

10 QUESTIONS WITH ELIZABETH GONZALEZ-SUSSMAN



Elizabeth Gonzalez-Sussman is a partner and head of Skadden's shareholder engagement and activism practice. She focuses on advising companies around the globe on how best to prepare

for, respond to and defend against activist campaigns. Elizabeth has been repeatedly named a leading lawyer in Corporate/M&A: Shareholder Activism by Chambers USA, achieved Tier 1 "Leading Lawyer" recognition for Shareholder Activism in The Legal 500 U.S. and is listed as one of Lawdragon's 500 Leading Dealmakers in America and 500 Global Leaders in Crisis Management. She has also been honored as one of Crain's New York Business' Notable M&A Dealmakers and a Power Players Distinguished Advisor in Shareholder Activism by Financier Worldwide. She holds a J.D. from Columbia Law School and a B.A. from New York University's College of Arts and Sciences.

13DM// Skadden's reputation as an elite corporate law firm is deep and longstanding, and last year you joined the firm to lead the shareholder engagement and activism practice. Tell us a little about your practice at Skadden.

EG// Since joining Skadden, I have focused on advising companies and boards on all aspects of shareholder engagement and activism defense. My practice spans both proactive and reactive work. I help management teams and directors anticipate potential activist approaches, strengthen their governance practices and develop strategies for constructive engagement with shareholders. When activist situations arise, I guide clients

through every stage—from initial outreach and response to negotiation and, if necessary, defense in proxy contests. Skadden's reputation, with its deep bench of talent and tremendous experience, enables me to deliver comprehensive, strategic counsel.

13DM// Prior to joining Skadden, you spent nearly twenty years representing activist investors. What made you decide to switch to advising companies, and how does your unique background and experience on the other side guide your counsel? What are some of the main differences between activist representation and corporate representation?

EG// After almost two decades representing activist investors, I was eager to embrace a new challenge and saw an exciting opportunity at Skadden, given its outstanding platform and reputation for handling the most complex, high-profile matters. I believe that my experience on the activist side gives me a unique perspective when advising companies and boards. I understand the strategy and tactics of activist investors, which allows me to help my current clients anticipate potential moves, develop effective engagement strategies, and prepare for all phases of activist campaigns. The main difference between representing activists and advising companies lies in the approach: as an activist adviser, the focus is on identifying vulnerabilities and driving change, while on the corporate side, it's about being proactive in addressing areas of underperformance, protecting and maximizing value, maintaining stability, engaging constructively with various constituents and demonstrating and building credibility with all shareholders.

13DM// CEOs have been a big subject of activist campaigns recently. We divide CEO activism into two types: (i) CEO succession where reasonable minds can differ and

10 QUESTIONS WITH ELIZABETH GONZALEZ-SUSSMAN

(ii) removing an empire builder with strong shareholder support. How does the activist defense strategy differ between these two types of campaigns?

EG// A board's best defense for any CEO-focused campaign is to demonstrate a clear record that the board has treated management succession as a core fiduciary responsibility. Boards should always have a well-prepared transition plan for their CEO to address not only performance issues if they arise, but also unforeseen events, such as an unexpected illness or sudden resignation.

When an activist targets a CEO, it is critical for a board to be soliciting shareholder feedback directly on the performance of the company's senior leadership. Notably, shareholders may be more candid with a board regarding the CEO's performance if the board has met or offered to meet directly with them well before an activist surfaces. Sometimes, shareholders who have long supported a CEO may be slow to communicate their preference for change in the hope that performance will improve, only to then quickly change their views after an activist surfaces. That reality can sometimes impact the timing of a board's decision regarding the CEO, even under circumstances where the board has already been preparing for a succession.

When a board determines that the incum-

bent CEO should remain at the helm, it must be ready to articulate why the CEO is best suited to lead and oversee management, execute the company's strategic plan and optimize shareholder value. Credibility hinges on showing that the decision flowed from a methodical and disciplined process rather than appearing as a reflexive defense of the status quo.

In summary, when succession planning is at issue, the defense rests on process: prove that the board has already been thinking, listening and planning. When an empire-building CEO is involved, the defense also rests on initiative: show that the board will, and can, remove an obstacle to long-term value creation without waiting for an activist to do it for them. Investors will ultimately reward a board that demonstrates it was ahead of the issue rather than reacting to it.

13DM// How do you view the increasing use - and success - of recent withhold campaigns?

EG// There has been a clear uptick in withhold campaigns during the past proxy season. It should serve as a reminder to boards that whenever a compelling value proposition emerges, activists are prepared to deploy every available tactic, even if only a few weeks

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10 QUESTIONS WITH ELIZABETH GONZALEZ-SUSSMAN

remain before the annual meeting. In other words, the long-standing practice of associating activism strictly with the annual meeting calendar is behind us. Most nomination windows close three to four months before the annual meeting, while some windows can close five to six months before the annual meeting, which could in many circumstances leave activists uncertain about whether to put forward director candidates. If, after the nomination window closes, there are material developments that strengthen the activist's case for board change, a "vote no" campaign can be an effective lever for an activist to apply pressure on the board.

We certainly saw greater success by more well-known activists in running withhold campaigns this past proxy season, including those issuing a single press release or running a media campaign without actually soliciting votes on their own proxy card. Historically, those campaigns had not been very effective, but the more established activists have recently found success amplifying their message, making them more difficult for companies to ignore.

Consequently, the number of proxy fights going all the way to a vote has declined. Whether this high settlement rate endures remains an open question, particularly as recent proxy voting developments, such as Glass Lewis' decision to shed its standalone benchmark proxy voting policy and the White House's desire to break up the voting blocs of passive index funds, may begin to make voting outcomes more uncertain and alter the "fight versus settle" calculus for both sides.

