LATIN LAWYER

THE GUIDE TO CORPORATE CRISIS MANAGEMENT

FOURTH EDITION

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

The Guide to Corporate Crisis Management

Fourth Edition

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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, this new 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.

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Crisis Management as a Tool for Approaching Shareholder Activism

Sergio J Galvis and Werner F Ahlers[1]

Apart from some temporary declines as a result of the outbreak of the covid-19 pandemic, shareholder activism has been on the rise globally in the 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 2020, companies outside the US constituted approximately 44 per cent of the known activist targets,[2] and the number of companies that grappled with activist investors reached record highs in Japan and Europe (led by the UK and Germany, which saw its highest historic annual number of activism campaigns), with France and the Netherlands having equalled their historic highs.[3]

1 Sergio J Galvis and Werner F Ahlers are partners at Sullivan & Cromwell LLP.
2 Lazard's Shareholder Advisory Group – H1 2021 Review of Shareholder Activism.
3 id.

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 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 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 CEOs' and boards' focus.[4] In his 2021 letter to CEOs, Mr Fink stated that, over the course of 2020, purposeful companies that had better ESG profiles outperformed their peers.[5]

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. In the first half of 2020, during the covid-19 pandemic, there were only 42 US activist campaigns (an approximately 40 per cent decline from the prior year period (especially in March and April). However, the number of US activist campaigns saw a strong recovery in Q4, with 30 new campaigns (up 200 per cent from Q3 levels). Eventually, by the end of 2020, 182 campaigns were launched, which represents a decrease of only 13 per cent compared to 2019.[6]

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. [7] Additionally, relative to prior years, activists in the first half of 2020 in the US tended to de-emphasise M&A and more often

4 Available at: https://www.blackrock.com/americas-offshore/2019-larry-fink-ceo-letter.
5 Available at: https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.
6 Lazard's Shareholder Advisory Group – 2020 Review of Shareholder Activism.
7 id.

criticised the strategy, governance and management of target companies.[8] 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 the 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 (also known as 'poison pills') in 2020. In the United States, over 69 companies adopted traditional rights plans and another approximately 27 adopted net operating loss (NOL) plans (intended to protect companies against ownership changes that could impair a company's ability to use its NOLs) throughout 2020 (versus only 26 rights plans adopted in all of 2017, 2018 and 2019 combined).[9]

The covid-19 pandemic also resulted in a shift to virtual shareholder meetings in the United States and the rest of the world. In 2020, 78 per cent of S&P 500 companies held virtual-only meetings, with 86 per cent announcing that they would hold a virtual annual shareholder meeting in 2021 (compared to 8 per cent in 2019).[10]

It is still early for a complete assessment of the potential longer-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;
- 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.

8 id.
9 id.
10 https://fortune.com/2021/06/01/virtual-shareholder-annual-meetings-small-investors/.

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 five 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 and growing as it has in been 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).[11]

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

11 Activist Investing Annual Review 2019.

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) 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 campaigns in Latin America have 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 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 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 the shareholders of Linx 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 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 2021, IBRASG's activism seems to have been more focused on policymaking and less focused on specific activist campaigns.

Though less squarely examples of shareholder activism, minority shareholders in companies such as Brazilian state-owned company Petrobrás and mining company Vale have brought legal claims against majority shareholders in 2020.

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 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. 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 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) toward government bonds, over the past decade these funds have expanded their investment profile to include equity securities.

For example, a study published in 2021 estimated that corporate and government retirement income systems in Peru had allocated 49 per cent of their funds to equities as of 30 September 2020, the highest level in Latin America. Other countries' retirement systems also have significant funds invested in equities:

Colombia 37.5 per cent (as of 30 September 2020), Chile 28 per cent (30 September 2020), Mexico 23.4 per cent (as of 30 June 2020), Brazil 19.6 per cent (as of 31 December 2019) and Argentina 10 per cent (as of 30 April 2020).[12]

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, in August 2020, the Business Roundtable 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. There is a growing sentiment among 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 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.

Environmental proposals during H1 2021 increased 40 per cent over the same period in 2020, comprising 16 per cent of submissions and, when voted, environmental proposals received higher-than-average shareholder support (to 41 per cent from 32 per cent in 2020) and the percentage of majority-supported proposals increased significantly (to 36 per cent, from 16 per cent in H1 2020).

12 Mercer, 'Asset Allocation Insights: Pension Allocation trends in Latin America, the Middle East, Africa and Asia 2021', available at https://www.mercer.com/our-thinking/wealth/growth-markets-asset-allocation-insights-2021.html.

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.

As an example, in June 2021, Engine No. 1, a small, newly formed 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 to turn over in total.

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 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.*[13]

Glass Lews' 2020 Guidelines also highlight the risks to shareholder interests of inattention to material environmental and social issues.

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 December 2020, Nasdaq proposed a new listing rule that would require all Nasdaq-listed

13 Glass Lewis, 2019 Guidelines, Brazil, 3, 8–9.

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 about the diversity of their directors on an annual basis. In January 2020, Goldman Sachs announced at the World Economic Forum in Davos that, effective July 2020, it would only underwrite IPOs in the United States and Europe of companies that have at least one diverse board member with the minimum requirement increasing to two by 2021.[14]

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

14 Goldman Sachs' Commitment to Board Diversity (4 February 2020), available at https://www.goldmansachs.com/our-commitments/diversity-and-inclusion/launch-with-gs/pages/commitment-to-diversity.html.

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.[15]

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

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15 *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.

battle.[16] 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.[17] Comparatively, Nelson Peltz of Trian Partners prefers to be known as a 'committed shareholder' that tries to work with boards of directors. Last year, 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.[18]

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.

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

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

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

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. Compared to 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 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.[19] 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 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 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 themselves to respond from a position of strength if an activist challenge arises.

19 *The Wall Street Journal*, 'DuPont Defeats Peltz, Trian in Board Fight', 13 May 2015.

APPENDIX 1

About the Authors

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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 Latin America situations.

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Published by Latin Lawyer and LACCA, edited by Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers, partners at Sullivan & Cromwell LLP, *The Guide to Corporate Crisis Management* is designed to assist key business decision makers and their advisers in effectively planning for and managing a corporate crisis in Latin America.

This guide delivers specialist insight to our readers – general counsel, compliance officers, government agencies and private practitioners – who must navigate the region's complex, fast-changing framework of rules and regulations.

In preparing this guide, we have been working with practitioners from a variety of disciplines and geographies, who have contributed a wealth of knowledge and experience. We are grateful for their cooperation and insight.

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