

ALERTS

Activist Investing — COVID-19 and Shareholder Activism — The Impact

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No area is immune from the effects of the current COVID-19 crisis, including shareholder activism. For shareholders contemplating or already conducting an activist type campaign at a company, COVID-19 leads to logistical impediments and shifts in timing and strategy, but, importantly, also creates opportunities for savvy investors.

Practical Impediments in Director Nominations

At this time of the proxy season, many investors are submitting director nominations for election to the boards of directors of target companies. Currently, shareholders are experiencing practical impediments, mostly stemming from brokers and banks operating at reduced capacity. For example, some of the nation's largest brokers are warning that transferring shares from a brokerage account into record name to be eligible to nominate a director may take a number of weeks. Alternative processes that we have used in the past to avoid these problems are also expected to take at least as long. (For context, these logistical steps ordinarily take 2 to 3 business days in regular markets.)

In addition to share ownership issues, director nominees themselves are often working remotely and requiring more time to complete relevant documentation. These delays can be further compounded, where nominees must secure approvals from other companies or their employers in order to be a nominee.

The cumulative lesson of this is clear: shareholders contemplating nominations should start early and initiate the process, even if they are not yet certain about their plans in order to preserve their rights and optionality in the event a campaign proves desirable.

Impact of SEC Operating Slowdown

Even after nominations, the proxy filing process may also be affected, as the strain on resources at the SEC may affect the speed and ease of being cleared to proceed with the campaign.

Normally in contested elections, the SEC comments extensively on all proxy materials, including those prior to commencing solicitation, in order to ensure that shareholders can rely on truthful information in making their voting decisions. Both sides spend significant time working to clear the SEC process quickly so they can solicit votes for their cause.

If comments from the SEC during the COVID-19 crisis end up being less rigorous, parties need to be prepared for more aggressive rhetoric and escalation in the tone of campaigns, which could force fact-checking into the public space.

Activists should be particularly vigilant in seeking substantiation from a defending company that may try to take advantage of a less rigorous SEC review and should be prepared to issue frequent press releases and letters to shareholders setting the record straight.

Active Solicitations May Face Challenges Getting Attention

During a campaign, an activist frequently looks to focus shareholder attention on the identified company issues and propose solutions to improve the company.

COVID-19 has spurred historic levels of market volatility and many market participants are focused on current portfolio valuations and trying to anticipate how future market behavior will affect their investments. This raises challenges in gaining the attention for an activist thesis (particularly a more long-term proposal), as well as atypical challenges in convincing investors that suggested changes will deliver results.

Activist Opportunities Abound

Of course, market volatility cuts both ways. This crisis may result in widespread delays in annual financial reporting by public companies and shifts in annual meeting dates, all of which could provide activists extra time to build their theses and present them to shareholders. A simple, easy-to-understand platform that can resonate with worn out and nervous investors may play best.

Increased settlement may be another likely side effect of COVID-19-provoked market volatility. With the outcome of contests more uncertain, sides may find added incentive to come to terms rather than take the risk of going to a vote.

Attractive Prices for High-Conviction Positions

The market slump offers a welcome opportunity to economically increase holdings in companies where activists have a high-conviction thesis.

Activists have recently continued to attract significant capital and many are sitting on large war chests, frequently with long duration lockups. This should allow them to weather short-term market turmoil.

Once the dust settles and market valuations reflect reality, underperforming companies will be exposed, creating major opportunities for activism. In the short term, investors should position themselves opportunistically to take advantage of this future potential.

Authored by Eleazer Klein and Aneliya S. Crawford.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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