

HEDGE FUND ACTIVISTS: THE DEBATE ON UNLOCKING VALUE

By Forbes Columnist/Skytop Strategies CEO and Founder Christopher P. Skroupa



Marc Weingarten, a partner at Schulte Roth & Zabel LLP ("SRZ"), serves as co-chair of the firm's global Shareholder Activism Group and is also a member of the Investment Management Group. Marc focuses his practice on mergers & acquisitions, leveraged buyouts, corporate governance, securities law and investment partnerships. One of the leading lawyers representing activist investors, he has advised on many of the most significant activist campaigns in recent years. He was selected twice as "Dealmaker of the Year" by *The American Lawyer*.

Eleazer Klein, a partner at SRZ and co-chair of the firm's global Shareholder Activism Group, practices in the areas of shareholder activism, mergers and acquisitions, securities law and regulatory compliance. He assists activists and companies with matters ranging from corporate governance and control to proxy contests and defensive strategies. Eleazer is also well known for his expertise since the 1990s for the development and implementation of alternative investment structures for private equity investments and, specifically, the structuring and negotiating of private investments in public equity, or PIPEs, and related products including registered direct offerings, convertible 144A offerings, reverse mergers, equity lines and SPACs.

Christopher P. Skroupa: This first question is for Ele. During the Big Debate, you placed emphasis on the fact that activist investors don't necessarily need to hold a board seat for an extended amount of time to

produce long-term value for shareholders. Do you base your argument on a heightened level of engagement in activist campaigns?

Eleazer Klein: I was reacting to the proposition that if activists are interested in creating long term value for shareholders, they should be willing to commit to standstills for extended periods of time. I don't believe that is required. In an activist situation, the activist has identified fundamental issues at a company and taken or won a seat on the board to help contribute to rectifying the issues. To the extent that they succeed, then they should be able to evaluate the value of staying on the board long term. It may make sense or it may be time to move on. In either case, there should be no need for a further standstill as a spirit of cooperation should be governing by then.

Additionally, if the company is unwilling to take the steps to bring about necessary change, the activist is entitled to the flexibility after an agreed upon period to consider further action vis-à-vis the company. This is in the best interests of all shareholders.

Skroupa: What about you Marc? What direction do you see engagement trends going?

Marc Weingarten: I think the established activists will continue the trend of working behind the scenes, and settling, to the benefit of all parties. They don't need to get a public win—their returns will reflect their success, and their investors will know. And their engagements with management will continue to be more reasoned—fewer personal attacks, less vitriol, more detailed analysis, more highly qualified nominees. Newer activists may continue to feel the need to go public early, to establish their reputations and attract capital, and with more of an attack strategy. The “occasional activist” or “reluctivist,” who are increasingly on the scene, are typically long-term holders who already have engaged in failed discussions with management, and have no choice but to take the matter public.

Skroupa: As co-chairs of SRZ's global Shareholder Activism Group, what trends have you seen developing in international activist campaigns, particularly those between the U.S. and the U.K.?

Klein: Activism outside the U.S. continues to grow year-over-year. We always said that unlike the rapid recognition of activism as a legitimate strategy in the U.S., it would be a slower build and take time overseas. We are seeing that.

Outside the U.S., activism is still primarily a behind-the-scenes strategy, although you are seeing more and more public fights in Asia, the U.K. and southern Europe. Relationships, family control and governmental influence still play significant roles in campaigns overseas and, like any campaign, local law maneuvering is crucial. What is interesting is that you are beginning to see a bit of the U.S. style of activism creep onto the foreign landscape. Settlements, frequently in the form of Relationship Agreements, have a foothold now and are becoming more frequent. Standstill concepts are being discussed and implemented more often.

Skroupa: Do you believe we'll see an increase in cross-jurisdictional campaign strategy?

Weingarten: Yes. As the practices of the U.S. gain more traction overseas, including the settlement agreement, standstill and voting and election principles, more U.S.-style investors and advisors will be involved in these campaigns. We have been advising for years overseas, with advisory capability on the ground in our London office, but there has been a demonstrable increase in activity recently. We would expect this trend to continue.

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