



# The Guide to Managing a Corporate Crisis

Third Edition

Editors

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

# The Guide to Managing a Corporate Crisis

---

Third Edition

Editors

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

Reproduced with permission from Law Business Research Ltd

This article was first published in December 2020

For further information please contact [Natalie.Clarke@lbresearch.com](mailto:Natalie.Clarke@lbresearch.com)

**LATIN LAWYER**

**Publisher**  
Clare Bolton

**Business Development Manager**  
Jack Levy

**Associate Publisher**  
Rosie Cresswell

**Editorial Assistant**  
Tommy Lawson

**Production Operations Director**  
Adam Myers

**Production Editor**  
Helen Smith

**Subeditor**  
Robbie Kelly

**Chief Executive Officer**  
Nick Brailey

Published in the United Kingdom  
by Law Business Research Ltd, London  
Meridian House, 3435 Farringdon Street, London, EC4A 4HL, UK  
© 2020 Law Business Research Ltd  
[www.latinlawyer.com](http://www.latinlawyer.com)

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients.

Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as at November 2020, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – [clare.bolton@lbresearch.com](mailto:clare.bolton@lbresearch.com)

ISBN 978-1-83862-429-3

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

# Acknowledgements

---

The publisher acknowledges and thanks the following law firms, advisory firms and corporations for their learned assistance throughout the preparation of this book:

Anheuser-Busch InBev

The Arkin Group LLC

Chevez Ruiz Zamarripa

Cleary Gottlieb Steen & Hamilton LLP

Creel, García-Cuéllar, Aiza y Enriquez

Debevoise & Plimpton LLP

Dechert LLP

D'Empaire

Galicia Abogados

Finsbury

McLarty Associates

Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados

Mitrani, Caballero & Ruiz Moreno

Morrison & Foerster LLP

Payet, Rey, Cauvi, Pérez Abogados

Pinheiro Neto Advogados

Posse Herrera Ruiz

Rodrigo, Elías & Medrano Abogados

Sullivan & Cromwell LLP

# Publisher's Note

---

Latin Lawyer is delighted to publish *The Guide to Managing a Corporate Crisis*.

Edited by Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers of Sullivan & Cromwell LLP, and containing the knowledge and experience of 50 leading practitioners from a variety of disciplines, it provides guidance that will benefit all practitioners when an unexpected crisis hits.

Corruption investigations, expropriation, industrial accidents, pandemics: corporate crises take many forms, but each can be equally dangerous for companies in Latin America. Covering the impact of political instability, the role of communications in crisis response, approaches to bribery investigations and game plans in response to financial stress, this book is designed to assist key corporate decision-makers and their advisers in effectively planning for and managing corporate crises in the region.

We are delighted to have worked with so many leading firms and individuals to produce *The Guide to Managing a Corporate Crisis*. If you find it useful, you may also like the other books in the Latin Lawyer series, including our *Guide to Corporate Compliance, and Regulators*, our online tool that provides an overview of the major 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.

# Contents

---

Introduction: Effective Crisis Management in Latin America..... 1  
*Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers*

## **Part I: Lessons from the Covid-19 Crisis**

- 1 Managing the Covid-19 Pandemic in Brazil: Issues and Recommendations for Directors and Officers..... 11  
*Cleber Venditti, Paula Indalecio and Thiago Jabor*
- 2 Covid-19 and the Impact on Corporate Governance and Compliance in Colombia..... 23  
*Jaime Herrera Rodriguez and Oscar Tutasaura Castellanos*

## **Part II: Navigating Political and Country Risks**

- 3 Argentina: A Legal Toolbox for an Unprecedented Crisis..... 33  
*Mariela I Melhem, Esteban Valansi and Siro P Astolfi*
- 4 Fire Marshals, Not Firefighters: A Different Approach to Crisis Management in Latin America .....46  
*Thomas F McLarty III*
- 5 Dealing with the Challenges of Political Violence and Crime in Latin America..... 53  
*Jack Devine and Amanda Mattingly*
- 6 Navigating a Corporate Crisis: Managing the Risks of Downsizing in Venezuela.....66  
*Fulvio Italiani and Carlos Omaña*
- 7 M&A in a Crisis-Prone Environment: Red Flags and Warning Signs in Peru .....71  
*José Antonio Payet and Carlos A Patrón*

## **Part III: Stakeholder Relations**

- 8 Never Let a Good Crisis Go to Waste: The Role of Culture, Perception and Common Sense in Crisis Management ..... 83  
*Pablo Jimenez-Zorrilla and Gregorio Lascano*

