Schulte Roth&Zabel

UK SHAREHOLDER ACTIVISM

Briefing

The Shareholder Activist's Toolkit for Launching Campaigns in the United Kingdom

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Traditionally, activist funds and investors have not targeted UK companies to anything like the degree they have in the United States, with approaches to UK boards of directors usually being far softer. However, given the returns recently seen by some activist funds, investors have become much more active in the United Kingdom. This set of *Briefings*, available online at the Schulte Roth & Zabel *Shareholder Activism Resource Center*, highlights the key tools available to the activist investor looking at opportunities in UK companies and analyses how those tools work as well as some of the key issues to keep in mind.

Tools Available to the Activist

UK activism has traditionally been less confrontational, as private discussions between investors and boards only rarely became public, and only rarely do investors seek to exercise their statutory rights under the United Kingdom's Companies Act 2006 as amended (the 'Companies Act') to force change. The Companies Act is the source of the key legal rights which form the basis of the activist investor's toolbox. Today, even if an investor does not initially intend to exercise those rights, it must understand them and how they can enhance (or limit) its influence.

Viewing the Shareholder Register

The shareholder lists of UK companies are publicly available, usually at their registered offices. Activists can therefore assess the register to see whether they might have support for their particular agenda. However, the shareholder list itself only shows legal (i.e., 'record') ownership, so investors who hold their shares through custodians or similar entities will not be disclosed. A public company must also maintain a separate register regarding those holding interests in its shares (known as the 'Section 808 register'), and as with the shareholder register itself, these are publicly available. Further, a public company has the right to investigate the identity of any person it knows, or suspects, is (or was at any time in the preceding three years) interested in its shares, and investors holding at least 10 percent of the paid-up voting share capital of a public company (excluding any voting rights attached to treasury shares) can compel the company to exercise its right to conduct such an investigation.

Please see the *SRZ Briefing* 'Viewing the Shareholder Register' for more information.

Requisitioning General Meetings and Resolutions, and Utilising Members' Statements
Shareholders can require the directors of a UK company to call a general meeting of its shareholders if they together represent at least 5 percent of the paid-up voting share capital of the company (excluding any voting rights attached to treasury shares). Such a meeting can be requested at any time. Further, such shareholders can propose resolutions to be tabled at the meeting. Shareholders in public companies can also have resolutions or other items of business tabled at an annual general meeting, provided they hold at least 5 percent of the total voting rights of the company (excluding any voting rights attached to treasury shares) or together amount to 100 members having voting rights and having paid-up share capital of an average of £100 per member.

Note that resolutions or statements (as to which, see below) need not be circulated if defamatory, frivolous or vexatious or (in the case of resolutions) if they would not be effective if passed (whether because of inconsistency with law or the constitutional documents of the company, or otherwise).

If a meeting, resolution or other business is properly requisitioned or requested, the meeting must be convened or the resolution or item of business included within the required statutory timeframe. However, where appropriate the board can and will focus on making a clear case as to what it believes is in the best interest of the company, whilst noting current guidance from investor organisations suggesting that boards should not seek to obstruct shareholder resolutions but should attempt to understand the concerns behind them, and take action where appropriate.

Aside from shareholders' rights to requisition general meetings, and to requisition resolutions and other business thereat, members can require the company to circulate a written statement of not more than 1,000 words relating to a matter referred to in a resolution to be dealt with at a general meeting or relating to other business to be dealt with thereat if they meet the 5 percent or 100 members/£100 per member tests referred to above. Separately, and without need to rely on shareholders' rights under the Companies Act, shareholders can contact other shareholders through the shareholder register or Section 808 register, or through press, web or similar campaigns. The targeted company of course may react in defence with counter statements or strategies.

More information on this topic can be found in the *SRZ Briefing* 'Requisitioning General Meetings and Resolutions, and Utilising Members' Statements'.

