LATIN LAWYER

# THE GUIDE TO CORPORATE CRISIS MANAGEMENT

FIFTH EDITION

**Editors**
Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers

Publisher
Clare Bolton

Senior Account Manager
Monica Fuertes Britez

Content Coordinator
Jialiang Hu

Production and Operations Director
Adam Myers

Chief Executive Officer
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, London, WC1V 7PE

www.latinlawyer.com



ISBN 978-1-80449-277-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

# Acknowledgements

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

Chevez, Ruiz, Zamarripa y Cia, SC

Davis Polk & Wardwell LLP

FGS Global

Mattos Filho

Mitrani Caballero

Morrison & Foerster

Posse Herrera Ruiz

Sullivan & Cromwell LLP

The Arkin Group LLC

Von Wobeser y Sierra, SC

# Publisher's Note

Latin Lawyer and LACCA are delighted to publish *The Guide to Corporate Crisis Management*. Edited by Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers, partners at Sullivan & Cromwell LLP, the fifth edition of this guide brings together the knowledge and experience of leading practitioners from a variety of disciplines and provides guidance that will benefit all practitioners.

We are delighted to have worked with so many leading individuals to produce *The Guide to Corporate Crisis Management*. If you find it useful, you may also like the other books in the Latin Lawyer series, including *The Guide to Mergers and Acquisitions*, *The Guide to Restructuring* and *The Guide to Corporate Compliance,* and our new tool providing overviews of regulators in Latin America.

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

**CHAPTER 3**

# Crisis Management as a Tool for Approaching Shareholder Activism

**Sergio J Galvis and Werner F Ahlers**[1]

Shareholder activism trends appear to be back to pre-covid-19 pandemic levels, resuming its rise globally. In Q1 2023, 69 new campaigns globally represented the second highest quarter of activity since 2019.[2] As the landscape, focus and tactics of activists evolve, companies and their directors can draw on crisis management techniques and strategies from the United States to prepare for activist campaigns. Few corporate events test a company's board and management like the appearance of an activist investor. An activist campaign, as with many crises, often arises unexpectedly, unfolds swiftly and can lead to dire consequences, including threatening a company's very existence. Every step a company takes can be fraught with implications. How management and the board respond to an activist's demands – from public statements to private boardroom strategy sessions – may well determine their company's future and define their legacy.

Once a phenomenon contained to the United States, shareholder activism is expanding across the globe. During 2022, companies outside the United States constituted approximately 48 per cent of the known activist targets,[3] and the number of companies that grappled with activist investors reached record highs in Japan and South Korea.[4] Despite 2022 marking Europe's lowest activism levels since 2015,[5] the region had its busiest first quarter on record in Q1 2023, accounting for 30 per cent of global activist campaigns.

---

1 Sergio J Galvis and Werner F Ahlers are partners at Sullivan & Cromwell LLP.
2 Lazard, 'Shareholder Activism Update: Early Look at 2023 Trends' (April 2023).
3 Insightia and Diligent, 'Shareholder Activism in H1 2023' (July 2023).
4 Insightia, 'The Shareholder Activism Annual Review 2023'.
5 Lazard, 'Shareholder Activism Update: Early Look at 2023 Trends' (April 2023).

Because companies in Latin America are also not immune from this phenomenon or the changing landscape in investor relations that drives it, their boards of directors should re-evaluate traditional approaches to responding to shareholder initiatives and shareholder relations models more generally. Companies can draw instructive lessons from the way that US companies have faced activist campaigns, as well as from the approaches to anticipating and responding to potential shareholder activism threats arising out of the current macroeconomic uncertainties, as well as from other important changes in the activism landscape, such as the growing relevance of environmental, social and governance (ESG) matters. Their use of crisis management tactics, in particular, can provide a helpful starting point for anticipating and effectively managing the changing landscape of shareholder initiatives that has significant potential to grow in Latin America.

## Unique challenge of shareholder activism

Broadly, shareholder activism is the practice of purchasing an issuer's shares with the primary intention of influencing corporate strategy or governance. Activists generally focus on companies with vulnerabilities, including poor financial performance, perceived board entrenchment, corporate governance practices that are not aligned with current best practices and a lack of responsiveness to shareholders.

