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REPRINTED FROM:
CORPORATE DISPUTES MAGAZINE
OCT-DEC 2025 ISSUE

KIRKLAND & ELLIS LLP

Published by Financier Worldwide Ltd
corporatedisputes@financierworldwide.com

PERSPECTIVES

ACTIVISM, HOSTILE M&A AND OTHER CORPORATE CRISES: PREPARING FOR A RAID IN TIMES OF TURBULENCE

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Public companies and their boards today face an environment ripe for intervention by activist hedge funds, short sellers, unsolicited bidders and other threat actors.

Rapid and substantial regulatory and economic policy changes, geopolitical shifts and generative artificial intelligence-related disruption, among other factors, have contributed to significant market volatility and, for some companies, meaningfully depressed forecasts and stock prices.

However, volatility and uncertainty also present unique opportunities for corporate leaders to press advantages, further differentiate from peers and make their companies harder targets.

This article discusses how companies can strengthen their defences, mitigate risk and ultimately best position themselves for a dynamic market and regulatory environment.

Activism and hostile M&A trends

The level of activist activity remains persistently high and did not abate during the volatile first half of 2025. According to data from Bloomberg, activists launched on average nearly 350 campaigns at US public companies per year over the past five years.

While some investors temporarily hit 'pause' on making large new investments in light of recent market uncertainty, others saw opportunities to invest in high-quality companies at attractive valuations. To that end, the first half of 2025 continued the pace of recent years, with activists launching 177 campaigns (matching the total from the first half of 2024).

These figures materially understate the true level of activist activity because they do not include the numerous instances of private engagements with activists that are not subsequently made public. Taken together, in practice almost 10 percent of US public companies face shareholder activism in any given year.

According to Bloomberg, the sectors most frequently targeted by activists in 2025 (through 31 July) have been healthcare (20 percent of all campaigns), consumer discretionary (15 percent), technology (15 percent), industrials (10 percent) and financials (8 percent). This is consistent with recent trends, as healthcare, consumer discretionary and technology have been the three most frequently targeted sectors in the past five years.

With M&A markets recovering, activists are returning in force to their preferred platform: pushing for an event-driven outcome (e.g., sale of the company, separation) that they believe will generate a near-term stock pop.

"Companies targeted by activists may find themselves surprised when longtime shareholders express sympathy for aspects of an activist's platform, despite not having previously shared such concerns."

While some activists have made these demands public and in some cases are pushing companies to publicly launch strategic reviews, a number of activists are making these demands privately, at least in the first instance, and using the explicit or implicit threat of a proxy contest in 2026 as pressure to get a deal done.

In the first half of 2025, Bloomberg data reports 60 unsolicited or hostile bids globally, up from 44 during the same period in 2024. In addition to what has been announced publicly, both strategics and financial sponsors are more regularly exploring unsolicited (and in some cases, hostile) M&A

approaches. The combination of depressed valuations, mismatched valuation expectations as between target boards and potential acquirers, and renewed activist pressure for M&A is creating fertile ground for opportunistic approaches.

While outright hostile tender offers and accompanying proxy fights to take control of the target board remain rare (recent exceptions include QXO's successful acquisition of Beacon Roofing following its hostile tender offer and proxy fight and Choice's unsuccessful hostile exchange offer and proxy fight at Wyndham), the core intuition behind unsolicited M&A is that making public a premium bid (or threatening to do so) has the potential to generate enough pressure on the target board from its own shareholders that it will come to the table.

Activists are more frequently publicly launching campaigns outside of the typical proxy calendar, as they have recognised that public attacks (or the threat of one) can be effective in pressuring boards to accede to their demands even without a near-term opportunity to replace directors at a shareholder meeting.

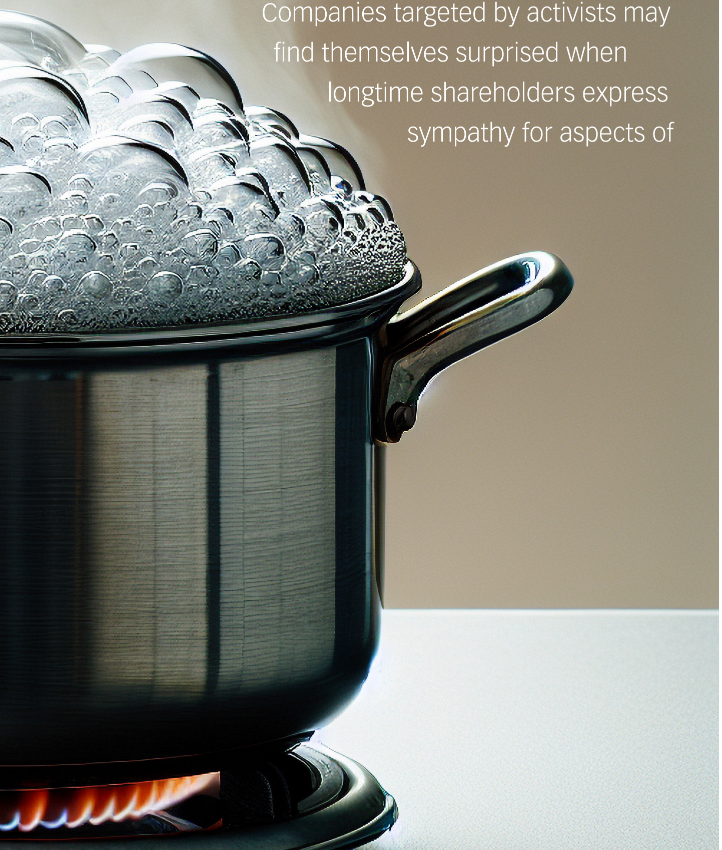
Companies should also be prepared for an activist to call a special meeting (or threaten to do so), particularly because many companies have lowered special meeting request thresholds in recent years following pressure over corporate governance best practices from proxy advisers, institutional investors and others.

