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2012 Shareholder Activism Insight Report

Posted by Marc Weingarten, Schulte Roth & Zabel LLP, on Monday November 26, 2012

Editor's Note: Marc Weingarten is partner and chair of the Business Transactions Group at Schulte Roth & Zabel LLP. This post is based on a Schulte Roth & Zabel report by Mr. Weingarten and David Rosewater; the full publication, including charts and figures, is available here.

Schulte Roth & Zabel is pleased to present the 2012 edition of Shareholder Activism Insight, published in association with mergermarket. Based on a series of interviews with corporate executives and activist investors, this report highlights emerging trends in shareholder activism, as well as insights into the changing corporate landscape investors and executives will face in the coming years.

Corporate executives should expect to see increasing opposition from shareholders during next spring's proxy season, according to the 78% majority of overall respondents. Using poor financial performance and the need for management or operational change as motivation, hedge funds, pensions and unions will continue the growth of shareholder activism. A significant increase in shareholder proposals will result, according to 84% of respondents.

The financial services sector is expected to see the greatest amount of shareholder activism as investors look to repair the still recovering industry after the crash of 2008. Distant runners-up, the industrials and chemicals, technology, and energy sectors are also expected to see more disputes with investors.

Half of respondents believe an active dialogue between shareholders and management can be the most effective defense tactic against activism. When a company prefers to be more active in preventing shareholder disputes, respondents cite offensive litigation, poison pills and staggered board elections as the likely defense tools.

Respondents report a busy 2012 proxy season for investors and corporates. The primary demands of shareholder proposals featured voting rules, operational changes, and board nominations, among others. The majority of shareholder activist respondents and plurality of corporate executive respondents expect between 20% and 30% of the proposals will have received majority support.

In addition to the above findings, this report provides insight into procedural details, mergers and acquisitions, drivers of activism, activist strategies, and various other issues concerning the shareholder activism environment. We hope you find this study informative and useful, and as always we welcome your feedback.

Methodology

In the second quarter of 2012, Schulte Roth & Zabel commissioned mergermarket to interview senior corporate executives and activist investors regarding their experience with shareholder activism and their expectations for the upcoming 12 to 24 months. All respondents are anonymous and results are presented in aggregate.

Study findings

After a busy start to this year's proxy season, both corporate and activist respondents widely expect shareholder activism to increase through 2012 and into the 2013 season. A lack of changes to management after repeat showings of poor performance is causing the increase, according to activist investors. A hedge fund partner explains the environment: "Shareholders have not seen any returns because of the extended fall in share prices, but management has not been affected. Shareholders will raise questions."

Some corporate executives, whose prediction for increased activism is identical to that of shareholders, seem to welcome the changes and improvements activists can force into companies more than would be expected. During the financial crisis, activists' ability to keep management on their toes proved most valuable, says an executive respondent from the tech sector: "Shareholder activists have been successful in improving governance and creating value. Activists have demonstrated their ability to affect companies' policies and decisions and this will cause more investors to take an activist approach."

With a very similar outcome to the 2010 Shareholder Activism Insight report, overall respondents (74%) agree that hedge funds will be most likely to increase activist initiatives. Other groups expected to see growth in shareholder activism are pension funds (50%) and union funds (44%). A private equity investor explains: "They have intensified their corporate governance activities and are trying to establish themselves as sophisticated players in the investment community while attempting to attain greater involvement in strategic corporate decisions and control in decision making."

The top four sectors expected to see increased shareholder activism are financial services, industrials and chemicals, technology, and energy; there is little difference in corporate and activist feedback when it comes to sector predictions.

As was the case in 2010, respondents are expecting noticeably more bullish activity in financial services compared to other sectors. This most likely reflects tumbling stock prices, controversial executive pay packages and a high volume of asset sales from larger banks. An activist respondent explains: “Financial services will continue to see high shareholder activism, in response to continued poor performance and high pay packages rolled out to the executive management. The financial crisis has also increased attention to business operations and corporate governance.”

Talking specifically about the dynamics of his sector, a technology CFO explains: “Technology companies have cash, off-balance sheet assets, and other hidden assets that they can take advantage of when their share price is down. Shareholder activists will come into play when the companies are not using the available assets to implement changes to improve performance.”

The influence of shareholders is expected to increase, according to 84% of all respondents. In the previous edition, respondents were divided with over half of corporates believing shareholders would not have any impact on M&A decisions. Since the last survey was conducted in Q2 2010, corporate executives have become widely aware of shareholders’ skepticism for all decisions including M&A. One corporate executive notes: “Shareholders are very concerned about the volatile market situation and are not confident in management’s M&A decision making. Shareholders are now actively involved in these deals.”

