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# Proxy Preview: Targets Eager To Settle To Avoid Proxy Wars

By **Karlee Weinmann**

*Law360, New York (March 19, 2014, 4:21 PM ET)* -- Companies targeted by activists are settling sooner and more often to avoid costly and distracting proxy fights, experts say, putting another feather in the caps of dissident investors who have built up substantial power in the marketplace over the past few years.

On the heels of a 2013 proxy season defined by more aggressive activists gunning for bigger targets, companies have already indicated they will take a softer stance this time around — especially as institutional shareholders grow increasingly open to activist proposals — threatening a potentially significant blow to a board and management team resisting calls for change.

"There's a lot of upside for a company to do that to avoid the proxy contest, as the company, including the representatives of the board, and the activist get to work things out in private and not in a highly public spotlight," said Skadden Arps Slate Meagher & Flom LLP partner Richard Grossman, who defends companies under activist fire.

Already this year, attorneys on both sides say they've seen more engagement between activists and company leadership, indicating more flexibility on the targets' part and greater activist influence both in the boardroom and in the wider marketplace. That cooperation has given way to an unprecedented string of settlements — typically one-year deals granting activists minority board representation — inked ahead of this year's nomination deadline, putting defensive companies far out in front of would-be proxy fights.

"I wouldn't say last year that wasn't the trend, but I think this year has been marked by it," said Andrew Freedman, a partner in Olshan Frome Wolosky LLP's noted activist practice. So far this year, the firm has settled six potential proxy fights thanks to more constructive engagement between the parties, he added.

In part, third-party criticisms have pushed companies to the bargaining table. Influential proxy advisory firms have bolstered campaigns for change, drumming up support from shareholders of all sizes that increasingly look to them for advice on how to vote in board elections and on other activist-sponsored proposals put before a company's investor base.

Critics have said the growing sway wielded by proxy advisers, most notably including Institutional Shareholder Service Inc., warrants some form of regulation by the U.S.Securities and Exchange Commission — a prospect the agency has danced around in the past. For now, though, the potential costs of losing an advisory firm's support has companies playing it safe, including opting for early-stage settlements.

Attorneys and other advisers representing companies have more frequently signed on to the settlement strategy to head off proxy battles that generally prove distracting and costly for a targeted company, especially in cases where the outcome of such a fight is murky, said Chris Davis, head of the investor activism group at Kleinberg Kaplan Wolff & Cohen PC.

"That is probably indicative of boards becoming smarter and better advised, and probably indicative of the pressure that companies are getting behind the scenes that you don't necessarily see from various investors that are calling independently in support of activist ideas," he said.

Aside from quieting private criticisms, a settlement also provides a relatively easy way out of a highly public, and usually contentious, throwdown. The average proxy battle drags on for months, bleeding a company's cash and shifting the focus of its management and board away from the issues that likely lured in the activist in the first place.

The bigger a company's business problems are, Freedman said, the more enticing a settlement might be.

"Depending on where they are with their strategic plan and financials, some companies just don't have the appetite for a multimonth-long proxy contest, which can prove extremely distracting to management and really can set them off course," he said.

Still, the upside of tying off a proxy fight before it gets off the ground often outshines longer-term consequences of a knee-jerk compromise could carry. When a company is too anxious about an activist circling, and too inexperienced to properly gauge its options, it can overcompensate with a pact that skews heavily in favor of the opposing side.

"A lot of companies are just not sufficiently equipped to deal with a proxy battle. They're vulnerable, they're unprepared," said Alston & Bird LLP's Keith Gottfried, who represents companies facing activist plays. "Unlike settlements that are usually mutually satisfactory, these are typically one-sided, pro-activist."

On a broader level, the trend toward settlements gives an added boost to shareholder activism in general by opening the door wider for fledgling activist funds to establish themselves in an increasingly crowded field, simultaneously reinforcing their ability to shape the marketplace.

As more activists find success and prove the investment strategy's potential to generate significant returns, more young funds and familiar names that have traditionally pursued other kinds of investments are joining the fray. Companies that are friendlier toward settlements offer newcomers an easier pathway to proving their muster, Freedman said.

With several high-profile dustups brewing in the leadup to this proxy season, it remains unclear how many targeted companies will bow to activist pressure by offering up board representation or other olive branches.

"It's a little early in the season to figure out how many of these will ultimately settle as opposed to how many will go to an all-out fight," Davis said. "The way it should work is that management should only go to an all-out fight if they have a toss-up chance of winning; otherwise they're just wasting company resources."

--Editing by Elizabeth Bowen and Philip Shea. 