## Contents

9	Singing from the Same Song Sheet: How Collaboration Between Legal and Communications Can Mitigate a Crisis.....	93
	<i>Paul A Holmes and Eric M Wachter</i>	
10	Crisis Management as a Tool for Approaching Shareholder Activism.....	103
	<i>Sergio J Galvis and Werner F Ahlers</i>	
11	Data Privacy and Cybersecurity: Crisis Avoidance and Management Strategies .....	113
	<i>Jeremy Feigelson, Andrew M Levine, Christopher Ford, Anna R Gressel, Stephanie Cipolla and Hilary Davidson</i>	
12	Mining Projects in Peru: Community Relations, Indigenous Rights and the Search for Sustainability.....	137
	<i>Luis Carlos Rodrigo Prado</i>	
<b>Part IV: Restructuring and Insolvency</b>		
13	Weathering a Crisis in Brazil: Fiduciary Duties of Directors and Officers of Brazilian Companies Approaching Insolvency .....	149
	<i>Giuliano Colombo and João Guilherme Thiesi da Silva</i>	
14	Financial Distress: An Action Plan for Corporate Restructurings in Mexico .....	160
	<i>Eugenio Sepúlveda</i>	
15	United States Bankruptcy Proceedings for Latin American Corporates.....	172
	<i>Andrew G Dietderich, James L Bromley and Fabio Weinberg Crocco</i>	
<b>Part V: Anti-Corruption and Government Investigations</b>		
16	Anti-Corruption in Latin America.....	181
	<i>James M Koukios, Ruti Smithline, Gerardo Gomez Galvis and Julian N Radzinschi</i>	
17	When Good Companies Fight Against the Bad: A Practical Crisis Management Guide for Doing Business in Mexico.....	195
	<i>Leonel Perezniето and Narciso Campos</i>	
18	Representing Individual Executives in Latin America .....	203
	<i>Mauricio A España, Hector Gonzalez, Andrew J Levander, Mariel Bronen and Yando Peralta</i>	
19	The Changing Landscape in Brazilian Investigations Since Lava Jato.....	214
	<i>Breon S Peace, Jonathan Kolodner and Lisa Vicens</i>	
20	Cross-Border Transfer Pricing Investigations and Proceedings .....	224
	<i>José Luis Fernández Fernández and César De la Parra Bello</i>	
	About the Authors.....	235
	Contributing Law Firms' Contact Details.....	255

# Part III

---

## Stakeholder Relations



# 10

## Crisis Management as a Tool for Approaching Shareholder Activism

**Sergio J Galvis and Werner F Ahlers<sup>1</sup>**

Apart from some recent (and likely temporary) declines since the outbreak of the covid-19 pandemic, shareholder activism has been on the rise globally in the several years leading up to 2020, including in Latin America. 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, like 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. Over the course of 2019, companies outside the US constituted 58 per cent of the known activist targets (an increase from 47 per cent in 2018),<sup>2</sup> and the number of companies that grappled with activist investors reached record highs in Japan and Europe (lead by the UK and Germany).<sup>3</sup>

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 reevaluate traditional approaches to responding to shareholder initiatives and shareholder relations models more generally. These 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 that have evolved

---

1 Sergio J Galvis and Werner F Ahlers are partners at Sullivan & Cromwell LLP.

2 Activist Investing Annual Review 2019.

3 Lazard's Shareholder Advisory Group - Review of Shareholder Activism – H1 2020.

during the covid-19 pandemic; 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 a significant potential to grow in Latin America.

### **The unique challenge of shareholder activism**

Broadly speaking, 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 that 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 the separation of the roles of chief executive officer and chair or new policies for director remuneration. More drastically, they may seek a sale or merger of the company. Most recently, as is discussed in more detail below, activists have increasingly pursued ESG initiatives, which are also increasingly playing a role in the considerations and public discourse of the wide variety of investors participating actively in activist campaigns. This phenomenon was perhaps no more prominently on display than when BlackRock's Larry Fink, in his 2019 annual letter to CEOs, emphasised the importance of 'purpose' (or 'a company's fundamental reason for being - what it does every day to create value for its stakeholders') and how this should guide CEO's and boards' focus.<sup>4</sup>

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 pressure boards. They may launch a proxy contest, seeking to elect a slate of directors 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 and their level of expertise as an activist. 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 of these scenarios, a company's board, management and advisers must attempt to anticipate the next move of the activist's chess piece.