Financial performance has grown from being a primary driver of shareholder activism for roughly half of total respondents in 2010 to just shy of 100% of respondents this year. A clear sign that earnings have fizzled for companies across all sectors, the focus has shifted heavily toward weak earnings, marking a change from the past two reports. In 2010, excess cash was the top concern of activist respondents and financial performance was considered the most significant trigger by the majority of corporate respondents. In 2008, the majority of overall respondents identified a period of flat or negative growth, profitability or stock price as the key driver of shareholder activism.

A partner at a private equity firm explains: “Recent steep drops in the share prices are driving the investors to show their frustration with management. Shareholders are coming out of the dark and are comfortably questioning management activities and dealings. Many proposals will be aimed at board changes.”

Communication between shareholders and management remains the most effective method for activists to achieve their goals. According to one activist respondent: “Dialogue can produce the changes desired by investors. Not only can it be less confrontational, but continuous dialogue helps in building relationships between management and shareholders in the future.”

Proxy contests have grown in popularity since the 2010 edition with nearly a third of overall respondents citing this as the most effective strategy. Providing an opportunity for minority stakeholders to gain an advantage, activists have succeeded in gaining the attentive ear of management who previously would not have listened.

Corporate governance and poor performance by management are the top drivers of unseating board members, according to 44% and 34% of respondents, respectively. The two issues have created increased scrutiny and made historically successful companies’ boards more progressive. A shareholder activist describes the evolving dynamic: “Poor corporate governance is the cause of concern and the main reason behind increasing shareholder activist activity. Even the largest corporations, which were once pioneers of management and decision making, have witnessed constant change in top level management.”

Compromise is key as half of respondents believe a company’s best defense from activist shareholders is keeping dialogue open, which respondents also consider ideal for activist strategies. The response is slightly tapered from the 2010 report as poison pills and staggered board elections have become a more recognized tactic by 22% and 16% of respondents, respectively.

Respondents maintain that keeping active dialogue is the preferred route, but in the face of extreme inflexibility, offense is the best defense. A corporate VP comments: “Ideally, the company should try to negotiate and reach for a settlement. But if the shareholder continues to be resistant, switch strategies to more offensive litigation.”

Shareholder proposals will increase over the next 12 to 24 months, according to 84% of respondents. Proposals, which were once restricted to corporate governance improvement, are reaching more aspects of management and increasingly impacting a company’s direction, respondents say. One shareholder activist explains: “With the emergence of environmental, political, and social concerns, shareholder activists have increased their involvement in company affairs, increasing the volume of proposals significantly.”

During the 2012 proxy season-to-date, respondents most frequently reported meetings and voting rules, operational decisions, and board nominations as primary proposal demands. The ability to call special meetings and replace existing board members is what shareholders believe will best counter balance poor corporate governance practices and maximize market value, respondents say. Capital allocation, which was a top concern of shareholders in recent years, has fallen toward the bottom of the priority list with just a quarter of respondents citing it.

Corporate and activist respondents are more divided in their expectations for shareholder proposal outcomes. One quarter of corporate executives think 30% or more of shareholder proposals will reach a majority. A media CFO explains the environment: “Shareholder support is increasing at a considerable rate. Most proposals relate to corporate governance, anti-takeover measures, and shareholder rights, which largely obtain majority support.”

The shareholder activists, while optimistic, are slightly more cautious when asked about support and implementation of proposals. A much smaller minority expect greater than 30% of proposals will receive support while 40% of respondents believe the actual number will fall on the lower end of the scale. Disputes among shareholders give management an edge and put activist initiatives at risk of failure, respondents mention. One activist respondent comments: “Disparate views among shareholders are common and present many challenges. Also, response to the shareholder proposals are generally negative and fail to gain management support.”

Corporate and activist respondents agree that voting rules on amending corporate bylaws and majority voting to elect directors are among the most likely procedural changes to take place during the 2012 or 2013 proxy sessions. These two changes reflect a broader push for corporate governance reform, which many respondents say is at the heart of today’s shareholder activism.

The number of “say on pay” votes held annually is the change that most divides corporate and activist respondents. Shareholder activists are four times more likely to expect more frequent voting on executive’s salaries than corporates. For the corporates, it’s unclear whether the gap is due to their expectations of such rule changes or whether they are answering subjectively based on their interests. But one activist respondent maintains: “Boards will inevitably need to reopen the discussion on “pay for performance,” and either refine communication with investors or revisit their compensation policies.”

