



Vinson&Elkins

Post De-SPAC Series

**How Post De-SPAC Public Companies Can
Prepare for a Tidal Wave of Proxy Fights,
Hostile M&A and Short Attacks**

October 20, 2022

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The Case for SPACtivism

- Since 2020, de-SPACed companies have generated significant negative returns on average⁽¹⁾
 - Approximately -43% for all de-SPACs closed in 2020
 - Approximately -64% for all de-SPACs closed in 2021
 - Of the 180 trading de-SPACs that closed in 2021, only 12 (7%) are currently trading at/above \$10
- De-SPACed companies continue to face short attacks
 - As of October 14, 2022, 17 de-SPACed companies have faced a short attack in 2022, compared to 52 and 22 in 2021 and 2020, respectively. ⁽²⁾
- Many de-SPACed companies remain highly vulnerable to activism.
 - As of October 14, 2022, 24 de-SPACed companies have faced an activism campaign in 2022, compared to 15 in the full year of 2021. ⁽³⁾

(1) As of October 14, 2022.

(2) As of October 14, 2022, as reported by Insightia and Factset.com.

(3) As reported by Deal Point Data.

The Case for SPACtivism

- What is a Short Attack?
- How Should Companies Under Short Attacks Respond?
 - Public communications
 - Shareholder engagement
 - Independent investigation
 - Evaluate litigation and regulatory intervention
 - Consider capital markets options
 - Pursue D&O insurance
- What Happens After a Short Attack?
 - Stock declines
 - Regulatory inquiries
 - Lawsuits

SPAC Subjects of Short Attacks

Since January 1, 2020, there have been **91 short campaigns** at previous or current SPACs and shell companies.⁽¹⁾

Companies Targeted, Generally

Since January 1, 2020, there have been **334 short campaigns**.⁽²⁾

⁽¹⁾As of October 14, 2022, as reported by Factset.com.

⁽²⁾As of October 14, 2022, as reported by Factset.com.

Traditional Shareholder Activism Threats

- Activism Campaigns to “Unlock Value”
 - Private pressure
 - Public pressure
- Proxy Fights
 - Battles for control over the board of directors
- M&A Activism
 - Pressure from shareholders for immediate sale of the company
 - Unsolicited/Hostile M&A

The Rise of Activism Campaigns

As of October 14, 2022, there have been 294 activism campaigns in 2022, compared to 327 and 277 in the full years of 2021 and 2020, respectively.

Proxy Contests

As of October 14, 2022, there have been 62 proxy contests in 2022, compared to 88 and 98 in the full years of 2021 and 2020, respectively.

De-SPACtivism

As of October 14, 2022, 24 de-SPACed companies have faced an activism campaign in 2022, compared to 15 in the full year of 2021.⁽¹⁾

⁽¹⁾All data as of October 14, 2022, as reported by Deal Point Data.

De-SPAC Governance Provisions/Defenses

- Post-De-SPAC governance often contain typical defensive measures:
 - Staggered/classified board
 - No action by written consent
 - Prohibitions on calling special meetings
 - Supermajority vote for amendment of charter
 - Blank check preferred
 - Choice of forum
 - DGCL 203
 - Dual class (high vote/low vote) stock is occasionally included
- ISS/Glass Lewis will often recommend against certain of these matters, in addition to compensation plans.

Types of De-SPACed Companies Uniquely Ripe for Proxy Fights

- Lack of controlling shareholder/Lack of voting agreement among large shareholders
 - Frustrated founders looking to gain control
 - Agitated early-stage investors seeking board representation/exit opportunities
 - Vocal post-IPO shareholders pushing for M&A
- Overdue first annual meetings
 - Delaware corporations (where most de-SPACed companies are incorporated) must hold annual meetings every 13 months
 - Many original SPACs never held annual meetings and a de-SPAC merger special meeting vote alone does not count as an annual meeting
 - After 13 months, shareholders can compel companies to hold an annual meeting through an expedited court proceeding

Recent De-SPACtivism Targets



Types of De-SPACed Companies Uniquely Ripe for Proxy Fights

- Inadequate advance notice bylaws
 - Example:

(ii) Without qualification, for business to be properly brought before an annual meeting by a stockholder, the stockholder must (i) provide Timely Notice (as defined below) thereof in writing and in proper form to the Secretary of the Corporation and (ii) provide any updates or supplements to such notice at the times and in the forms required by this Section 2.4. To be timely, a stockholder's notice must be delivered to, or mailed and received at, the principal executive offices of the Corporation not less than 90 days nor more than 120 days prior to the one-year anniversary of the preceding year's annual meeting (which, in the case of the first annual meeting of stockholders following the Effective Time (as defined in the Corporation's Certification of Incorporation), the date of the preceding year's annual meeting shall be deemed to be [•]); provided, however, that if the date of the annual meeting is more than 30 days before or more than 60 days after such anniversary date, notice by the stockholder to be timely must be so delivered, or mailed and received, not later than the 90th day prior to such annual meeting or, if later, the 10th day following the day on which public disclosure of the date of such annual meeting was first made by the Corporation (such notice within such time periods, "Timely Notice"). In no event shall any adjournment or postponement of an annual meeting or the announcement thereof commence a new time period (or extend any time period) for the giving of Timely Notice as described above.

