

Bridge Over Troubled Waters: Five Ways Public Companies Can Prepare for Shareholder Activism in Times of Turbulence

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As public companies navigate a landscape marked by rapid and substantial market volatility, regulatory uncertainty and geopolitical shifts, there is growing concern inside boardrooms that these same factors may increase vulnerability to a more familiar threat: shareholder activism. Whether or not catalyzed by this uncertainty, activists remain persistent. Through the first few months of 2025, the drumbeat of activist campaign launches has surpassed the highs of recent years. While some investors are hitting “pause” on making large new investments, others (including activist funds) are seizing opportunities to invest in high-quality companies at attractive valuations.

There is no free pass from activism during periods of significant market disruption, even where the primary drivers are macroeconomic and outside the company’s control. As we have said [before](#), it is critical that companies update and tailor their activism preparedness and response programs to address the current threat landscape. To help companies prepare in the current environment, here are five steps to consider:

- **Dust off your “on the shelf” poison pill.** Similar to the first few months of the pandemic, many boards are growing anxious about the prospect of waking up to an activist or unsolicited bidder announcing without prior warning that it has rapidly accumulated a large stake. This has led many boards to revisit whether to preemptively adopt a shareholder rights plan, or poison pill. While we have not (at least yet) seen a surge in rights plan adoptions comparable to 2020, many companies are taking the opportunity to ensure that their “on the shelf” rights plan reflects the latest developments in market practice and caselaw, and that their boards understand the circumstances in which adopting a rights plan may be

appropriate. Given the limitations of the various regulatory early-warning regimes (including Schedule 13D), we are also seeing companies initiating (or upgrading) stock surveillance and corporate website monitoring systems so they are best equipped to detect rapid accumulation, including through the complex derivative arrangements often used by activists.

- **Update your vulnerability analysis.** A core element of preparedness is conducting an outside-in, objective review of vulnerabilities across typical activist attack vectors (e.g., financial, strategic, capital allocation, governance and investor relations). Often completed with the assistance of outside financial and legal advisers, this exercise is designed to identify the criticisms that are most likely to resonate with existing shareholders. The output of this vulnerability analysis should help the company prepare rebuttals and identify possible proactive changes. This can be especially valuable during times of significant macro uncertainty and change, where vulnerabilities are more easily identified than value-creation levers. For example, if an outside-in analysis suggests there are specific initiatives that may appear value-enhancing but do not make sense when taking into account non-public or other company-specific factors (e.g., tax consequences or other dis-synergies in a sum-of-the-parts analysis), it may be prudent – before an activist latches onto the idea and makes a public demand – to make it clearer to investors that management and the Board regularly evaluate alternative value-creation ideas. This may include laying breadcrumbs on earnings calls and through other Reg FD-compliant investor communications that certain seemingly obvious “solutions” may be unworkable.
- **Consider bylaw amendments to reflect recent developments.** In connection with the implementation of the universal proxy rules, over 1,000 companies updated their bylaws to take account of the new regime and make other changes to reflect the modern activism landscape. Since that time, Delaware caselaw on advance notice bylaws has provided further clarity on both the content of and board process around adopting advance notice bylaws. Another emerging development may begin to warrant attention for bylaw drafters: shareholder proposals made outside of the typical Rule 14a-8 process for including proposals in the company’s proxy materials. We are seeing shareholders submit business proposals under company advance notice bylaws and mail their own proxy materials under Rule 14a-4. This option has become more appealing because the universal proxy rules now allow the shareholder to include on its proxy card the company’s director nominees alongside the shareholder’s business proposals – by contrast, historically, without the ability to include the company’s director nominees, it was unlikely that other shareholders would vote on the shareholder’s proxy card, and the company could simply not include these proposals on its card. While still relatively rare, we understand this tactic may be used more frequently starting in the 2026 proxy season, particularly

by labor unions and other investors who may prioritize non-economic objectives. As most amendments to advance notice bylaws have been focused on the process for director nominations, not business proposals, we are now developing bylaw updates designed to provide boards and shareholders with more information about proposals that may have primarily non-economic motivations, including disclosure of the parties who may stand to benefit from these proposals in a manner that is not shared with the wider shareholder base. We will also be closely watching rulemaking at the SEC in this arena – the Business Roundtable has recently [proposed](#) eliminating this tactic as part of a broader suite of reforms to the shareholder proposal process.

- **Solicit regular and meaningful feedback from shareholders.** The volatility of the current environment makes building and maintaining relationships with large shareholders through “off season” engagement more important than ever. These engagements can help portfolio managers and investment stewardship teams better understand the company’s strategy, challenges and opportunities during times of uncertainty (e.g., where the company is withdrawing forward-looking guidance). Proactive engagement should also help make board members less susceptible to opportunistic counter-narratives from activists who are repeat players in the space and tend to have long-term relationships with key decision-makers at large institutional holders. In preparing for these engagements, senior management and board members should be advised on the implications of the SEC’s recent guidance on Schedule 13D/13G, which has led many large investors to modify their approach to engagement (a topic we discussed in more depth [here](#)).
- **Be prepared for more “withhold-the-vote” and other off-cycle campaigns.** Activism has increasingly become a year-round, rather than seasonal, threat, with activists more frequently launching campaigns outside of the typical annual meeting calendar. While the threat of a formal electoral challenge is still the most effective pressure point, activists have realized that public pressure (or the threat of a public attack) at any time during the year can also be effective. This phenomenon can be more pronounced in periods of rapid change. For example, where macro or other factors lead to material negative effects at a company after a company’s director nomination deadline has passed but before its annual meeting, activists retain the ability to launch a withhold campaign urging shareholders to vote against directors without nominating alternatives. While these campaigns do not give activists the opportunity to elect their own candidates to a board, they can undermine director credibility and apply significant pressure by presenting shareholders a relatively low-cost way to register a protest vote without having to endorse a particular activist candidate or platform. At companies with majority vote standards in uncontested elections, a successful campaign could also result in a director being forced to tender his or her resignation. Boards should be prepared to

counteract these efforts swiftly, while continuing to prioritize ongoing board refreshment and ensuring that director biographies in proxy statements and corporate websites are clearly drafted to communicate why and how each director's background, skillsets and experience add unique and relevant value to the board. We are happy to share examples of such bio enhancements.

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Suggested Reading

- 08 April 2025 In the News New SEC 13G/13D Guidance & Shareholder Engagement
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