Both groups of respondents agree that staying out of the media is best for both parties when negotiating. Disputes that appear in the media can often negatively affect the value of the company. One corporate CFO recalls: “Most of the institutional investors are organized and tend to solve the issue relatively well with cooperation.”

A shareholder activist agrees, but adds that the media can be used for leverage by some activist investors. The respondent comments: “It depends on the type of activist investor. With hedge funds the discussion often goes public as they employ a short-term strategy. They look for quick returns and thus do not get involved in prolonged dialogues and rather go public to put pressure on the management. But other activist investors like mutual funds and pension funds cooperate with the management very well and work together most of the time."

Respondents disagree on the issue of board representation. Activist respondents unanimously agree that shareholders should have board representation, but only 36% of corporate respondents feel the same. A private equity VP sums up many of the activists' responses: "Board representation is important in improving transparency and reducing the number of disputes. Decisions can be taken more easily if shareholders have a board seat, as it greatly improves trust in management and prevents overly cautious scrutiny of a company's documents."

But many corporates believe the presence of shareholders in board meetings adds unnecessary complications to negotiations. The CFO of a leading media company explains: "There is no need for board representation from the shareholders. It has its advantages, but can cause more harm than good in making effective management decisions. Shareholder representation will falter the voting mechanism and cause frequent disagreements." Another corporate respondent states that management can work with shareholders on the board, but with certain limitations: "There should be proper rules, so that the shareholders' representatives do not influence the daily operations decisions, but are restricted to taking active part in strategic decisions."

Many respondents – 44% of corporate and 28% of activists – are unsure of the SEC's eventual decision on the timeline for 13D filings. Most shareholder activists – 56% compared to just 20% of corporates – do not expect any change to the filing period rule.

The shortening of the current 10 day requirement for filing of Schedule 13D following the acquisition of more than 5% beneficial ownership of a company has been under consideration in recent years. Legal experts representing corporate interests have reportedly been in favor of the change in order to protect companies from what they view as aggressive or harmful shareholder activism.

Activist respondents believe that despite a shortened filing requirement, hedge funds will develop a new strategy to work around the new rules. Some corporates agree, but most insist that the shortening will provide management with increased protection from activists. Overall, most respondents see that the cost of building a position greater than 5% will be increased by a shortening.

Proxy access proposals are expected to increase over the next 12 months, according to a majority of overall respondents. Activists have succeeded in reducing corporate defenses in recent years, respondents say, and the gates for more proxy contests have opened. An activist respondent elaborates: “A series of rules, including those related to proxy access and activism, will be enacted soon. This will increase the proxy access proposals and bump up a crop of proxy fights. Investors are certainly going to utilize the changing regulations to their full advantage during the next proxy season.”

The issue of proxy access remains important for a majority of respondents. A private equity director explains the significance: “Proxy access enables shareholders to include proposals in company proxy materials recommending amendments to company bylaws that would give qualified shareholders proxy access for their own director nominees.”

Strategies and campaigns employed by well-known activist investor Carl Icahn are not expected to trigger a long-term trend, according to overall respondents, although corporate respondents are not as certain about this.

The average holding period of activist investments has remained relatively unchanged since the 2010 survey. Though, by a larger margin, 60% of respondents still say most investments are held for at least one year, compared to 48% in 2010. The increase may be attributed to the growth of non-hedge fund investors in shareholder activism, as one managing director explains: “Institutional investors like mutual funds and pension funds who tend to hold onto their investments for long-term returns have increased the average holding period of activist investors.”

Activist investors say the mid-market is the most attractive place to execute activist strategies. While high profile individual activists involved in large-cap companies tend to attract the most media attention, respondents to this survey say this is not the norm.

Investors’ expectations of activist opportunities appears to be on the rise as a 60% majority say they are comfortable with committing 10% to 15% of assets under management to such investments. Only 6% were as comfortable with this allocation in 2010, and that year 42% were willing to use only the lowest amount possible.

This year, activist investors are targeting higher returns with just under half stating an expected range of 20% to 30%. Previously, less than a quarter of respondents were willing to aim as high. Indeed, in the last survey 14% targeted a return under 10%, whereas respondents are unanimously more optimistic today.

Interestingly, not since the 2008 edition have respondents cited returns greater than 30%.