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Shareholder Activism

More Companies Cite Activism as a Risk in Financial Disclosures

Sixty-five public companies cited “shareholder activism” as a risk factor in SEC filings during the first six months of 2017, more than five times as many during the same period three years ago, according to a Bloomberg BNA analysis.

Companies are showing increasing awareness and concern about the potential costs of activism even as the rate of growth of activist campaigns has slowed.

The trend “speaks to the fact, not just that there is a lot of activism out there, but that boards and public companies are aware of the pervasive threat of activism,” Jeff Gramm, owner of hedge fund Bandera Partners LLC and author of “Dear Chairman: Boardroom Battles and the Rise of Shareholder Activism,” told Bloomberg BNA.

Companies disclose risk factors in their financial reports to help shareholders and potential investors understand the risks they face. Bloomberg BNA examined Securities and Exchange Commission periodic reports, including annual filings, quarterly filings, and filings for events or changes between quarterly reports, in the first six months of 2008 to 2017.

Targeted Companies The companies that cited shareholder activism as risks in 2017 range from real estate management and development company Forest City Realty Trust to Oxford Industries Inc., the owner of the Tommy Bahama and Lilly Pulitzer clothing lines, to clinical-stage biotech company Mirati Therapeutics Inc.

The market valuations of the 65 companies that listed shareholder activism as a risk factor in 2017 range from \$45 million to \$27.2 billion. Of those companies, over half are small-cap companies, less than one-third are mid-cap, with only a few being large-cap.

Some list shareholder activism as a risk factor as a preemptive measure against future attacks, while others, like Darden Restaurants Inc., are driven by having been a prior target for activists.

“It’s just gotten to be something that everybody has got to be conscious of,” instead of only companies with low-performing stock, Bonnie Roe, a New York-based partner at Cohen & Gresser LLP who advises clients on SEC compliance and mergers and acquisitions, told Bloomberg BNA.

Concerns Corporate boards and C-suites are worrying more about shareholder activism, Roe said. “More people are conscious of the fact that their own corpo-

rate strategy could be derailed by an activist coming in.”

In addition, proxy fights can be expensive, distracting for management, result in the loss of long-term gain, and push the company in a “negative” direction, Kai Liekefett, a New York attorney who heads Vinson & Elkins LLP’s Shareholder Activism Response Team, told Bloomberg BNA.

Activism can be helpful for companies—for example, shareholder-driven cost cutting at Bank of New York Mellon Corp. led to improved profitability. However, that’s not always the case.

“Not all activism is good, and not all activism increases shareholder value, but the threat of activism in the system and the accountability that it provides to companies is good,” said Gramm, who’s also an adjunct professor at Columbia Business School.

The “best defense from activism is to know your vulnerabilities” and communicate those vulnerabilities to shareholders, Gramm said.

Companies now are more prepared for activists, corporate attorneys told Bloomberg BNA.

“I do think boards are doing a much better job on the whole” with being prepared for shareholder activism, Douglas Schnell, a Palo Alto, Calif.-based attorney who leads Wilson, Sonsini, Goodrich & Rosati’s shareholder activism practice, told Bloomberg BNA.

“They’re engaging more with shareholders, they’re thinking about shareholder activism more,” Frank Aquila, a New York-based M&A partner at Sullivan & Cromwell LLP, told Bloomberg BNA.

Plateauing Activism Data from FTI Consulting shows that the growth rate of activist campaigns has slowed over the last three years.

Fifty-six percent of activists surveyed expected the volume of activism in 2017 to remain the same as 2016, according to an Activist Insight and Schulte, Roth & Zabel report. Thirty-two percent of respondents expected an increase in volume.

Many large-cap companies have already been or currently are targets of activism, so some activists are turning their attention to mid-cap or small-cap companies, according to a separate report by Activist Insight, Schulte, Roth & Zabel, and FTI Consulting.

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