaces with an attack.

In most cases a corporation will be well advised to meet with the activist and discuss the activist's criticisms and proposals, which are frequently presented in the form of a well-researched whitepaper. If the activist's recommendations are not unreasonable, careful consideration should be given to adopting some or all, thereby avoiding a public dispute. In situations where the activist seeks board representation to pursue its objectives, depending on the circumstances it may be the best course of action to consider agreeing to board representation on condition of an appropriate standstill agreement.

Major institutional investors like BlackRock and Vanguard want direct contact with the independent directors of corporations. Waiting to establish investor-director contact until under an activist attack is too late. Meaningful director evaluation has also become a key objective of institutional investors and a corporation is well advised to have it and talk to its investors about it. Regular board renewal and refreshment can be important evidence that meaningful director evaluation is occurring. In the DuPont situation, ISS did not accept DuPont's argument that the addition of two "super star" directors to its board, after the attack started, obviated any reason to add Mr. Peltz and one of his nominees.

If a corporation disputes an activist's counter whitepaper it needs to make a compelling case; failure to do so will result in ISS following its policy of generally supporting a dissident short slate. ISS's question, "Have the dissidents made a compelling case that change is warranted?" becomes "Has the corporation made a compelling case that change is not warranted?" Note the not so subtle shift of the burden.

Finally, in some cases even winning a drawn out proxy battle can be more damaging to a corporation than a reasonable settlement with acceptable board representation.

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