A key reason why shareholder activism can be so challenging is that, like many high-stakes games, it is often unpredictable. Activists' objectives vary. Most demand more profitable operations, which may take the form of a proposal to divest or separate divisions. Some activists may insist on a change in governance, such as attacks on individual directors based on personal characteristics, which have been facilitated by recent US universal proxy rules. More drastically, although less common in 2023, they may seek a sale or merger of the company.

Despite the rise of anti-ESG stakeholder engagement, as discussed in more detail below, activists continue to pursue ESG initiatives, which also continue to have a role in the considerations and public discourse of the wide variety of investors participating actively in activist campaigns. In 2020, BlackRock's Larry Fink, in his annual letter to chief executive officers (CEOs), stated that, over the course of the year, purposeful companies that had better ESG profiles outperformed their peers.[6] In 2023, Mr Fink did not use the term ESG in his annual chairman's

6 Available at https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.

letter to investors but stressed first that 'climate risk' is 'an investment risk', and second, the importance of disclosures and enquiries about how companies plan to navigate the transition to a low carbon economy.[7]

Activists tend to be strong personalities, marked by unique brands of strategies and techniques. Some take a less hostile approach and aim to drive change through private dialogue with management. Others tend to make more noise. They initiate high-profile public campaigns (including personal attacks on directors and management) designed to put pressure on boards. They may launch a proxy contest, seeking to elect directors,[8] or force specific actions. Threatening or filing litigation to challenge board actions is another option in their toolkit. Occasionally, they make an offer for the entire company.

Their playbooks can also be influenced by the size of their funds, their level of expertise as an activist and their ability to attract support from institutional investors and pension funds. Other factors can include the fund's position in its fundraising cycle, its historical financial performance and the timing for limited partners to redeem their capital.

In all these scenarios, a company's board, management and advisers must attempt to anticipate the activist's next move.

## Obstacles to shareholder activism in Latin America

Of course, the corporate environment in Latin America differs from that of the United States, where shareholder activism had its most significant early development. Governance and disclosure regimes in the region vary by country. One key difference that many Latin American companies share is that they are controlled by shareholder blocks centred around families or other affiliations, a dynamic that can make an activist campaign less likely to succeed.

In addition, the shareholders of Latin American companies generally tend to exercise more direct control over boards of directors and their decisions. As a result, shareholders of Latin American companies seeking change can turn to existing corporate mechanisms to influence the board in ways that may not be available in the United States, without resorting to activist tactics. In some Latin American jurisdictions, for example, shareholders holding as little as 5 per cent of a company's share capital may be allowed to call a special meeting.

---

7 Available at https://www.blackrock.com/corporate/investor-relations/larry-fink-annual-chairmans-letter.

8 The ability of shareholders to 'mix and match' nominees from both the activist's and the company's slate under the universal proxy rules may be making it easier for activists to gain at least one board seat but harder for them to gain control.

Another key difference is that, historically, corporate governance matters in Latin America have been less subject to litigation, perhaps in part because courts are not as specialised as courts in the United States (most notably the Delaware courts) and generally take longer to resolve disputes. In addition, in part as a response to this phenomenon, corporate governance disputes in Latin America are increasingly subject to arbitration proceedings, which are normally confidential, resulting in uncertain outcomes to the general public with limited details available on the dispute and outcomes.

Another difference is that Latin American securities markets operate with less liquidity, which reduces the appetite of activists who may struggle to sell shares they amass. Finally, Latin America is a complex patchwork of markets of different sizes and laws requiring potential activists to develop specific knowledge about a target's market. Mexico is very different from Colombia, which is very different from Argentina, and so on.

## Shareholder activism in Latin America

The development of shareholder activism in Latin America has not been as steady nor has it been growing as it has in other regions. In the first half of 2023, only one new campaign is known to have taken place (in Brazil).[9] Although the total numbers in Latin America are relatively low, particularly when compared with other regions, directors of Latin American companies should not be complacent or feel insulated from this phenomenon.

One of the earliest examples of activists targeting a Latin American company is Cartica Capital's attempt to thwart Chile's CorpBanca SA's US$3.7 billion merger with Brazil's Itaú Unibanco Holding SA in 2014. Cartica, a US investment firm, took the aggressive step of filing litigation in the United States to stop the merger. In 2018, Mexico's Grupo Aeroportuario del Sureste, an airport operator, was challenged by Standard Life Aberdeen, one of the world's largest asset managers, which sought to eliminate the company's two tiers of stock by calling an extraordinary shareholders' meeting.

