MAY 2015

GOVERNANCE PERSPECTIVES

# DUPONT'S PROXY CONTEST VICTORY: A TURNING POINT FOR COMPANIES' RESPONSES TO ACTIVISM?

- This highly celebrated DuPont victory signals that shareholders recognize that not all companies require activist intervention or a seismic change in strategy—DuPont's strong financial performance and implementation of strategic initiatives supported its contention that it was pursuing a viable long-term strategy while remaining receptive to alternative approaches and the need to focus on smart capital deployment.
- DuPont benefitted from an atypically high percentage of retail shareholders, who normally side with the board, and seemed to have listened and responded to its institutional shareholders, rather than simply battling with the insurgent. While DuPont does not by any means portend the end of shareholder activism as we know it, it may point the way to a new proactive and more positive approach by companies to activism.
- The DuPont battle—expensive and distracting, even if victorious—teaches that companies must substantially revamp their shareholder engagement efforts before a battle begins. Perhaps more importantly, companies must bring to bear energetic and disciplined focus on successful realization of a well-articulated strategy rather than limiting their investor relations to 20th century sell-side analyst metrics to focus on capital efficiency and total shareholder return.

DuPont defeated the proxy contest waged by Trian Partners, the activist firm founded by billionaire Nelson Peltz in the mid-2000s. In years past, this boardroom battle may have been significant solely by virtue of the sheer size of its target; DuPont is a formidable company with a storied history and a $65+ billion market cap. Recent activist campaigns focused on huge companies like Apple and Pepsi, however, have made contests involving such mammoth targets seem relatively commonplace in today's environment.

The DuPont situation was remarkable not only due to its large size but also its operational and financial success; in recent years, DuPont had significantly outperformed both its peers and the S&P 500. Further, DuPont's management had also undertaken and successfully completed strategic initiatives taken right from the activists' playbook, including the ever-popular return of cash to shareholders (through share buybacks) and the divestiture of noncore businesses (through sales or spin-offs). Moreover, the initiatives undertaken by DuPont's management were not minor; DuPont had returned about $14 billion in cash to its shareholders over the past six years, had divested or committed to divest two substantial legacy businesses, and had also completed a substantial cost-savings initiative.

Trian, however, claimed that DuPont needed to undertake further strategic and operational changes in light of its "repeated failures" to deliver promised earnings and revenue targets. In early 2015, after engaging in preliminary discussions with DuPont, Trian advanced four nominees for election to DuPont's board, including Mr. Peltz and John H. Myers, the former CEO of GE Asset Management. Notably, in the weeks before the DuPont annual meeting, both ISS and Glass Lewis endorsed the election of Mr. Peltz, and ISS also recommended that shareholders elect Mr. Myers. Given the support of the proxy advisory firms, the contested election was too close to call in the weeks leading up to DuPont's annual meeting.

The precise ramifications of the DuPont proxy contest victory will not be known for some time. However, Trian's loss will not stop activists from pursuing larger targets but may discourage activists from pursuing sizable targets that have proven operational success and a solid retail investor base.

**DuPont's victory—earned at considerable expense and management distraction (and perhaps impairing DuPont's current quarter performance)—underscores the critical importance of shareholder engagement efforts.**

Targets simply must effectively communicate their message to all shareholders—from retail holders to pension funds, hedge funds, and other buy-side investors that purchase large quantities of securities for money management purposes. Although some institutional investors nurture activist themes, management's convincing counterarguments may turn their votes as well as the tide of a contested election. This does not mean, of course, that a company's outreach efforts should ignore the sell-side contingent altogether, but instead underscores the need for a cohesive and consistent message designed to reach all shareholders in order to garner a critical mass of votes in support of management's platform. And of course, the deployment of such a sophisticated and nuanced engagement effort presumes that the company has a prepared, sophisticated, and effective IR department that is up to the challenge—more on that in a subsequent piece from us to you.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

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