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Activism returns post-pandemic, universal proxy cards to drive activity - 34th Annual Roth Conference

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- Universal proxy cards expected to lower bar for activists to initiate proxy fights
- Shortening the SEC 13D filing window from 10 days to five days viewed as a positive move

After a dip in the number of proxy fights during the darkest days of the pandemic, shareholder activism is returning and the arrival of universal proxy cards later this year threatens to open the floodgates even further, according to three advisors specializing in helping companies manage activist activity.

Low barriers to entry, introduction of significant new capital and increasingly favorable public perception are driving a wave of aggressive shareholder activity that must be anticipated and managed, attorney Paul Caminiti, founder of the New York firm Reevemark, told a panel entitled “Shareholder Activism Defense” at the 34th Annual Roth investor conference Monday in Dana Point, California.

The volume of proxy battles took a breather in 2020 and 2021, as leadership across all companies struggled to cope with COVID-19, the advisors agreed.

“It was considered bad form,” Caminiti said of aggressive activism.

Still, most of the clients that come to Reevemark have "an activist that is circling and saber rattling; someone you need to engage," he said.

Activist funds are seeing increased success publicly and privately in getting their agendas enacted; fewer than half of proxy fights go to a vote, said panel moderator Michael Fein, US president of Kingsdale Advisors.

Kingsdale - which advises public companies on governance, transactions and other special situations - cautions clients that no company is “immune, regardless of size, sector or geography,” Fein said.

What were once routine shareholder gatherings, now require greater attention and preparation to manage activist funds.

"Nothing is truly routine anymore," he said.

One aspect of Kingsdale's services include "stock surveillance," to help monitor large purchases that might foretell activist activity.

A company facing a worst-case threat could need advice on everything from defense strategy to Delaware corporate law, stock market listing rules and strategies for influencing the public discourse.

"There's a lot of legal work to be done in a shareholder activism defense scenario," said Leonard Wood, a senior management associate specializing in corporate governance at Sidley Austin.

As evidenced by activist fund Engine No. 1's successful election of three directors to the board of **Exxon Mobil** [NYSE:XOM], modern proxy fights can now be shaped by conversations on Twitter, he said.

An early, critical step is to recognize that "activism is not business as usual," Wood said.

All of the advisors expressed support for the role of activism and acknowledged that activist funds often target broken companies and genuinely create shareholder value.

But there will be times when a company's leaders feel they must fend off aggressive funds and that is becoming more difficult, the advisors agreed.

They pointed to the outsized influence wielded by proxy advisory services like ISS and Glass Lewis, which assist large institutional investors in deciding how to vote their shares at thousands of annual meetings.

Convincing ISS and Glass Lewis to support an activist campaign could give the faction control of 30 percent or more of a proxy vote, Caminiti and Wood agreed.

"It has made it comparatively efficient to try to disrupt boards," compared to 20 years ago, Wood said.

Another hurdle for company leadership is the SEC's new rules mandating universal proxy cards, which require that beginning 1 August, all director nominees be included in proxy cards so that shareholders can vote any combination of dissident and company nominees, just as if voting in person.

By no longer receiving proxy cards with a limited slate of nominees, boards are likely to see more flux – a development likely to encourage activists to carry more proxy fights all the way to voting, the advisors said.

"It's such a big change," Wood said. "It lowers the bar for entry for activists to start a proxy fight."

One rule under SEC consideration that the advisors do want to see enacted is a shortening of the 13D filing window from 10 days after reaching the 5% ownership threshold, to five days, thus reducing the advantage for funds that use the time to continue buying up shares.

"Typically, you'll wake up to a 13D with 7, 8, 9 percent," Wood said. "We think this is a great rule."

Proxy fights can quickly become very personal for the activists and company leadership and Caminiti warned against digging in heels from the start.

“You have to have a respectful dialogue with them out of the gate, if you’re going to get a constructive resolution,” he said.

The Roth investor conference continues through Tuesday.

by Aldrin Brown in Dana Point, California