Another well-reported example of activist-like tactics came in 2017, when GWI Asset Management began building a stake in Brazilian construction company Gafisa and eventually, in early 2019, its ownership of the company exceeded 50 per cent of the company's shares. GWI carried out several changes in the company with a view to reducing costs, which included, among other things, changing the headquarters and senior management (including the CEO)

9 Insightia and Diligent, 'Shareholder Activism in H1 2023' (July 2023).

and laying off half the company's employees. The measures were not very well received by the market and Gafisa, which was reflected in meaningful share price declines, and GWI eventually sold the majority of its stake in the company in February 2019.

In August 2020, Brazil's Institute of Shareholder Activism and Governance (IBRASG) brought a claim in São Paulo courts on behalf of minority shareholders of Linx, a provider of retail management software in Brazil, against Linx's controlling shareholders to challenge the terms of the approved merger of Linx with Stone (a provider of financial technology solutions that debuted on Nasdaq in 2018). On 17 November 2020, 55 per cent of Linx shareholders approved the merger with Stone (after an increase by Stone of the consideration for the merger a couple of days before the general shareholders' meeting).

The involvement of IBRASG may also indicate a meaningful change in the landscape of parties pursuing activist campaigns, at least in Brazil. According to its website, IBRASG was created to 'defend minority investors in the Brazilian capital markets'. Even though the Institute was created several years ago, in 2020 it become more active in representing minority shareholders in disputes in Brazil, which may point to an increased focus on activist campaigns in the future. During the course of 2023, IBRASG has taken a more active role in representing minority shareholder interests (including in connection with PwC's involvement in the Americanas SA bankruptcy procedure).

Although the activists in these campaigns were not able to achieve their goals entirely, at least two or more recent activist campaigns in Latin America have had more success. In 2019, the CEO of Brazilian healthcare management company Qualicorp SA stepped down under pressure from Brazil's XP Long-Biased FIM fund. In Q3 2023, minority shareholders of Westwing Comércio Varejista SA started an activist campaign from the company's largest new shareholder, WNT Asset Management, which included proposing an amendment to the company's by-laws that would result in the number of votes cast by a shareholder being capped at 15 per cent of the company's shares (with the objective of preventing hostile takeovers). Although the minority shareholders were unable to approve the amendment, they successfully managed to elect two of the five board members, defeating WNT's board slate proposal.

Though less squarely examples of shareholder activism, minority shareholders in companies such as state-owned Brazilian company Petrobrás, mining company Vale and telecommunications company Oi SA have brought legal claims against majority shareholders between 2020 and 2023. Minority shareholders of Americanas SA also brought legal claims against company management in 2023.

These may be additional examples of how the traditionally less litigious landscape of corporate governance in Latin American jurisdictions is shifting to a more contentious and litigious one that may also result in increased avenues being available to investors pursuing shareholder activist campaigns.

## Role of institutional shareholders in Latin America

Another important trend that may portend increases in activist activity is the increasing concentration, professionalisation and assertiveness of institutional investors. In any activist campaign, the role of institutional investors is often influential role owing to the fact that activists will court them for their support. Before a campaign emerges, a company's board and management must draw up a plan to identify, analyse and communicate with its largest and most vocal shareholders.

Most activists hold only a small stake in target companies and rely on the support of large institutional investors to gain traction in their campaigns. As retail ownership of public companies declines and institutional ownership increases, activists can rapidly garner support from other shareholders with less engagement and lower costs. In addition, activists may also enlist increased support from institutions owing to a shift in investment philosophy: many retail investors are moving away from active investment strategies and relying more on passive holdings, such as index funds, leaving activists with more concentrated holdings.

Index funds are increasingly investing in Latin American companies, reflecting the broader trend of investors seeking more exposure to emerging markets during the past decade. In addition, many countries in the region have a pension system comprised of privately managed pension funds for both private and public sector employees. These funds represent the largest and most predominant types of minority investors and have the potential to play a role similar to that of institutional investors in the United States. Although these funds have historically weighted their funds heavily (if not exclusively) towards government bonds, these funds have expanded their investment profile during the past decade to include equity securities.