13DM// What do you think companies often get wrong about activist investors?

EG// Companies can sometimes assume an activist's influence and probability of success in the event of a proxy fight are tethered to the percentage of stock it holds. Some companies may not take as seriously an activist with a small outright ownership position or where the activist holds its entire interest in the company in the form of derivatives, not realizing that the activist can still quickly catalyze a shift in allegiance by the broader shareholder base with a well-articulated critique of company performance. Today's institutional investors are pragmatic and increasingly issue-oriented—they may very well back the incumbents on a "clear day" but could flip if and when an activist, irrespective of its size or form of ownership, presents a more compelling strategic plan or strategy.

Companies may also occasionally assume every activist's endgame is a seat in the boardroom, when in fact many campaigns can be resolved long before director nominations become necessary. Frequently, the activist's true objective is a public commitment for the company to explore some strategic initiative—whether that involves clarifying the leadership-succession roadmap, pursuing or abandoning a specific M&A transaction, recalibrating capital allocation priorities, or otherwise sharpening the company's

10 QUESTIONS WITH ELIZABETH GONZALEZ-SUSSMAN

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strategic plan. With meaningful engagement on these asks early in the process, a board can avoid a proxy fight without any board change.

13DM// 13D Monitor provides Company Vulnerability Ratings for over 2,500 public companies and has been remarkably accurate in predicting which companies will be engaged by an activist (median rating of a company engaged is over 80 out of 100). In your experience are companies generally surprised when they are engaged? Should they be?

EG// In my experience, most boards are not caught off guard when an activist surfaces. In fact, many boards and senior management teams are very mindful of the potential of being engaged by an activist investor and continuously monitor their stock price performance and other operational metrics relative to their peers, with a view toward addressing any underperformance issues and maximizing shareholder value. Many boards also conduct periodic vulnerability assessments with the assistance of external advisors such as myself to obtain an objective sense of how the market and key stakeholders perceive the company. Coupled with a robust shareholder outreach program that keeps the top shareholders informed and engaged, this disciplined approach means that the emergence of an activist seldom comes as a total sur-

prise.

However, the increased willingness of activists to go public first without any prior engagement with a company can come as a surprise. Most boards are doing the right thing by welcoming private engagement, but some activists are not giving boards any time to discuss the activist’s thesis in advance to avoid public escalation, an unfortunate recent trend in activism. This ambush tactic can cause significant and unnecessary disruption to the company, particularly among its employee base, and begins the engagement with the activist on the wrong foot. It begs the question as to whether the activist’s motives in going public without any private engagement is more about self promotion or trying to preempt other activists from going public first, than it is about trying to do what is in the best interests of the company and all shareholders.

13DM// Index funds own approximately 25% of the U.S. public equity market, more than double what they owned 10 years ago, and there is no sign of a slowdown. How integral are they in a proxy fight? Is there a point when they become too powerful?

EG// The decision by several index funds to split their stewardship teams into distinct units with separate decision-makers is a consequence of a shifting regulatory and political

10 QUESTIONS WITH ELIZABETH GONZALEZ-SUSSMAN

landscape impacting the influence that these index funds, the leading proxy advisory firms and other large institutional investors historically wielded over proxy voting outcomes. In addition, certain index funds are expanding their pass-through voting programs, allowing their underlying clients to indicate their voting preferences. At the same time, traditionally passive large institutional investors have become more cautious in their engagements with companies as a result of recent SEC guidance narrowing the scope of activities that more-than-5% shareholders may undertake while preserving "passive" Schedule 13G status.

On the proxy advisory firm front, Glass Lewis announced that it would eliminate its standard benchmark voting recommendations in 2027, and, more recently, the White House announced it is considering issuing an executive order that would restrict proxy advisory firms from making voting recommendations or prohibit issuing recommendations where a conflict exists. The White House also suggested it may potentially require proportional voting at passive index funds based on the voting preferences of their underlying clients.

As an advisor to companies facing shareholder activism, the key takeaway for me is that this rapidly evolving regulatory and political paradigm is significantly altering the activities of the large institutional investors and proxy advisory firms, which may ultimately result in greater uncertainty as to proxy vote outcomes as early as the upcoming proxy season.

13DM// What does this uncertainty mean for shareholder activism?

EG// As the influence of large index funds and proxy advisory firms diminishes over time, making voting outcomes less and less predictable, companies may need to expand their investor engagement programs in order

to reach a wider audience, particularly retail and index fund investors. The index funds will still matter, but success will increasingly depend on the ability to reach and mobilize their underlying investors —whether through targeted digital campaigns, social-media infographics or other easily digestible content. Boards will have to reconceive shareholder engagement as a year-round exercise catered to a broader subset of investors rather than the concentrated stewardship teams of a few index managers. On the flip side, activists may become even more emboldened to launch campaigns and resist settlement given the greater unpredictability of vote outcomes.

13DM// Historically, shareholder activism was about the activist's plan versus the Company's plan. With the Universal Proxy Card it often comes down to who the most qualified director is. Has this changed how you advise your clients?

EG// Activists have clearly leveraged the universal proxy card rules to try to gain one or two board seats based on a "what's the harm" argument, even where candidates are not more qualified than existing directors. However, I think advisors to companies being targeted by activism need to be cautious about drawing definitive conclusions that the ultimate result of a campaign will come down to who is the most qualified director. Indeed, boards should conduct a holistic, individual assessment of each director to ensure he or she is a distinct value-add with a clear and compelling profile. However, boards should simultaneously conduct a "sum-of-the-parts" self-review, evaluating how the unique skills, experience and background of each director combine to form a versatile, highly qualified and well-rounded board as a whole. By doing so, a board should be well-positioned to effectively articulate to shareholders that removing or replacing any one director would disrupt the board's overall effectiveness.