THE ACTIVIST REPORT

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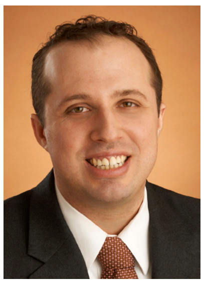
10 Questions with Keith Hallam



Keith Hallam is a partner in Cravath's Corporate Department. His practice primarily focuses on mergers and acquisitions and activist defense. Mr. Hallam also advises corporations and their directors on general corporate and governance matters. Mr. Hallam has broad mergers and acquisitions experience spanning numerous industries. Notable transactions include representing Alere in its $8 billion sale to Abbott Laboratories; Pinnacle Foods in its $10.9 billion acquisition by Conagra Brands; Starwood Hotels in its $13.3 billion sale to Marriott International and in connection with a competing, unsolicited acquisition proposal from a consortium consisting of Anbang Insurance Group, J.C. Flowers & Co. and Primavera Capital; and Xerox in its spin-off of Conduent and in the $1.05 billion sale of its IT outsourcing business to Atos.

13DM: You have represented many companies facing shareholder activism. Could you tell us a little more about your practice?

KH: My practice focuses primarily on mergers and acquisitions and activist defense, where I advise corporations and boards of directors on corporate and governance matters. In the activist context, this includes representing companies across a number of different industries and situations. Within the last couple months I represented Ashland in its proxy contest and subsequent settlement with Cruiser Capital; Benchmark Electronics in its cooperation agreement with Engaged Capital; and Conduent Inc. in its agreement with Darwin Deason.

13DM: Recent engagements in which you have defended against activism include ARIAD, Benchmark Electronics, Hertz, NCR, UTi and Xerox. Most have been settled amicably. How do you guide companies toward avoiding public proxy fights?

KH: Every situation is obviously different with its own facts, circumstances and other dynamics so there really is no "one-size-fits-all" approach to dealing with activists. If a company and an activist can avoid a public fight that may be the best thing for the company and its shareholders, but it is important to remember that is not always the case. Our advice to Boards when dealing with activists is that they have to do what they believe is in the best interest of the company and its shareholders and that in some cases that means they will not be able to work out a deal with an activist and that may lead to a public fight.

13DM: How do you think passive index funds and the rise of passive investing has fundamentally reshaped the activist playbook?

KH: For Boards, it means that increased and ongoing engagement with shareholders is more important than ever. Increased concentration amongst institutional shareholders, particularly institutions such as Vanguard, BlackRock and State Street, means that the support of these shareholders is critical in an activist situation. And we have seen these traditionally "passive" investors become much more active and much more vocal.

13DM: There has been a lot of activist-induced M&A recently. Do you see strategic activism continuing even in a less interest rate-friendly environment?

KH: I do, primarily because activist-induced M&A is based on wide-ranging investment theses. For example, this can include encouraging a sale of the entire company, seeking break-ups or divestitures of particular divisions or business units, or entering a stock after a deal has been announced with the goal of improving the overall deal terms (commonly referred to as "bumpitrage").

13DM: Over the past 10 years, activist investors have become more accepted by institutional investors, experienced corporate advisors and the media. But it seems like acceptance has been lagging in the board room and C-Suite. How do you see corporate executives reacting to activists? Has that changed significantly over the past 10 years?

KH: In my experience, most corporate executives and boards of directors are open to constructive dialogue with their shareholders (including activists). So the way executives and boards of directors react to specific activist situations is usually

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driven by whether they feel the activist is interested in being constructive and working with the company to create value, or just interested in making a quick buck in a way that is not in the best interest of the company and its other shareholders.

13DM: What advice do you give to your clients to prevent an activist engagement? Is a regular dialogue with shareholders an antidote or do boards need to do more?

KH: A big part of preparing for activists is regular shareholder engagement. Companies have become more proactive in terms of engaging with their shareholders, including outside of the annual proxy season. While regular engagement has become the new normal, alone it's not a silver bullet to avoid activism. When thinking about and preparing for potential activist engagements the best defense is definitely a strong offense. What I mean by that is that the best way to be prepared for activists is for Boards to regularly and critically assess the company's performance, corporate strategy, executive compensation, Board composition and any vulnerabilities. Boards need to be directly and regularly involved in this and companies need to be able to clearly articulate their position on these issues. Being caught flat-footed without a clear strategy is the worst situation in which a company can find itself.

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13DM: What is the most important thing for a corporate executive to know when an activist starts buying shares of his/her company? What is the first thing he/she should do?

KH: Companies cannot afford to wait for an activist to show up. As I said, preparation is key. Executives are best able to respond when an activist starts buying shares when they already have a plan in place. As I mentioned previously, companies that have critically assessed the company's performance, corporate strategy, executive compensation, Board composition and any vulnerabilities will be best able to engage with the activist. After that, the next steps are really driven by the specific facts and circumstances.

13DM: What is the most important thing an activist could do to be well received by management?

KH: Companies are much more willing to try to work constructively with activists who are constructive themselves. Activists who approach management teams privately with thoughtful ideas backed by an in-depth understanding of the company are more likely to be accepted by management and the board. This type of engagement creates the opportunity for meaningful dialogue between the parties—the activist can express their views and management can explain how the company's current strategy addresses the activist's concerns, or how the company can take the activist's concerns into consideration.

13DM: How do you envision shareholder activism evolving over the next five years and beyond? Are there any trends on the horizon that you foresee?

KH: One thing we can continue to expect is further growth in activism outside the United States. The last couple years have seen significant growth in activist campaigns in Europe and elsewhere, and I think the number of international campaigns will continue to increase as activist investors develop new ways to deploy capital. I also expect the traditionally "passive" investors will continue to become more active.

13DM: From board room diversity to disclosures around climate change impact, corporate stakeholders are increasingly looking at corporate stewardship and ultimately the value to society that companies are creating. When advising boards, how much relative emphasis do you place on ESG factors?

KH: As you know, this is something that large institutional investors are increasingly paying more attention to. As a result you've seen companies also become more focused on this and so this is an area where we and our clients spend a lot of time. Every Board needs to understand what its shareholders care about and be able to explain the company's views on those matters (including ESG matters).

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