A study published in 2022, for example, estimated that corporate and government retirement income systems in Peru had allocated 46.5 per cent of their funds to equities as at 31 October 2021, the highest level in Latin America. Other countries' retirement systems also have significant funds invested in equities: Colombia 42.2 per cent (as at 31 October 2021), Chile 38.7 per cent (as at 30 September 2021), Mexico 21.7 per cent (as at 31 December 2021), Brazil 21.5 per cent (as at 30 June 2021) and Argentina 12.3 per cent (as at 30 September 2021).[10]

## ESG agenda in United States and Latin America and the consequences for activism

Even though more activist investors in the United States have been focusing on ESG matters in the past few years, since 2022, a battle over ESG agendas has become more prominent and there are some indications that activists may be having difficulties in gaining traction for public ESG-focused campaigns. At least 165 anti-ESG bills were introduced in 37 US states in the first half of 2023.[11] In the current environment, institutional investors have started to adjust their ESG priorities.

In December 2022, Vanguard made public its decision to withdraw from the Net Zero Asset Managers initiative but gave assurances of its commitment to helping investors navigate the risks from climate change to long-term returns.[12] Other institutional investors, such as State Street and BlackRock, updated their 2023 voting policies to de-emphasise ESG as a stand-alone priority and instead emphasise risk stewardship and the link between a company's 'values' and long-term shareholder value.

Despite a current environment in which articulation of ESG priorities is being revisited and revised, current ESG regulatory initiatives, such as the US Securities and Exchange Commission's (SEC) climate-related disclosure rules, suggest that ESG matters will continue to be on companies', investors' and stakeholders' radars; for example, Morgan Stanley has announced that it will double down on ESG by expanding its offering of ESG-themed funds.[13]

The anti-ESG movement is not as prominent outside the United States. The support for environmental and social (E&S) proposals increased to 11.6 per cent in 2023 (from 10.6 per cent in 2022) in European companies and to 17 per cent (from 11.3 per cent in 2022) in non-US and non-European companies.[14]

---

10 Mercer, 'Pension asset allocation insights 2022 – Pension asset allocation trends in Asia, Middle East, Africa and Latin America'.

11 S&P Global Market Intelligence, 'Half of anti-ESG bills in red states have failed in 2023 as campaign pushes on', 28 June 2023.

12 Available at https://corporate.vanguard.com/content/corporatesite/us/en/corp/articles/update-on-nzam-engagement.html.

13 'Morgan Stanley is doubling down on ESG', Bloomberg, 7 March 2023.

14 'Pautas ESG recebem menos apoio de acionistas americanos', Capital Aberto, 18 June 2023.

In the United States, even though, historically, ESG engagement centred around issues regarding structural governance (i.e., ensuring shareholders have meaningful participation), more recently attention has shifted to E&S issues. There is a growing sentiment among certain shareholders that emphasises the need for corporations to pay attention to long-term value. This shift can be seen as being driven, in part, by social media, the impact of movements such as Black Lives Matter, #MeToo and #TimesUp, a growing sense of urgency to combat climate change and recent incidents in which a failure in E&S oversight has led to significant value destruction.

Activist campaigns with environmental demands during 2022 increased by 81 per cent compared with 2021; however, when voted on, only 11.5 per cent of environmental proposals achieved at least partial success (a decrease from 25.8 per cent in 2021). The declining shareholder support was partially due to an unpersuasive economic thesis underlying the proposals.[15]

Recently, ESG issues have resulted in other significant consequences for companies around the globe, such as top management replacement and certain investors voting against the re-election of directors who failed to make headway on a range of issues, from environmental goals and corporate strategy to board diversity, among other things. As an example, in June 2021, Engine No. 1, an investment firm holding only 0.02 per cent of Exxon Mobil's shares, launched a proxy contest against Exxon to push for the reduction of Exxon's carbon footprint. The campaign resulted in five of 12 board seats turning over; however, Engine No. 1 announced in October 2023 that it had sold its sustainability-focused exchange traded fund business and is planning to shift its activist approach to private investments instead of public proxy fights. In 2022, after a campaign focusing on the improvement of Suncor's employee safety measures, Elliott Management succeeded in appointing three directors to the company's board, making it one of the few successful ESG-focused campaigns of that year.