### **Developments in shareholder activism during the covid-19 pandemic**

Historically, periods of significant volatility in the equity markets, such as the 2008 financial crisis, were followed by a significant increase in unsolicited offers, proxy contests and event-driven activism. By contrast, in the first half of 2020, during the covid-19 pandemic,

---

<sup>4</sup> Available at: [www.blackrock.com/americas-offshore/2019-larry-fink-ceo-letter](http://www.blackrock.com/americas-offshore/2019-larry-fink-ceo-letter).

there were only 42 US activist campaigns (an approximately 40 per cent decline from the prior year period (especially in March and April). However, June showed indications of a rebound in new activist activity in the US and Europe.

In the first half of 2020, although almost all kinds of activism were down in absolute terms, there was some difference between the United States and the rest of the world. In the US, business strategy demands were down sharply, while remaining stable in other countries.<sup>5</sup> Additionally, relative to prior years, activists in the first half of 2020 in the US tended to de-emphasise M&A and more often criticised the strategy, governance and management of target companies.<sup>6</sup> The objectives of shareholder initiatives also seem to have changed generally during the period immediately following the outbreak of the covid-19 pandemic.

In addition to impact on campaign activity, as a response to market volatility and share price declines resulting from the covid-19 pandemic that could make companies vulnerable to shareholder activism, many companies adopted rights plans (poison pills) from March to June 2020. In the United States, over 60 companies adopted traditional rights plans and another approximately 25 adopted net operating loss plans (intended to protect companies against ownership changes that could impair a company's ability to use its net operating losses) between March and July 2020 (versus only 26 rights plans adopted in all of 2017, 2018 and 2019 combined).

The covid-19 pandemic also resulted in a shift to virtual shareholder meetings in the United States and the rest of the world. Over 65 per cent of S&P 500 companies have held or announced they would hold a virtual annual shareholder meeting in 2020 (compared with 8 per cent in 2019).

It is still too early for a more complete assessment of the potential long-term impacts of the covid-19 pandemic, but the following trends may be expected based on recent observations: increased focus on company responses to the pandemic and its varied fallout as a focus of activism campaigns; the growing importance of ESG matters; and new approaches to shareholder engagement (as traditional methods of in-person meetings are no longer feasible, in some cases, companies are developing new ways to engage with shareholders).

### **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. In the region, governance and disclosure regimes 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

---

<sup>5</sup> Activist Investing H1 2020.

<sup>6</sup> Lazard's Shareholder Advisory Group - Review of Shareholder Activism - H1 2020.

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.

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 US (most notably, 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.

### **An uptick in shareholder activism in Latin America**

The development of shareholder activism in Latin America has not been as steady or growing as it has in other regions, but in the years leading up to the covid-19 pandemic there were signs that activists were paying increased attention to Latin America, particularly in Brazil (which had seven campaigns in 2018 alone).<sup>7</sup>

While the total numbers in Latin America may seem relatively low, 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 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 others, changing the headquarters and senior management (including the CEO) and laying off half of 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.

While the activists in these campaigns were not able to entirely achieve their goals, at least one or more recent activist campaign in Latin America has had more success by taking direct aim at management. In 2019, the CEO of Brazilian healthcare management company Qualicorp SA stepped down under pressure from Brazil's XP Long Biased FIM

---

<sup>7</sup> Activist Investing Annual Review 2019.

fund. Similarly, Brazilian telecommunications carrier Oi SA battled in 2019 with its largest shareholder, GoldenTree Asset Management, over the fate of its CEO.

More recently, in August of 2020, Brazil's Institute of Shareholder Activism and Governance (IBRASG) brought a claim in Sao 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, the shareholders of Linx approved the merger with Stone (with a higher price than the one that had originally been negotiated), and the outcome of this dispute provides some insight on the ability of an activist party to affect a pending M&A transaction in Brazil.

The involvement of IBRASG may also indicate a meaningful change in 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, it has recently become more active in representing minority shareholders in disputes in Brazil, which may point to an increased focus on activist campaigns in the future.

Though less squarely examples of shareholder activism, minority shareholders in companies such as Brazilian state-owned company Petrobrás and mining company Vale have recently brought legal claims against majority shareholders. 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 available to investors pursuing shareholder activist campaigns.