Effecting Board Changes
A director of a UK company can be removed at any time by an ordinary majority (i.e., a simple majority of those present and entitled to vote) of its shareholders at a general meeting. There is no window within which such removal rights must be exercised, and there is no need to demonstrate cause (though the finding of cause — in some description — will often have a bearing on whether the director concerned will have rights under his service contract for termination payments and/or whether his share options or entitlements to pension contributions (if any) become subject to an accelerated vesting or payment schedule). Targeted directors have a right to issue and circulate statements in their support.

Please see the *SRZ Briefing* 'Effecting Board Changes' for more information.

Pursuing Derivative Claims
Where certain specified types of wrong are committed by company directors, a shareholder can bring a claim on behalf of the company in the shareholder's own name but can continue with it only with the permission of the court. Such a claim is known as a derivative claim, and it must be brought in accordance with the Companies Act.

For more information, please see the *SRZ Briefing* 'Pursuing Derivative Claims'.

Other Concerns for the Activist
Whilst very positive for the activist investor, the UK legal landscape does include some possible dangers. With careful planning and execution of campaigns and other activities, shareholder activists can avoid issues in the following areas.

FCA Rules on Trade Reporting
Investors holding positions at 3 percent or above in public UK companies or companies admitted to trading on a UK market are subject to disclosure requirements under the United Kingdom's implementation of the EU Disclosure and Transparency Directive. The required disclosures must be made using a prescribed form, generally within two trading days following acquisition. The disclosures must be made to the relevant company and to the UK regulator (the Financial Conduct Authority) and are public.

Please see the *SRZ Briefing* 'FCA Rules on Trade Reporting' for more information.

Insider Trading Risks
Investors who are trading in public UK companies or companies admitted to trading on a UK market are subject to strict insider dealing rules and restrictions under the UK Criminal Justice Act 1993 (criminal offences) as well as under the EU Market Abuse Directive (civil offences across the EU), the latter of which applies to trading in any companies admitted to trading on any EU regulated market. Investors (wherever in the world they are located) must not deal in/trade, or attempt to deal in/trade, the shares of such companies while in possession of 'inside information' (defined as information of a precise nature, which is not generally available, relating directly or indirectly to the public company or to the shares, which would, if generally available, be likely to have a significant effect on the price of the shares). Activist investors should note that information as regards the intentions of other shareholders (where that information has the necessary characteristics described above — including being likely to have a significant effect on price) can constitute inside information.

For these purposes it is important to note that the definition of 'insider' includes any person who has inside information as a result of his or her membership of an administrative, management or supervisory body of the relevant public company or as a result of his or her holding shares in the capital of the relevant company. The insider dealing offence can be committed even if the person dealing in the shares did not know that the information that was held was inside information; consequently great care must be taken to ensure that appropriate monitoring and control procedures, including the maintenance of restricted lists, are adhered to.

The *SRZ Briefing* 'Insider Trading Risks' contains more information on these issues.

Defamation
In issuing statements or issuing press releases generally, there is always the risk that a claim may be brought under the UK's defamation laws. Truth is of course an absolute defence, the burden of proof being on the issuer of the statement. Care should accordingly be taken to verify the facts which support any public statement made or advice taken as to other available defences which may be relevant. A libel claim can be both costly and frustrating to the activist's ultimate goals as regards the targeted company.

The Mandatory Cash Bid Obligation
The UK's City Code on Takeovers and Mergers (the 'Code') places an obligation on the acquirors of interests in shares in companies to which the Code relates which carry 30 percent or more of the voting rights of that company to make a mandatory cash offer for all of the remaining shares. The 30 percent threshold includes concert parties; investors will need to ensure that any voting

arrangements with like-minded investors, formal or informal, do not risk forming a concert party for Code purposes.

Please see the *SRZ Briefing* 'The Mandatory Cash Bid Obligation' for more information.

Authored by Jim McNally.

If you have any questions concerning this *Briefing*, please contact your attorney at Schulte Roth & Zabel or one of the following attorneys: *Eleazer Klein*, *Jim McNally* or *Marc Weingarten*.

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