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Shareholders' Rights & Shareholder Activism 2021

Introduction

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Trends and Developments

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When the coronavirus pandemic first hit in 2020 and brought much of the world's economy to a standstill, it also brought shareholder activist activity to a standstill, as companies and their shareholders faced great uncertainty about what the future would hold. As life slowly returned to a new normal, shareholder activists were quick to return to the scene. A new activist forced an unexpected watershed moment for one of the world's storied oil giants when it won a traditional proxy fight for board seats by utilising a wholly untraditional argument. Activists continued to utilise fundamental shareholder rights – including books and records' demands – to supplement campaigns in the M&A activism space. And as large amounts of capital flow into new cryptocurrencies, new activists have emerged to hold market participants accountable to holders.

David Defeats Goliath: Engine No 1's Victory at Exxon

While investors had become increasingly vocal about the importance of environmental, social and governance (ESG) goals in recent years, it was virtually unheard of for investors to take significant concrete actions in support of those goals. That all changed when Engine No 1, a newly launched investment firm launched a proxy fight at Exxon Mobil Corp. and stunned corporate America with its victory as it secured three seats on Exxon's board of directors.

The campaign not only represented a David v Goliath victory – with Engine No 1, a 0.02% stockholder, challenging a company of Exxon's size – but it also constituted the first major share-

holder activism campaign with climate and environmental issues playing a critical role, spurring hope that big corporations may be held more accountable for the actions (or lack thereof) they take with regard to ESG issues.

Prior to Engine No 1's campaign, environmental issues were typically relegated to the non-binding shareholder proposal section of a proxy, rather than playing a central issue in director elections. So, when a previously unknown firm launched a campaign for seats on the Exxon board with a thesis heavily incorporating environmental concerns, many observers – and seemingly even Exxon – rashly wrote them off.

Engine No 1, however, was never deterred. It had identified serious issues at Exxon that would jeopardise the future of the company, its shareholders and the environment, if left unaddressed, and had nominated four highly skilled, experienced board candidates that it believed could help lead Exxon on a successful path forward.

Central to Engine No 1's campaign strategy was its engagement with shareholders of all types. The California State Teachers' Retirement System (CalSTRS) quickly came out publicly in support of Engine No 1's campaign, and eventually it garnered praise and backing from other major pension funds, including the California Public Employees' Retirement System (CalPERS) and the New York State Common Retirement Fund, as well as academics, activists and environmental organisations.

Engine No 1's argument that its nominees were better suited both to strengthen Exxon's finances and to lead it through the transition to clean energy won it the support of all three proxy advisers – Institutional Shareholder Services (ISS), Glass Lewis and Egan Jones.

With this broad support across the spectrum, Engine No 1 succeeded in electing three of its nominees to Exxon's board of directors at the 2021 annual meeting, sending shock waves across not just the oil industry but all of corporate America. This historic victory forced boards to recognise that ESG concerns cannot just be ignored and must be proactively addressed to satisfy shareholders.

Engine No 1's campaign has shown that a shareholder with a strong argument, a proactive shareholder outreach strategy, experienced advisers and the willingness to go all-in based on its conviction (despite doubt from outsiders) can use traditional methods, such as a proxy fight, to bring about seismic change.

Books and Records' Demands Continue to Prove Valuable Tools

The ability of a shareholder to inspect a company's books and records has long served as an effective tool to acquire information from companies about the business they are conducting. In Delaware and many other states, common-law rights of shareholders to inspect books and records were codified in statutes such as Section 220 of the Delaware General Corporation Law (Section 220), and have proven useful to activists seeking to apply additional pressure against recalcitrant targets, especially in transactions plagued by suspicious deal processes.

In January 2021, shortly after the announcement of the proposed acquisition of Pluralsight Inc (Pluralsight) by Vista Equity Partners (Vista) for a purchase price of USD20.26 per share,

Eminence Capital, LP (Eminence), a significant stockholder, announced its opposition, citing a disappointing consideration and a suspicious and potentially flawed deal process. After Pluralsight balked, Eminence crafted a books and records' demand pursuant to Section 220 of the Delaware General Corporation Law, seeking books and records regarding the merger process, including electronic communications. The demand sparked a dialogue between Eminence and Pluralsight, resulting in Pluralsight agreeing to produce a limited set of documents, including board materials. But when Pluralsight refused to produce emails or other electronic communications, Eminence went to court, filing a complaint and motion to expedite in the Delaware Court of Chancery seeking to obtain emails based on targeted searches. Only after the Court granted Eminence's motion to expedite did Pluralsight agree to produce emails.