### **The 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, institutional investors often play an influential role owing to the activist 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. For instance, for US campaigns launched in 2018, the median percentage ownership of the activist investor was approximately 7 per cent and was less than 2 per cent in companies with a market cap of over US\$20 billion. 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 due to a shift in investment philosophy: many retail investors are shifting 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 over the past decade. In addition, many countries in Latin America have a pension system comprising privately

managed pension funds for both private and public sector employees. These funds represent of 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) toward government bonds, over the past decade, these funds have expanded their investment profile to include equity securities.

For example, a study published in 2019 estimated that corporate and government retirement income systems in Peru had allocated 51 per cent of their funds to equities as of 30 April 2018, the highest level in Latin America. Other country's retirement systems also had significant funds invested in equities: Colombia: 39 per cent (as at 1 June 2018), Chile: 32 per cent (as at 31 October 2018), Mexico: 22 per cent (as at 31 December 2017), Brazil: 18 per cent (as at 31 December 2017) and Argentina: 14 per cent (as at 31 October 2018).<sup>8</sup>

### **The rise of the ESG agenda in the US and Latin America, and consequences for activism**

In the United States, more activist investors have been focusing on ESG matters, and some are gaining traction. For instance, in 2017, the powerful institutional investors BlackRock, Vanguard and State Street backed a proposal requiring ExxonMobil to share more information about its climate-related plans and the proposal passed. Some activists are creating special funds to focus on ESG and other similar initiatives.

US corporate leaders are taking this movement seriously. In a major shift in policy, the Business Roundtable in August 2019 announced its commitment to the principle that corporations should consider the interests of stakeholders other than shareholders. In a statement signed by 181 CEOs, the group committed to consider the well-being of their employees and communities as well.

In the United States, even though, historically, ESG engagement centred around issues related to structural governance (i.e., ensuring shareholders have meaningful participation), more recently attention has shifted to environmental and social (E&S) issues. This shift can be seen as being driven, in part, by the impact of social media, movements such as Black Lives Matter, #MeToo and #TimesUp, a growing sense of urgency to combat climate change and recent incidents where a failure in E&S oversight led to significant value destruction.

Recently, ESG issues have resulted in other significant consequences in 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 others. In H1 2020, even though the total number of E&S shareholder proposals in the United States declined, the support of such proposals by other shareholders increased, with a record 15 E&S proposals being successful (compared with two in 2016 and three in 2018).<sup>9</sup>

Similarly, the covid-19 pandemic has further ignited the E&S debate in Latin America. The head of Latin America in BlackRock mentioned recently that they are seeing growing

---

8 Mercer, 'Growth Markets Asset Allocation Trends: Evolving Landscape 2019'

9 Lazard's Shareholder Advisory Group - Review of Shareholder Activism - H1 2020.

interest in sustainable strategies from pension funds across the region, including in Mexico, Colombia and Peru. In Brazil, the ESG movement has already developed into a significant consideration for companies' boards. Glass Lewis, the influential proxy advisory firm, recently changed its guidelines for Brazil to codify its approach to reviewing how boards are overseeing environmental and social issues. Its 2019 Guidelines for Brazil state:

*In instances where it is clear a company has 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 for oversight of environmental and social risks.<sup>10</sup>*

Other industries and sectors in 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.

### **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 shifted their tactics. In the past, boards tended to respond reactively to activists, by shunning them or engaging in minimal interaction. Today, 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. The covid-19 pandemic will also likely continue to place focus on companies' leadership and corporate governance, its response to the pandemic and its ability to preserve and drive long-term value.

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.

### **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

---

<sup>10</sup> Glass Lewis, 2019 Guidelines, Brazil, 3, 8-9.

members must communicate effectively and, if necessary, frequently with management and the board.

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? Is 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 reflexively strike back. 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 is known for occasionally aggressive public tactics, such as releasing sharply worded letters criticising boards and management. In 2018, he took an aim at Sony, calling for a breakup of the company and also 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.<sup>11</sup>

Paul Singer of Elliott Management, however, 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.<sup>12</sup> 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.<sup>13</sup> In contrast, 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.<sup>14</sup>

---

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

12 *The New York Times*, 'Arconic Settles With Elliott After Bruising and Public Dispute', 22 May 2017.

13 Bloomberg, 'eBay Adds New Directors to Board and Begins Strategic Review', 1 March 2019.

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



## **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. Twitter, Facebook and other social media platforms allow them to reach influential investors quickly and cheaply.

