

Proxy Preview: Bigger Toolbox, Broader Goals For Activists

By Karlee Weinmann

Law360, New York (March 18, 2014, 6:09 PM ET) -- Activist investors will continue carving out a more prominent position in the marketplace this proxy season, buoyed by the investment strategy's increasing popularity and a deeper arsenal of tools and tactics that have already begun to shape 2014 into another banner year, experts say.

Attorneys have seen a continued uptick in activist plays so far this year, forcing companies to resolve qualms quickly in order to avoid proxy fights. Several issues have emerged as recurring sticking points for activist shareholders, whose voices are louder than ever.

Here, Law360 explores the activist plays underpinning the forthcoming proxy season:

Renewed M&A Focus

Activists will turn to deal-making as a tool both to wedge themselves into companies, typically to contest a transaction after it is announced, and to push for new M&A moves they contend will deliver substantial shareholder payouts.

"You definitely see the activist really agitating — not on the sidelines — for a deal to get done," said Alston & Bird LLP's Keith Gottfried, who helps companies defend against activist plays. "Lots of activists are not just looking to get in there and hold a position, but also looking for a liquidity event."

When it comes to such deal-making, activists will keep close watch on a target company's protocols for executing a transaction. Specifically, they'll look for boards and management to prioritize transparency and independence, quelling concerns over links between the target's top brass and potential buyout benefits, said Barry Genkin, the leader of Blank Rome LLP's shareholder activism practice.

"We're going to see shareholders pushing companies that heretofore would not have special committees involved in M&A projects try to get them involved to basically give shareholders the view that there's going to be a greater level of independence," said Genkin, who typically represents companies.

Most efforts to push a company to sell itself will focus on small and midsize companies — corners of the marketplace that have recently bustled with M&A activity, enticing strategic buyers and private equity firms.

More Boardroom Muscle

Unhappy investors have also begun to jostle for bigger boardroom shifts in order to amplify their influence from the inside of a targeted company. Campaigns for minority board representation are commonplace, but activists are hungry for more.

Though top proxy advisory firms have fairly relaxed standards for endorsing proposals for a board seat or two, dissident investors have grown more confident in their chances to make a bigger impact as institutional investors warm up to shareholder activism in general. Over the past three years, the outlook for such an effort has brightened substantially, said David Rosewater, a Schulte Roth & Zabel LLP partner who has represented activists in a series of high-profile plays.

"It's still difficult, but I think recent history has proved that if you've got a company that is in need of significant change and a good plan on the part of the activist to unlock value that's unrealized, that shareholders are willing to turn out a majority of the board if that's what it takes to get things done," he said.

New Requests

Harnessing a bigger-than-ever platform, activists have begun to cast a wider net for information to bolster their calls for change. In many cases, requesting that data is a tactic in itself, often backing companies into a corner in a very public way.

Books and records requests, meant to give activists access to private information so they can better tailor their arguments, have cropped up as a recent favorite. Carl Icahn has locked horns with eBay Inc. this week after he **asked for insider access** to the company, a proposal that was met with swift and emphatic rejection.

Still, the mere request was a power play, said Andrew Freedman, a partner in Olshan Frome Wolosky LLP's activist practice.

"While nine times out of 10, a company will deny the activist's books and records request, it still puts those issues and the alleged wrongdoing of a company out there in the spotlight," he said. "In addition to being a potentially effective legal tool, it's a potentially effective [public relations] tool for the activists as well."

In pushing eBay to spin off its multibillion-dollar PayPal Inc. unit, Icahn has also set in motion another strategy picking up steam in the marketplace. As part of a bid to ramp up pressure on the company, the investor called for a **nonbinding shareholder vote** on his proposal.

Such a move can pull other shareholders into the battle and, down the line, have significant consequences. If the plan goes before shareholders and clears a majority vote, a company faces backlash from increasingly influential proxy advisers if it doesn't adopt the proposal.

"Whether this is the beginning of a trend remains to be seen, but it certainly is something that is gaining some traction," said Skadden Arps Slate Meagher & Flom LLP partner Richard Grossman, who defends companies. "It's a powerful tool."

Social Media Advantage

High-profile activists have recently taken to social media to immediately reach a wider audience. Twitter and, more recently, Facebook have both welcomed investors and served as megaphones for their messaging. The U.S. Securities and Exchange Commission has tried to retool disclosure rules to put social media in play in campaigns, almost always giving activists an edge on the public relations front, Genkin said.

Where companies have to carefully craft statements that often worm their way through an internal drafting and fact-checking framework, an emboldened activist can instead sound off in short order with more room for candor.

"Communications is so key, and I think it's hard to create a level playing field because the activist can react much more quickly than can a company," Genkin said. "Social media is going to present some formidable challenges to companies on the defensive end. If there is an advantage, it goes to the activists."

Compensation Tweaks

Activists will continue to latch onto compensation structures at targeted companies, a focus that has already pushed firms to recalibrate their bonus systems and pay scales. The bigger focus on compensation issues lines up with the weightier influence of proxy advisory firms, including top name Institutional Shareholder Services Inc.

"You will see more and more movement toward performance-based compensation, with more stretch goals and more formula-based bonuses and other incentive compensation based on total shareholder returns, which is ISS's favorite metric," said Regina Olshan, who heads the executive compensation and benefits group at Skadden Arps Slate Meagher & Flom LLP.

--Editing by Elizabeth Bowen and Philip Shea.