

# Proxy Fight Primer

A proxy fight is an intense and high-stakes undertaking. This document provides a high-level primer on the process.

## Preparations

For guidance on preparing for an activist and conducting off-season engagement, please refer to our [previously published primer](#), which outlines these three important preparations:

- **Shareholder analysis.** Evaluate your shareholder base and assess potential support.
- **Vulnerability assessment.** Identify which issues raised by activists are likely to resonate with business strategy, performance and governance issues that could attract activist interest and tactics that may be used.
- **Stakeholder engagement.** Create a plan to rally support among current shareholders, influential proxy advisory firms and other influencers.

Taken together, these steps create a foundation to deal with a proxy fight. The shareholder analysis will inform who comprises your shareholder base and how they may support you in a proxy fight, in light of your identified vulnerabilities. As part your preparations, you will assemble a team of key internal contacts and external advisors, such as a proxy solicitor, and have them ready to be deployed.

Your engagement plan will identify who participates in communicating with stockholders and how meetings are conducted and scheduled. Off-season engagement in general is a valuable tool. It can strengthen the relationship with your shareholder base and gives an opportunity to provide management's rationale for key issues – and take input from investors – outside of the frantic pace of a proxy fight or annual meeting.

## Pre-Proxy: Know Your Shareholder Base

It is important to know when a shareholder dissident takes a position in stock. Funds with \$100 million or more in qualifying assets must detail their ownership in Section 13 filings quarterly, within 45 days of the end of each quarter. In addition, the SEC requires that shareholders file within 10 days of acquiring five percent of the beneficial ownership of the company. In some cases, companies may also order a non-objecting beneficial ownership (NOBO) list for insight into its shareholder base. Because the quarterly schedule of the Section 13 filings, it effectively means that, for annual meetings in April or early May, the company's only definitive public views into shareholder ownership prior to the annual meeting will be available in November and February prior to the annual meeting.

While activists may make their presence known and reach out to the company, some may choose to wait until the last possible moment to alert management. Activist investors may clandestinely acquire positions that skirt reporting requirements, such as via broker-dealer swaps. In addition, investors that hold less than five percent of beneficial ownership may acquire stock and pursue similar goals, even if they are not formally cooperating (known as a “wolf pack”). In addition, within the 10-day timeframe, an activist may acquire

a significant ownership stake before the company is aware of this significant development. To gain more current information and insight into what shifts in ownership may mean for the campaign, companies may engage firms for market surveillance and/or voting analytics to supplement information from public filings. Check with your proxy solicitor to understand how best to identify your current ownership structure and what it will mean in the context of a vote.

Once the activist is known, it is important to engage with the activist in order to fully understand the activist's intent. Simply circling the wagons at this point is not an option: This approach will likely only give the activist more sway with your other investors, as your company will be seen as unresponsive. In addition to engagement, it is important to research what tactics that particular activist is likely to employ against you given their track record, and monitor the activist's ongoing activity.

Also, it is critical to engage your existing major investors to ascertain and/or develop support. It is important to determine your likelihood of success in a protracted campaign. Because proxy fights are expensive, settlements can occur early in the process if the company or activist determines that the outcome of the campaign is not assured. Companies often misinterpret constructive or friendly meetings as indicators of support. Therefore insight into past voting behavior in contests is critical.

### **From Preliminary Filing to Definitive Filing: A Quiet Period**

Both the activist and the company must file their preliminary proxy statements and proxy card drafts with the SEC at least 10 calendar days prior to the distribution of the definitive proxy statement to investors. Negotiations between companies and dissidents often take place prior to a preliminary filing by the dissident. Often the filing of this initial proxy by the dissident is a shot across the bow, warning the company that a dissident plans to move forward if good-faith discussions are not making progress. This proxy filing is a critical point in the contest, as it is often the first indicator of which incumbent directors are being targeted. At this time, the vulnerability of the targets can be assessed and proxy solicitors can assist with multiple vote scenarios, which can help the board decide on various courses of action.