Immediate Action Items

1. **Structural Defenses:** Ask special proxy fight counsel to review the company's charter and bylaws to assess legal strengths and weaknesses; prepare an up-to-date, fully drafted and negotiated "shelf" poison pill to enable the board to react quickly in the event of activist attacks
2. **Corporate Governance Analysis:** Analyze the company's corporate governance from an activist campaign standpoint (board composition & practices, compensation, shareholder rights, related party transactions, etc.)
3. **Financial Self-Evaluation:** With the assistance of outside advisors, evaluate the strategy and performance of the company like an activist
4. **Stock Surveillance:** Retain a stock watch service to monitor trading in the company's stock to receive advance notice in the event an activist builds a stake
5. **Investor Relations:** Screen meeting/call requests for activists; conduct perception surveys; prepare "off the shelf" press releases and statements
6. **Boot Camp:** Walk board and management team through a "mock proxy fight" to familiarize them with the risk and issues related to activism

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Appendix



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As co-head of V&E's Shareholder Activism practice based in New York, Lawrence draws on nearly 20 years of experience as a securities attorney and business advisor to counsel senior management and boards of public companies with respect to proxy contests and other shareholder activism campaigns, such as merger contests, shareholder activism proposals, consent solicitations, withhold the vote/vote "no" campaigns and short attacks.

In 2021 and 2022, Chambers ranked Lawrence in its category for Corporate/M&A: Takeover Defense/New York, a distinction awarded to only 12 lawyers in the U.S. He is also listed as a Next Generation Lawyer by Legal 500 U.S. in the category Shareholder Activism – Advice to Boards.

“
[Lawrence] brings a combination of deep experience, valuable insights and a collaborative mindset. I am very impressed with his level of engagement, accessibility, and helpfulness.

— *Chambers USA*, 2021

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Selected Experience Highlights

- Verisk Analytics, Inc. in shareholder activism preparation and defense with respect to strategic relations with D.E. Shaw & Co., L.P.
- eHealth, Inc. in the defense of the proxy fight by Starboard Value and the shareholder activism campaign by Hudson Executive.
- Evolent Health in the defense of the activism campaign of Engaged Capital.
- Fiesta Restaurant Group in the defense of the shareholder activism campaign and threatened proxy fight by AREX Capital Management.
- Noble Energy in connection with the activist investment and rumored proxy contest by Elliott Management.
- Hilton Grand Vacations in the defense of the shareholder activist investment by Land & Buildings (2021) and Elliott Management (2019).
- Nutrisystem in the defense of the activism campaign by Legion Partners Asset Management.

Accolades

- Recognized as “Next Generation Lawyer” (2020) and “Next Generation Partner” (2021 – 2022) by *The Legal 500 U.S.*, Shareholder Activism – Advice to Boards
- Ranked “Band 3” by *Chambers USA*, Corporate/M&A: Takeover Defense (New York), 2021 – 2022
- Finalist for “Dealmaker of the Year” as part of *The Deal Awards* 2018 – 2019
- Received *New York Law Journal's* Rising Star award, which honors the most promising attorneys in New York's legal community under the age of 40

Patrick Gadson

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Patrick is the co-head of V&E's Shareholder Activism practice, which advises public companies in competitive proxy solicitations, strategic investor relations, and corporate governance based in New York. He also counsels senior management, boards of directors, investment managers and both private equity and strategic investors in a wide variety of complex corporate governance matters, strategic investor relations and other special situations.

In 2021 and 2022, Patrick has been featured on *Lawdragon's* "500 Leading Dealmakers in America". He has also been recognized on *Thomson Reuters'* "Super Lawyers" rising star list for 2022.

“

[Patrick] has a ton of knowledge of these situations and leaves no stone unturned. [He] is an invaluable conduit between the two sides of these disputes. He understands the perspectives of the other side and knows how they think, their strategies and tactics, and what their next moves are likely to be.

— *Chambers USA*, 2021

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Selected Experience Highlights

- eHealth, Inc. in the defense of the proxy fight by Starboard Value and the shareholder activism campaign by Hudson Executive.
- Noble Energy in connection with the activist investment and rumored proxy contest by Elliott Management.
- Comscore Inc. in the defense of the activism campaign of Starboard Value.
- Hilton Grand Vacations in the defense of the shareholder activist investment by Land & Buildings (2021) and Elliott Management (2019).
- NutriSystem Inc. in the defense of the activism campaign of Legion Partners Asset Management.
- Sandridge Energy in its proxy contest defense against Carl Icahn and in the defense of the unsolicited bid of Midstates Petroleum.

Accolades

- Recognized as "Next Generation Partner" (2021 – 2022) by *The Legal 500 U.S.*, Shareholder Activism – Advice to Boards
- Ranked "Up and Coming" by *Chambers USA*, Corporate/M&A: Takeover Defense (New York), 2021-2022
- Legal publication *Lawdragon* featured Patrick Gadson on its "500 Leading Dealmakers in America" list, 2021–2022
- Selected to the New York Rising Stars list by *Thomson Reuters* "Super Lawyers", 2022
- Recognized as a 2019 Rising Star by *The Deal*

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