The emails, along with the other documents Pluralsight produced, helped corroborate Eminence's suspicions of a flawed transaction process rife with conflicts of interest and preferential treatment given to Vista. Citing some of Eminence's arguments, ISS and Glass Lewis joined Eminence in recommending shareholders vote against the proposed transaction. Faced with certain defeat, Pluralsight abruptly adjourned the special shareholder meeting the morning it was set to take place.

Five days later, Pluralsight entered into a revised agreement in which Vista acquired all outstanding shares of Pluralsight for USD22.50 pursuant to a tender offer, an increase of 11% per share over its original offer.

Eminence's success is a reflection of a larger trend of activist investors using books and records' demands to obtain additional information that sharpens or confirms their message, which can, in turn, give other shareholders

additional reasons to support their positions. As was the case with Eminence, the Delaware Chancery Court in particular has increasingly shown a willingness to require companies to produce electronic communications, such as emails, in response to a well-crafted books and records' demand. Even when litigation seeking books and records is not commenced, books and records' demands can lead to a dialogue between activists and that can result in the activists and shareholders obtaining useful information that helps them to make better decisions and which can be invaluable in other parts of a proxy fight or litigation.

Crypto Activism Takes Centre Stage

Over a decade after the introduction of bitcoin and several years after the proliferation of cryptocurrencies, activist tactics have begun to work their way into the crypto space. In the summer of 2020, Los Angeles-based Arca submitted a white-paper presentation to Gnosis (GNO), a decentralised exchange and prediction market platform, demanding a turnaround plan and to push the token to improve its "tokenomics" to align better with token-holders.

In its white paper, Arca accused the fund of, among other things, under-performing benchmarks, such as the price of the Ethereum token, spending capital unnecessarily on certain equity and taken investments, taking out a three-plus-year interest-free loan from token-holders, failing to deliver the products laid out in its fundraising white paper, and launching products that accrue value only to Gnosis management. Arca called on Gnosis to tender for outstanding tokens at

book value in order ultimately to return USD74 per GNO token to token-holders. Sounding much like classic activists, Arca explained in a blog post following the public release of its white paper that it believed that cryptocurrency "token-holders have rights" even though rights have not been codified in legislation or under case law.

Following Arca's lead, Marlton, LLC, a family office based in Chicago, launched a campaign against Grayscale Bitcoin Trust, a trust holding the ubiquitous Bitcoin token, to undertake a Dutch tender offer to close its discount to net asset value after the trust had been dragging its feet in converting to an exchange-traded fund. In the wake of Marlton's pressure, the trust's sponsor, Grayscale Investments LLC, agreed to purchase an additional USD500 million of shares of the trust.

Both events follow on from calls from industry practitioners for "Carl Icahn-like" personalities to put under-performing coins and crypto funds to the test. As the cryptocurrency space proliferates and evolves, an increasing number of active shareholders and token-holders is expected to emerge to highlight blind spots in a crypto project's strategy or to point out mismanagement of project resources or failures to deliver on the promises of a token's white paper. These developments, along with recent indications from the SEC that cryptocurrency projects should provide increased disclosure to investors, are expected to increase the bargaining power of token-holders and shareholders of cryptocurrency funds going forward.

USA TRENDS AND DEVELOPMENTS

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Schulte Roth & Zabel LLP is widely regarded as the dominant global law firm for activist investing. From offices in New York, Washington, DC, and London, the firm's lawyers bring a sophisticated knowledge of market practices and unparalleled expertise in all areas related to activist investing. SRZ has more than 30 years of experience advising clients on more than 1,000 shareholder activism matters. The team assists with all matters relating to activism, including campaign strategies, corporate governance, proxy rules, trading and affiliate rules, Sections 13 and 16 compliance, antitrust regulations,

federal and state securities and corporate laws, tax and regulatory issues and litigation. The firm helps its clients navigate applicable law and regulations on a global scale, and the legal team provides guidance on both the strategic and tactical levels in everything ranging from running proxy contests, consent solicitations or withhold campaigns, calling special meetings or engaging in exempt solicitations and partnering with management and corporate boards to effectuate high-level changes that make a significant impact.

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