

December 21, 2005

Being Prepared For Attacks By Activist Hedge Funds

In this environment of increased attacks by hedge funds, including against some of our largest and most well-known companies, it is more critical than ever for companies to be prepared in the event they become the next target. Companies need to:

- Be acutely aware of where they stand in relation to their peers, including in terms of performance, results and operations. Relatively poor performance, regardless of the reason, can make one an easy target.
- Consistently articulate the company's business and financial strategy in a way that is meaningful and understandable.
- Carefully monitor analyst reports, particularly for suggestions on strategic changes the company could make. Company officials must be careful when discussing potential strategies with analysts, and "half-baked" ideas for the company's strategic direction must be refuted or otherwise addressed immediately.
- Have in place sophisticated stock watch programs which alert management to new large investors and non-ordinary course patterns of stock purchases. Hedge funds have become very sophisticated in their ability to execute purchases so as to avoid detection. Detection tools must be upgraded to meet the challenges posed by these purchases.
- Ensure that the company's investment bankers, lawyers and public relations consultants are at the ready with a state-of-the-art program for responding to a potential attack.
- Review at least annually with the Board the response program so that the Board is comfortable with how to proceed in the event of an attack.
- Be aggressive and prepared to litigate or inform regulators immediately if there is evidence that funds have violated securities laws -- including by failing to disclose the formation of a group, the identities of the group members and/or the group's intention -- the HSR Act or the Investment Company Act.
- Not allow the attackers to achieve the moral high ground by wrapping themselves facetiously in the cloak of good governance.
- Above all, do not be caught off-guard and do not remain passive.

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