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, employees and key third-parties, including proxy advisory firms. Similarly, presenting a consistent, contemporaneous message to shareholders is of 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, especially in a covid-19 pandemic environment. 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 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 we mentioned earlier, institutional investors are a valuable source of support in an activist campaign against a Latin American target. 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 improving returns.

By identifying differences in an activist's focus, companies can get a head start on winning the support of institutional investors. Companies should bear in mind, however, that some institutional investors, such as the privately managed pension funds and index funds, as well as non-government 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 stay 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 pressure 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, directors need to be trained and accompanied by legal advisers, as appropriate, before meeting with shareholders, to avoid any missteps, including the disclosure of confidential information.

### **The 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 to medium-term time horizon. This requires a careful, detailed analysis, as well as the crafting of a clear and compelling message.

El du pont de Nemours and Company's 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.<sup>15</sup> DuPont succeeded in having all 12 of its incumbent directors re-elected, defeating Trian's slate.

DuPont's victory reinforces that activists will face challenges if they target companies with strong boards and management teams 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 new challenges imposed by the covid-19 pandemic and its fallout, as well as the rapidly changing landscape in certain Latin American countries like 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 to respond from a position of strength if an activist challenge arises.

---

<sup>15</sup> *The Wall Street Journal*, 'DuPont Defeats Peltz, Trian in Board Fight', 13 May 2015

# Appendix 1

## About the Authors

### **Sergio J Galvis**

Sullivan & Cromwell LLP

Sergio Galvis is a leading corporate lawyer in the United States who is known for his cross-border work, especially in Latin America. He joined Sullivan & Cromwell LLP after graduating from Harvard Law School and clerking for the Honourable Lawrence W Pierce of the US Court of Appeals for the Second Circuit, and has been a partner at the firm since 1991. He is a member of S&C's management committee, oversees the firm's recruiting and administrative functions and leads its Latin America practice.

Sergio has worked with clients across more than 25 countries in Asia, Europe and the Americas on hundreds of significant matters in a broad range of practices, including crisis management, criminal defence and investigations, workouts and restructurings, corporate governance, sovereign financing, capital markets, M&A and project financing. He also regularly works on OFAC compliance and sanctions issues, especially as they relate to in Latin America situations.

### **Werner F Ahlers**

Sullivan & Cromwell LLP

Werner Federico Ahlers is a partner in Sullivan & Cromwell LLP's general practice group, whose practice focuses on a wide range of cross-border mergers and acquisitions, joint ventures, private equity transactions and corporate matters. Werner advises on a variety of corporate, project and restructuring financing matters, and in the areas of corporate governance and crisis management. He is a core member of the firm's Latin America practice, and regularly acts on equity and debt investments for strategic investors based in and outside the region, private equity, pension and sovereign wealth funds, and bank and multilateral

agency lenders. His practice spans diverse sectors, including mining and metals, power and energy, real estate, infrastructure, telecommunications, healthcare and financial services.

Werner has been repeatedly recognised for his cross-border advisory work by leading legal publications, such as *Chambers* (Global and Latin America), *Latin Lawyer*, *Law360*, *The M&A Advisor*, *The American Lawyer* and *The Legal 500* (Latin America and US). Werner serves on the executive subcommittee and as chair of the Latin America sub-committee of the Cyrus R Vance Center for International Justice. He is a native speaker of Spanish and is proficient in Portuguese.

**Sullivan & Cromwell LLP**

125 Broad Street

New York, New York 10004-2498

United States

Tel: +1 212 558 4000

Fax: +1 212 558 3588

galviss@sullcrom.com

ahlersw@sullcrom.com

www.sullcrom.com

Corruption investigations, expropriation, industrial accidents, pandemics: corporate crises take many forms, but each can be equally dangerous for companies in Latin America.

Published by *Latin Lawyer*, edited by Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers of Sullivan & Cromwell LLP, *The Guide to Managing a Corporate Crisis* is designed to assist key corporate decision-makers and their advisers in effectively planning for and managing corporate crises in the region. Fifty leading practitioners from a variety of disciplines have contributed their knowledge and insights from their experience.

Covering the impact of political instability, the role of communications in crisis response, approaches to bribery investigations and game plans in response to financial stress, this book provides guidance that will benefit all practitioners when an unexpected crisis hits.

Visit [latinlawyer.com](http://latinlawyer.com)  
Follow @Latin\_Lawyer on Twitter  
Find us on LinkedIn

**an LBR business**

ISBN 978-1-83862-429-3