In a shift from historical norms, activists are also more regularly launching public attacks – usually in the form of a strategic leak to a major business publication, followed by the release of an activist letter or white paper – before engaging privately with boards. By attempting to catch the company and its directors by surprise and seeking to shape the media and investor narrative early, activists appear to be placing less emphasis on constructive engagement while applying maximum pressure on the company.

This phenomenon is particularly prevalent during times of significant macroeconomic and regulatory change, when company prospects can turn quickly, creating opportunities for activists to pounce when their targets are in positions of significant vulnerability.

Preparation and response

Companies targeted by activists may find themselves surprised when longtime shareholders express sympathy for aspects of an activist's platform, despite not having previously shared such concerns.



Companies are therefore encouraged to seek candid feedback from their shareholders and ensure that their shareholder engagement plan remains aligned with recent guidance from the US Securities and Exchange Commission (SEC).

Maintaining meaningful shareholder engagement has become increasingly complex under the SEC's new guidance and commentary regarding schedules 13G and 13D, which some large investors interpret as a constraint on their ability to be candid without triggering disclosure obligations under the more burdensome schedule 13D.

As a result, building and maintaining relationships with large shareholders through 'off-season' engagement that elicits useful feedback under the new SEC guidance has gained importance. Listening tours involving independent directors and third party investor perception surveys are considered useful tools in this context.

Communicating the board's expertise proactively, even outside of a proxy fight scenario, is also viewed as beneficial. Under the SEC's universal proxy regime, proxy contests have become more focused on perceived strengths and weaknesses of individual director candidates.

Accordingly, companies may wish to consider revising proxy and web bios for directors to clearly articulate how each director's relevant expertise and attributes – with specific examples from their professional history – contribute unique value to the board. Although this exercise was traditionally reserved for proxy fights, undertaking it earlier on a 'clear day' can enhance the board's credibility with investors, regardless of activist engagement.

Refreshing the company's vulnerability assessment is another recommended step. External advisers can assist in identifying the most likely and resonant criticisms, equipping the team to prepare thoughtful, persuasive rebuttals and consider proactive measures. Opportunities to integrate key messages and themes into earnings calls and investor presentations should be explored to demonstrate that management and the board are actively evaluating alternative value-creation ideas before an activist raises them.

Structural defences and monitoring capabilities benefit from periodic review. Having an up to date, deployable shareholder rights plan (poison pill), including for hostile tender offers or rapid stock accumulation, is advisable. Advance notice and other bylaws should be reviewed regularly for developments in case law and market practices. Monitoring the shareholder base (and corporate website) for suspicious activity is considered prudent. Staying informed about recent changes in state law, particularly in Delaware, Texas and Nevada, helps clarify the availability of structural defences and other options.

Establishing a knowledgeable and integrated crisis response team is also recommended. This team should be prepared to make decisions and respond in a live-fire crisis. Outside counsel, financial advisers, crisis public relations firms and other relevant specialists may be engaged or kept on standby.

With respect to outside counsel, it is important in this regard to not only know 'the firm', but also the specific lawyers whose judgment is trusted. The external crisis response team should meet periodically with internal stakeholders to become familiar with the company's unique priorities, challenges and culture, and to develop a working relationship ahead of any live crisis.

Senior leadership and the external crisis response team are advised to develop and present an action-oriented response plan to the board, and to become familiar with the cadence, tactics and timelines of potential crisis scenarios.

External advisers may also lead the C-suite and board through tabletop or simulation exercises. When conducted effectively and efficiently, these exercises can build important muscle memory and coordination among participants, which proves valuable across a range of crisis situations.

Senior leadership and board members should be made aware of approved protocols for responding to inbounds from activists, unsolicited bidders, plaintiffs' lawyers, former colleagues and employees, expert network firms and other threat actors, who regularly seek to elicit compromising soundbites and drive wedges between key corporate stakeholders. CD

The authors would like to thank Vera Lee and Ria Sen, associates at Kirkland & Ellis LLP, for their assistance in the preparation of this article.

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