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A Look At Shareholder Activism In The Retail Sector

Law360, New York (February 10, 2014, 12:26 PM ET) -- Shareholder activism continues to be a powerful force in corporate America.

In 2013, activists launched 206 campaigns against U.S. companies.[1] In addition, many more activist initiatives resulted in early settlements and corporate transactions before a public campaign was even launched by the activist.

And the pace of activism is expected to accelerate during 2014. In fact, recent estimates indicate that approximately $10 billion to $12 billion was invested in activist hedge funds in 2013, bringing their collective total assets under management to more than $100 billion.[2]

As activists have become increasingly sophisticated, their campaigns have broadened in scope. Although there continue to be many instances where an activist's main agenda is to precipitate a sale of the target company, there has been a significant increase in the level of refinement of activists' proposals, including with respect to board representation, reorganizations, return of capital to shareholders, changes in strategic direction, capital allocation plans and corporate governance reforms.

Although activists have targeted companies in a wide range of industries, the fashion retail sector was a frequent target in 2013 and can be expected to continue to be a target in 2014. Activists often view fashion retailers as relatively inexpensive targets, with the potential for significant upside.

In the fashion retail sector, the goal of recent activist campaigns can be divided into three main categories: (1) implementing management changes to force a strategic change, (2) effecting a going-private transaction or (3) engaging in a strategic consolidation, all as illustrated below.

Management Change

In an example of an activist seeking a management change, in December 2013, Engaged Capital LLC announced it had acquired a 0.5 percent stake in Abercrombie & Fitch Co. Engaged made public a letter sent to the board calling on the directors to initiate a search process to replace incumbent CEO Mike Jeffries.

Subsequently, on Jan. 28, 2014, A & F announced that it would split the offices of chairman of the board and CEO, appoint three new board members, one of whom will serve as the new chairman, and eliminate its poison pill. Engaged released a statement asking A & F to explore further strategic and organizational changes.

Going-Private Transaction

In April 2013, Barington Capital Group LP, a 2.3 percent shareholder of The Jones Group Inc., confirmed media speculation that it had attended a meeting with Jones executives. Within a month of such media reports, Jones announced that it had entered into an agreement with Barington pursuant to which Jones would nominate Barington's CEO, James Mitarotonda, to its board of directors at the upcoming annual shareholders meeting, and that Barington had agreed to a standstill and to vote its shares in favor of the board's nominees.

Barington pushed Jones to effectuate a strategic transaction, either through divestitures of individual brands from its substantial portfolio or through a going-private transaction. On Dec. 20, 2013, after a lengthy process, Jones entered into a merger agreement with affiliates of Sycamore Partners pursuant to which Sycamore will take Jones private in an all-cash transaction expected to close in the second quarter of 2014.

The purchase price per share in the Sycamore transaction is $15 per share, a $0.93 premium over the $14.07 per-share price at which Jones shares closed on the day that Barington's stake was disclosed.

In a comparable situation, in July 2012, Clinton Group LLC made public a letter disclosing its 4.25 percent (presently 8.1 percent) stake in Wet Seal Inc. and launched a proxy contest to remove and replace the board with directors more willing to seek out and negotiate a going-private transaction.

Wet Seal settled with Clinton in October 2012, agreeing to nominate four of Clinton's proposed directors to the board, including the chairman. To date, Wet Seal has not found a potential buyer and continues to explore financing alternatives to effectuate a going-private transaction.

Strategic Consolidation

In September 2013, JoS. A. Bank Clothiers made an unsolicited takeover bid for its larger rival, The Men's Wearhouse Inc. Eminence Capital LLC publicly disclosed its 9.8 percent stake in Men's Wearhouse on Nov. 7, 2013. Eminence's stated goal was to effectuate a consolidation of Men's Wearhouse and JoS. A. Bank in order to realize potential synergies and increase shareholder value.

On Nov. 15, 2013, after the Men's Wearhouse Board rejected JoS. A. Bank's offer, Eminence commenced a proxy solicitation to amend the Men's Wearhouse bylaws such that shareholders could remove and replace Men's Wearhouse's directors at a future special meeting of shareholders.

In late November, Men's Wearhouse took the strategic initiative by proposing an acquisition of JoS. A. Bank — which was consistent with Eminence's stated goal of having the two companies combine. This acquisition proposal was rejected by JoS. A. Bank's board on Dec. 23.

Men's Wearhouse responded on Jan. 6, 2014, by proposing an increased cash tender offer. On Jan. 13, Eminence, which also holds a 4.9 percent stake in JoS. A. Bank, filed suit in an effort to force negotiations between the companies and announced they will be nominating two directors to the JoS. A. Bank board at the next annual meeting.

In another example, in November 2013, Hirzel Capital Management LLC publicly disclosed its intent to actively seek to influence the management of Aeropostale Inc., of which it owns 6 percent. To date, Hirzel has not announced its proposed strategy for the company although other shareholders have indicated support for a sale of Aeropostale.

Although the fashion retail industry has provided attractive targets for shareholder activism, the ultimate results of recent activist efforts will likely determine whether the retail space will continue to attract attention from activist investors.

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[1] Data from FactSet.

[2] "No Barbarians at the Gate; Instead, a Force for Change." Alexandra Stevenson, Dealbook, http://dealbook.nytimes.com/2014/01/06/no-barbarians-at-the-gate-instead-a-force-for-change/ (Jan. 6, 2014)
