



# KINGSDALE

Shareholder Services Inc.

## Shareholder Activism is Here to Stay: What You Need to Know

We could blame the recent explosion of shareholder activism on the recent implosion of the markets – but that would not be one hundred per cent accurate. The increasing rate of dissident activity is affecting more and more issuers and is the “new norm.” Shareholder activism is here to stay.

A variety of factors have caused the steady surge of shareholder activism in the market, including changes in the standards and expectations of corporate governance, SEC rulings (including NYSE Rule 452), availability of information and advisors for activists and a growing sense of confidence in launching a proxy contest coupled with depressed stock prices (notwithstanding the recent surge).

As the activist’s toolkit grows, what can an issuer do to be prepared?

### Be Prepared Not Vulnerable

Early planning and preparation is critical to ensure a successful defense against an activist campaign. Examine everything from your corporate structure to your company bylaws, management and board practices, corporate governance, and investor relations programs to ensure you know where your potential weaknesses lie and why you may seem attractive to an activist investor.

Once you are clear on where your company’s potential blind spots are, put a plan into action that will address each area of concern – this could include revising your business plan to reflect recent economic changes, adopting further voluntary disclosure practices, strengthening corporate compensation disclosure and/or ensuring strong accountability measures from an environmental as well as corporate standpoint. In addition, it is also important to be aware that there is a strong possibility your managements’ decisions will be challenged. The manner in which you learn of this opposition can vary from a simple rumour, shareholder letter or a meeting with board members, to the receipt of a full-blown meeting requisition and dissident circular.

### Know Your Shareholders

Understanding your investors and their differing motives could be one of the most important endeavours for your company. Your board and management team should have access to an up-to-date snapshot of the company’s shareholder base including retail versus institutional makeup, trading activities, and profiles of all institutional holders and their advisors. Shareholder communication and outreach programs that engage your shareholders and keep them informed of your business strategy improves their understanding of management decisions and the value of holding your stock. Regular communication with your “top holders” will provide key insight into their expectations and shed light on any potential issues that may need to be addressed. In turn, this communication will allow you to take stock of who your “friends” are should an activist campaign be launched. A unified communication plan should be maintained to ensure a clear and consistent message is sent to shareholders with the goal of maintaining open and positive relationships.

## Leverage an Expert Advisory Team – before the alarm bells ring

Leading public entities engage external professionals during the early planning and preparatory stage to develop a defense strategy. Governance, communication and investor relations audits, conducted by a neutral third party, can be an invaluable tool that can help your board and management team identify and address potentially contentious issues. If you haven't looked into who your shareholders are in a while, it could be time to retain a third party to conduct a shareholder analysis program.

Once an activist campaign is launched, the temperature and pressure rises quickly. It also distracts management from running the company as countless hours are spent in the execution of a defense strategy. A company's best defense is a multi-disciplined team of professionals with specific experience in contested situations. Effective teams include board and management representatives, legal counsel, investor relations advisors, and proxy solicitation firms who collectively and efficiently determine the most effective response strategy.

Success in a proxy contest often hinges on the most effective message getting to shareholders. Maintaining a strong, consistent message and communicating effectively with all shareholders is critical and can determine the outcome of the votes. Among other important tasks, your proxy solicitor will canvass shareholders to gain insight into their views. This will help drive the communications and messaging strategy. Hiring an experienced communications team to make the best use of the variety of available shareholder channels will help ensure your message reaches the "hearts and minds" of your shareholders. Bear in mind that in proxy contests, shareholders are asked to vote their conscience, so it's imperative that your communications address their key concerns.

In addition to focusing on shareholder communication, your team should leverage relationships with proxy advisory firms that include RiskMetrics Group and Glass Lewis. These firms consider the arguments of both sides and deliver voting recommendations to shareholders that are strictly followed by many large institutional firms in North America. With an understanding of your institutional holders' voting patterns and an opportunity to present your message to these advisors, you will be better able to predict the outcome of voting and solicit proxies accordingly.

A good proxy solicitor will help canvas those all important votes and will be able to ensure the votes you receive are both valid and tabulated correctly. Your legal team will work closely across all aspects of the campaign, developing any requisite litigation strategies or defenses as required. In a proxy contest, the only votes a board can be sure are in their favour are their own, which means the importance of a team of professionals who are able to act on your behalf until the very end could make the difference between winning and losing.

### Wear the White Hat

Etiquette is a word that you do not often hear attached to proxy contests. In many cases, you will have no choice but to fight the fight. However, you need to be prepared to defend yourself in court where a judge can ultimately decide the outcome. Accordingly, management must know and understand the legal implications of all decisions and act as the beacon of governance in any proxy contest. Be prepared to face extreme tactics from an activist investor that may include personal attacks on your board and management. You will need to have a response strategy that can be executed almost immediately to address these issues in a tactful and legal manner while preserving the integrity of personal reputations and your corporate brand. Also take into consideration that a large percentage of proxy contests end up being settled before they get put to a vote. Having thick skin and a short memory can also come in handy!