The level of sophistication of the E&S debate varies from country to country in Latin America. According to a survey carried out by the International Bar Association, only seven of the 16 Latin American countries surveyed had ESG disclosure obligations for publicly held companies.[16] In Mexico, since 2022, pension funds are required to consider ESG factors when assessing their investments.[17] In

15 Insightia, 'The Shareholder Activism Annual Review 2023'.

16 International Bar Association – Latin American Regional Forum, 'ESG survey results report: ESG in Latin America' (2022).

17 ibid.

Brazil, the ESG movement has already developed into a significant consideration for companies' boards. In 2019, Glass Lewis, the influential proxy advisory firm, changed its guidelines for Brazil to codify its approach to reviewing how boards are overseeing environmental and social issues. Glass Lewis has not changed its approach since then, as stated in its 2023 Policy Guidelines for Brazil:

> *Where it is clear that companies have not properly managed or mitigated environmental or social risks to the detriment of shareholder value or when such mismanagement has threatened shareholder value, Glass Lewis may consider recommending that shareholders vote against members of the board who are responsible with [sic] oversight of environmental and social risks.*[18]

Meanwhile, diverse industries and sectors across Latin America, such as the energy sector in Chile and Brazil, have shown increased focus on ESG issues. Issues unique to the Latin American sociopolitical climate may also shape the profile of shareholder activism and ESG issues in the region. Environmental advocacy groups, for example, have urged companies operating in Latin America to adopt rainforest conservation policies to protect endangered lands.

The focus on board diversity is another important trend within the ESG arena that has continued to accelerate. More companies have publicly proclaimed their commitment to the objective of diversifying board representation. In August 2021, the SEC approved Nasdaq's proposal for new listing rules that require all Nasdaq-listed companies to have, or explain why they do not have, at least one self-identified female and at least one director who self-identifies as an under-represented minority, and to disclose information annually about the diversity of their directors. Companies with five or fewer board members will be considered compliant with the new rules by having only one diverse director. In January 2020, Goldman Sachs announced at the World Economic Forum in Davos that, as of July 2020, it would only underwrite initial public offerings in the United States and Europe of companies that have at least one diverse board member. That minimum requirement was increased to two by 2021, with the additional condition that one must be a woman.[19]

---

18 Glass Lewis, '2023 Policy Guidelines – Brazil', p. 17 (https://www.glasslewis.com/wp-content/uploads/2022/12/Brazil-Voting-Guidelines-GL-2023.pdf?hsCtaTracking=e974b366-9c26-4452-b125-633286b833c0%7C88f1d7a4-f430-4de2-b1e7-49d72f0d28a5).

19 Goldman Sachs' commitment to board diversity, available at https://www.goldmansachs.com/our-commitments/diversity-and-inclusion/board-diversity/2022-update/.

Similarly, in July 2023, B3, the Brazilian stock exchange, updated its listing rules to establish that B3-listed companies must address on a 'comply or explain' basis the election to their boards of directors or executive committees of at least one person who self-identifies as female, regardless of the sex assigned at birth, and one member of an under-represented minority.

At least in the United States, however, certain diversity, equity and inclusion initiatives are likely to face increasing challenges; for example, in July 2023, anti-ESG asset management company Strive sent a letter to the CEO and board chairman of McDonald's Corporation expressing concern that the company's decision to set and adhere to race-based and gender-based targets for its board, management, employees, suppliers and vendors creates 'serious legal and commercial risks' under the *Harvard* decision[20] and could result in lawsuits as well as regulatory investigations.[21]

## Crisis management lessons from the US experience

As activists become more prolific and sophisticated, companies around the world are looking to their counterparts in the United States for lessons on preparing for an activist campaign. In recent years, many targeted US companies have changed their tactics. In the past, boards tended to respond reactively to activists, by shunning them or engaging in minimal interaction. Now, many companies have achieved more productive results by implementing a proactive strategy in which a board is prepared in advance to respond to a potential campaign. As a result of macroeconomic uncertainties, activist campaigns are likely to continue to focus on companies' operations and corporate governance, and not on capital allocation or mergers and acquisitions.