During this period, it is imperative to create a communication plan for shareholders, proxy advisory firms and the media. During these preparations, continue to engage both the dissident - while monitoring its activity - and current investors.

When engaging with proxy advisory firms such as ISS, know that they evaluate two criteria when deciding whether to support the dissident:

1. Whether it has been made clear that change is needed, and
2. Whether the activist or management nominees are best suited to make that change.

In answering these questions, advisory firms examine a company's business strategy, stock price, earnings performance and governance practices.

The proxy statement can be an important resource for the campaign. However, neither the proxy statement of the activist or company must comprise the entirety of the argument for the campaign.

### *Communications*

The filing of the definitive proxy statements starts the fight in earnest. However important the proxy statement may be, the activist will also use any means of communication available to get the word out. The activist will send direct solicitations such as “fight letters” to investors as well as conduct personal, one-on-one meetings.

Press releases and conferences may be used to gain traction with the media in hopes of wide dissemination of the activist’s message. And with social media, a new arrow in the activist’s quiver, activists can quickly and broadly comment on developments in the campaign on platforms such as Twitter. Internal communications are also important in easing concerns of employees as well as encouraging them to support the company.

It is vital that management executes an active, disciplined communication campaign with messaging focused on how the company’s strategy will deliver superior long-term shareholder value. It is important to consider how proxy advisory firms and your shareholder base would react to any communications. To be most effective, management should provide strong, fact-based rationales for supporting their position. Heated communications irrelevant to the chief issues will send the wrong message to potentially supportive investors.

The content of solicitation communications is subject to stringent rules. Management needs to be fully aware of how to comply, and your company’s public relations advisors, general counsel and proxy solicitor should all be consulted to ensure compliance. Most company communications, including those sent to employees, will be considered a solicitation and will need to be filed with the SEC on the day of their use. Note that there are exceptions to this rule: if the party sending the communication is not seeking proxy authority, and if the number of shareholders solicited is 10 or fewer.

In addition to fight letters and other broad communications, management should continue to engage one-on-one with its investors – including the activist – and proxy advisory firms to target retail investors. If the issue is closely contested, the company should consider a solicitation strategy. Monitoring voting throughout the campaign, for both retail and institutional investors, is critical at this juncture to enable targeted outreach. Votes can – and often do – change during the course of a contest and companies need to be prepared to follow up with investors in the closing weeks and days of a solicitation campaign.

There are a growing number of proxy advisory firms, and while many institutions vote independently of these advisors, vote recommendations by these firms can determine the swing votes in a contest. Proxy solicitors engage in numerous meetings with these advisors and can help coach senior executives and board members on how to best engage and conduct these meetings – which are often quite different than traditional investor relations.

### THREE CLEARLY DEFINED STAGES

#### Before proxy is filed

- > File 13D
- > Engage dissident
- > Ramp up outreach program with major investors
- > Initiate reconnaissance for dissident activities (investor feedback, additional SEC filings, inquiries regarding mailings, etc.)

#### Preliminary filing through definitive filing

- > File preliminary proxy
- > Draft deck and coordinate investor roadshow
- > Create talking points
- > Strategize media engagement plan
- > Re-engage dissident
- > Enhance investor deck with an eye towards engaging proxy advisory firms
- > Continue investor outreach (and follow up on previous outreach efforts)
- > Continue reconnaissance on dissident activities

#### Definitive filing through meeting date

- > File DEF14A
- > Refine investor deck and talking points
- > Initiate retail solicitation strategy
- > Begin institutional proxy solicitation (as compared to pre-proxy outreach)
- > Engage proxy advisory firms
- > Monitor and identify beneficial voting
- > Implement fight letter mailing strategies
- > Issue press release responses after release of proxy advisory firm recommendations
- > Continue retail and institutional solicitation and vote tracking

#### Meeting date

- > Consider review and challenge period in advance of final tabulation certification

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