When Should Boards Fight?

In the headlines today, it is common to see announcements about activist campaigns or activists taking equity positions in public companies. Nonetheless, full-scale proxy fights have become relatively rare. Most public company boards opt to settle with activists, seeking to avoid costly, time-intensive and uncertain contests that distract directors and management from running their business. Settlements are widely viewed as a way to preserve value, reduce disruption and maintain greater control over outcomes.

As advisors, we always advocate that companies engage in constructive dialogue with shareholders. However, settlements are not always in the best interest of the company and its broader shareholder base. Some activist demands pose risks that no responsible board can accept, making a full-fledged proxy fight necessary to protect the company from unacceptable terms and potential value destruction. Boards and management teams must understand the various dynamics at play, the pros and cons of settling and when it may be advisable to resist settling and commence a fight. In the following paragraphs, we weigh the benefits of settlement versus prosecuting a proxy fight and highlight certain settlement terms and tactics that should be opposed.

What to know about Settlements

Despite their popularity, settlements often fail to deliver superior outcomes. A recent analysis of 634 settlements between U.S.-listed companies and activist investors from 2010 to 2024 revealed that a majority of companies underperform the market following settlement agreements with activists. Specifically, the average company lagged the S&P 500 in terms of Total Shareholder Return by nearly 10% in the three years post settlement. Notably, the only consistent exception to this underperformance occurs when a company is sold within three years of the settlement. In these scenarios, these companies outperformed the market by on average, by over 15%. (The full article can be found here.)

Settlements can introduce other risks as well. The addition of activist-backed directors, especially activist fund principals, can alter board dynamics, sometimes leading to internal conflict or the advancement of agendas misaligned with the interests of the broader base of shareholders. Furthermore, at times settlements fail to deliver lasting peace, as activists may eventually resume public campaigns or leak information related to the negotiations if dissatisfied with the pace of change to apply pressure.

Despite these risks, settlements are more common than they used to be and are happening at a faster pace. According to FactSet data, in the 2025 proxy year thus far, approximately 50% of announced proxy contests not subsequently withdrawn or abandoned ended in settlement agreements. This is compared to average settlement rates

of approximately 22% between 2001 and 2004 according to Shark Repellant's Proxy Fight Trend Analysis. Not only are settlements preempting proxy fights, but when a public campaign is launched, the average time to resolution was only 16.5 days in the second quarter of 2025 according to a Diligent report released in August. This compares to just under six months in 2021. This trend reflects practical considerations, as settlements often provide the path of least resistance—and greatest efficiency.

Cost is another factor. On average, companies expected to spend approximately $4.6 million on proxy fights for the 2025 proxy season according to *Diligent Market Intelligence* data. Depending on the size of the company, the complexity of the issues and the shareholder base, the total cost could be significantly higher, especially if a contest drags on. Prolonged fights create bigger distractions for boards, management teams and employees. They can also result in delayed shareholder meetings, unsettle investors, trigger uncertainty across the business and complicate hiring and retention. Against this backdrop, it is understandable why a company would choose to settle quickly and avoid a fight.

How to Know When to Fight

A proxy fight may be necessary when activists insist on unreasonable demands or when the outcome proposed by the activist is not in the best interest of the company's shareholders. For example, a proxy contest may be warranted when the activist insists on putting the company in play via a publicly disclosed sale process or strategic review that could destroy value, especially when the company has already tested the waters and not received real interest. However, an activist lacks full access to information and may press certain intentions without realizing the board has already considered a range of strategic alternatives and determined that it is not in the best interest of the company's shareholders to proceed with those alternatives. Risking a failed process at the demand of an activist could lead to a sharp decline in the stock price or other adverse consequences.

Another example could be an activist seeking the removal of a CEO that has the full support of the board in the absence of an immediate, viable successor. A third example could be if the activist is demanding unreasonable changes to board composition, which could grant the activist disproportionate and inappropriate influence or reduce independence or eliminate relevant skillsets on the board. A fourth example could be if activist insists that they, or a member of their investment team, join the board, but the company anticipates that this would materially disrupt board dynamics and strategic vision.

Before entering negotiations, a board may want to define clear non-negotiables and align on what it will and will not accept. Tolerance levels vary by company, but many effective boards decide these boundaries in advance. Rushing to settle often produces suboptimal terms that create long-term risk.

If any of the above are on the table, it is critical to understand the activist's true agenda and time horizon before entering into a settlement. Common agendas include (1) raising fund profile to attract capital and justify management fees, (2) building a public track record or "win" for marketing purposes, (3) pushing for actions that temporarily boost stock price, such as stock buybacks, dividends or asset sales, in order to realize quick returns, (4) securing influence or information access for future campaigns, (5) seeking visibility for personal or reputational reasons or even (6) pushing for actions that generate liquidity to support their own cash flow requirements.

The reality is that boards cannot always take activists' stated intentions at face value. Activists often avoid explicit demands for CEO removal or a sale process during their initial campaigns and then pursue those outcomes once they settle and secure influence. Directors should look beyond the surface, understand the activist's history, ask thoughtful questions, and weigh both explicit and implicit objectives before agreeing to any terms.

Before choosing whether to settle or fight, boards must honestly assess their position and evaluate their relative strength. This starts with the most obvious factor – financial performance. Boards should benchmark their TSR and financial results against peers and indices. Boards then may want to go deeper: gauge investor sentiment, analyst views, and management's credibility on the long-term plan. With the rise of passive ownership, boards should carefully review their governance profiles in respects to the large index funds' stewardship principles—including board skills and tenure, shareholder rights, and any defensive measures that could frustrate investors. Strong fundamentals and market confidence can and should empower a board to push back against activist overreach where appropriate. Conversely, weakness in these areas may suggest a more conciliatory approach.

Above all, when evaluating whether to settle or proceed with a potential proxy fight, boards must also carefully consider their fiduciary duties to the company and its shareholders. Directors are obligated to act in good faith, with due care, and in the best interests of the corporation, which requires a thorough and unbiased assessment of the merits of the dissident's proposals versus the company's current strategy. Boards should ensure that any decision to settle or fight is grounded in a rigorous process—one that often includes input from seasoned independent advisors and a clear read on shareholder sentiment. Throughout the process, directors should steer clear of entrenchment motives and ensure

that their actions are guided by the overarching goal of maximizing value for all shareholders.

Over the last several years, settlements have become the default outcome in activist campaigns for many goods reasons as they offer lower costs, faster resolution and a return to business as usual. However, settlements are not universally beneficial when demands jeopardize long-term value. In these instances, boards should be prepared to fight. Before reaching this decision point, boards may identify their unique dealbreaker terms and should examine and understand an activist's true agenda and objectively assess their financial position relative to market and investor expectations. With these practices, boards and management teams can approach activism not with fear, but with confidence—and make informed decisions on when to settle and when to fight.

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