To help Latin American companies and their advisers anticipate and respond to shareholder activism, we have outlined below some key observations, tactics and strategies gleaned from the US experience, including the importance of applying techniques and strategies from crisis management. In every situation, the options available for responding to shareholder activists will depend on the circumstances. Even small variations may require different responses.

---

20 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 180 (2023).

21 Strive's letter to McDonald's, available at https://www.strive.com/our-letter-to-mcdonalds.

## Assemble and educate the team

A well-prepared company will assemble a core response team, including internal personnel and external advisers who can address legal, financial and public relations issues. This team will be tasked with analysing governance trends and the evolving activist landscape. Its members must communicate with management and the board effectively and, if necessary, frequently.

It is also essential to prepare the board by having management and advisers regularly update directors on possible activist lines of attack and the company's anticipated responses. Activism readiness should be given a regular spot on the annual board calendar as part of board discussions on strategic planning and capital allocation. Advisers should also periodically review executive compensation and stock option plans for change-of-control provisions.

## Think like an activist investor

One of the best ways to anticipate an activist campaign is to adopt the mindset of an activist investor. A company's attractiveness as a target and its ability to respond turn on many factors, including its capitalisation, the identity of its shareholders, its recent returns and its media profile. As an initial step, a company needs to identify areas where it may be vulnerable. Does its balance sheet present weaknesses, such as a shortage of cash? Could its governance practices and succession plans be attacked as promoting entrenchment? Are the company's business strategy and financial performance sound?

If a company is targeted by an activist, it should carefully consider its response plan and resist the urge to strike back reflexively. It also should take into account the identity and track record of the activist and, most importantly, the nature and attractiveness of the activist's proposal; for example, in the United States, activist investor Daniel Loeb of Third Point LLC, who was known for occasional aggressive public tactics, such as releasing sharply worded letters criticising boards and management, later adopted a more amicable approach. In 2018, he took an aim at Sony, calling for a breakup of the company, and opposed the merger of United Technologies Corporation with Raytheon Company. In a letter to the board of United Technologies, he called the merger 'ill-conceived' and 'irresponsible' and described the company's rationale for the deal as a 'word salad' that was short on substance.[22] More recently, he managed to obtain board representation in The Walt Disney Company through an amicable deal.[23]

Paul Singer of Elliott Management, on the other hand, while not afraid of public proxy contests, often prefers to achieve a settlement rather than put a proposal to a shareholder vote. In 2017, he reached a deal with industrial parts maker Arconic that gave Elliott Management three board seats and included an agreement to make corporate governance changes, rather than continue a public battle.[24] In March 2019, Singer struck a deal with eBay in which the company agreed to add two new directors and undertake a strategic review of its business.[25] Comparatively, Nelson Peltz of Trian Partners prefers to be known as a 'committed shareholder' that tries to work with boards of directors. In 2017, after he launched a proxy battle for Procter & Gamble Company and fell slightly short, the company's board invited him to join as a director.[26]

## Communicate effectively

Activist campaigns can quickly spin into a war of words. With social media now a standard form of business communication, activists have more options for waging the public side of their campaigns. X (formerly known as Twitter), Facebook and other social media platforms and blogs allow them to reach influential investors quickly and cheaply. According to Nasdaq's Investor Relation Intelligence, around 10 per cent of activist campaigns in the United States in 2022 were reported on the Seeking Alpha website.[27]

Companies need an effective and sophisticated media strategy focused on delivering a consistent message to the public and the capital markets. The best prepared companies formulate a response protocol and a communications response plan that is tailored to address the varying concerns of shareholders,

22 'Daniel Loeb's Third Point Calls for Breakup of Sony – Again', *The Wall Street Journal*, 13 June 2019; 'Third Point Sends Letter to United Technologies Corporation's Board of Directors', Business Wire, 28 June 2019.

23 Kenneth Squire, 'Third Point's Dan Loeb pens a pointed letter to Bath & Body Works – What could happen next', CNBC, 25 February 2023.

24 Michael J de la Merced, 'Arconic Settles With Elliott After Bruising and Public Dispute', *The New York Times*, 22 May 2017.

25 Scott Deveau and Spencer Soper, 'eBay Adds New Directors to Board and Begins Strategic Review', Bloomberg, 1 March 2019.

