



## **Activists at the Gate**

The thought of an activist attack can spread panic in the boardroom and the reality of one can become a nightmare. On March 8th, NACD Chicago members and guests were fortunate to have a team of experts who have engaged in many activist battles deliver insight and proactive measures to counter activist overtures. The panel was skillfully moderated by Kai Liekefett, a partner with Sidley Austin, LLP who leads the shareholder activism practice. In the last two years alone, Kai has been involved in more than 20 proxy contests, more than any other defense attorney in the country.

Panel participants included:

- Chris Hodges, CEO and founder of the Alpha IR Group, has been a strategic IR consultant for over two decades, counseling clients across all industries through IPOs, activist/short attacks, M&A engagements, proxy crises, analyst/investor days and more.
- Charlie Koons, managing director of the Activism & Contested Situations Advisory Group at Morrow Sodali, has over 20 years of experience as a trusted advisor in proxy contests and M&A to both corporate issuers as well as shareholders.
- Alfredo Porretti, vice president in the Shareholder Activism and Corporate Defense Group of Morgan Stanley, represents issuers only and his group was ranked No. 1 activist defense financial advisor by Thomson Reuters in 2016 and 2017.

Activism is alive and well. Kai Liekefett started the panel discussion with an overview of the activist landscape. In 2017 there were approximately 235 publicly reported activist campaigns and 80 ended in a proxy contest. Kai estimates that the total number of attacks was probably in the 350 to 400 range, which would translate to 10 percent of Corporate America being under some form of activist attack during the last year.

Boards need to proactively assess vulnerability through the same lens as an activist. Activists typically screen for the following vulnerabilities:

- Relative performance as measured by total shareholder return, relative trading multiples, operational metrics
- Potential transactions including break-up opportunities, sale of the company, spin-offs
- Capital structure opportunities including dividend payout, share repurchase and cash on the balance sheet
- Corporate Governance issues including low governance scores, long-tenured directors and compensation

Take pre-emptive measures and have an early warning system in place. If you believe your company may fall under scrutiny of activists, the panel advises that good surveillance may be a good investment. It can give you another level of information beyond 13f filings about who is possibly accumulating positions in your stock. Everyone was unanimous on systematically receiving a report from the Investor Relations Officer on current street sentiment and insisting

on the unvarnished version. The panel made an emphatic point to make certain the company's by-laws are always up-to-date and that every company has a fully drafted and negotiated "shelf" poison pill in place. The board should consider unilateral bylaw amendments to gain tactical advantage in any confrontation.

If an activist does come knocking at your gate—Phase I

- Management should take the meeting. Give them the same access to management as other larger holders. Think about what you would like the proxy to say if an attack does go public: "We have been responsive and treated them fairly."
- Ask for an agenda. Who will be attending? What would they like to cover? Often a first interaction is with a lower level person in the activist's organization whose main job is to check assumptions.
- Be an active listener. Hear what they have to say, don't be defensive and keep interaction at a minimum, and importantly, take detailed notes. Also, make sure there are two participants from the company.

The activist doesn't plan to go away anytime soon—Phase II

- Assemble your team of experts—legal, investor relations, proxy consultant, investment banker and the right internal staff.
- Make certain that the team is well-prepped, especially for the Q & A
- The panel recommended not signing an NDA—it cuts both ways relative to ultimately controlling the narrative if the attack goes public.

Board engagement with the activist—Phase III

- If it comes to meeting with the board, limit the interaction to the lead independent director and perhaps one of the appropriate committee heads, not the entire board. A member of management should always be in attendance, although it is appropriate for the executive to step out for a portion of the meeting if requested.
- There probably is an asymmetry of information in favor of the activist, so have your team of experts rehearse the board members like they were going through a trial deposition.

There are obviously many ramifications and many outcomes to an activist attack. While proxy fights are distracting and expensive (on both sides), the panel advises—don't settle unless there is truly common ground.