26 Tiffany Hsu, 'Nelson Peltz Appointed to P.&G. Board, After All', *The New York Times*, 15 December 2017.

27 Nasdaq, Investor Relations Intelligence, 'Shareholder Activism: 2022 Year-in-Review.'

employees and key third parties, including proxy advisory firms. Similarly, presenting a consistent, contemporaneous message to shareholders is of the essence. Management should consider whether its public disclosures provide a complete and consistent narrative regarding the company's leadership efforts to respond and mitigate crises. A compelling narrative may also help the company in its engagement with regulators.

Personal conversations are also essential. Management should sit down with major shareholders to understand their concerns and communicate the company's strategic plan and mid-term to long-term vision. As part of these conversations, management should explain its analysis of alternatives to create value, including previewing for investors why some activist proposals that may appear superficially appealing are not advisable.

In addition, management's public speaking appearances must be monitored to limit opportunities for inadvertent or inconsistent comments about the bidder's offer or the company's articulated strategy in response.

### Understand institutional investors and their agendas

As mentioned above, institutional investors are a valuable source of support in an activist campaign against a Latin American target. By identifying differences in an activist's focus, companies can get a head start on winning the support of institutional investors. Compared with most activist investors, the managers of pension funds and index funds have a longer-term investment horizon and tend to focus on improving the quality of corporate governance as a means to improve returns.

Companies should bear in mind, however, that some institutional investors, such as privately managed pension funds and index funds, as well as non-governmental organisations, may seek, as the price of their support, adherence to formulaic corporate governance initiatives or sociopolitical commitments. These may not be appropriate or advisable for every company.

### Consider appropriate structures for board oversight and involvement

Boards of directors may want to take a fresh look at their role in overseeing shareholder engagement, if they have not done so recently. Some may choose to create formal committees and policies for monitoring and overseeing management's approach to shareholders, while others may expand the mandate of an existing committee.

At a minimum, the board must make it a priority to be regularly informed of the company's shareholder outreach efforts and the resulting feedback. They will also need regular briefings on any developments in the arena of shareholder activism, including new activist techniques or strategies and evolving corporate responses to activists.

In addition, as boards have become increasingly involved in shareholder engagement, particularly with institutional investors, some activists may seek to put pressure on certain directors to meet with shareholders. Ultimately, the level of director–shareholder engagement will depend on the company's comfort level with particular directors meeting with shareholders. This is a big step that many boards are unwilling to consider. If a board does consider this, however, directors need to be trained and accompanied by legal advisers, as appropriate, before meeting with shareholders, to avoid any mistakes, including the disclosure of confidential information.

## Value of a well-articulated case

Every company facing or anticipating an activist campaign should make a convincing case to its investors that its current business strategy will create superior value over a near-term to medium-term time horizon. This requires a careful, detailed analysis, as well as the crafting of a clear and compelling message.

E I du Pont de Nemours and Company's (DuPont) victory in the proxy campaign run by Trian Fund Management, LP demonstrated the value of a well-articulated case, as well as the importance of effective engagement with institutional investors. When it launched its campaign, Trian sought four seats on DuPont's board of directors, arguing that DuPont's business was underperforming owing to excessive corporate overhead costs and bureaucracy, notwithstanding that DuPont had been consistently outperforming the stock market and stressing this track record to its investors. Although Trian had garnered the support of two of the most influential proxy advisory firms, DuPont's three largest institutional shareholders all voted in favour of the incumbent slate.[28] DuPont succeeded in having all 12 of its incumbent directors re-elected, defeating Trian's slate.

28 Jacob Bunge and David Benoit, 'DuPont Defeats Peltz, Trian in Board Fight', *The Wall Street Journal*, 13 May 2015.

DuPont's victory reinforces that activists will face challenges if they target companies with strong boards and management terms that outperform the market. To increase the likelihood of success, a company must also maintain proactive engagement with its institutional shareholders to counteract an activist's message.

Although shareholder activism has yet to emerge in Latin America with the same intensity as it has in the United States, the boards of Latin American companies must not be complacent, especially considering the rapidly changing landscape in certain countries in the region, such as Brazil. As in any crisis management strategy, preparation is paramount and could be the key to a company's survival. By learning from the hard-won experience of US companies, Latin American companies can prepare themselves to respond from a position of strength if an activist challenge arises.