

Q&A with Mark Gerstein, Cary Hyden, Paul Tosetti, Michele Johnson

## Defending Against The Hostile Bid: Lessons Learned From Allergan

September 10, 2015

Readiness, a strong board and delivering good value are the best strategies to thwart activist investors say Latham & Watkins partners Cary Hyden, Paul Tosetti, Michele Johnson and Mark Gerstein in discussion with Allergan's Former Executive Vice President and General Counsel Arnold Pinkston.

### Preparing the Board of Directors for Hostile Bids and Activism

**Gerstein:** As the tsunami known as a hostile takeover attempt advanced on Allergan, you had already prepared your board. What did "prepared" mean for Allergan and how can other companies prepare for hostility or activism?

**Pinkston:** Definitely be prepared with a takeover readiness plan. A plan is not a detailed document – because what comes at you is always going to be a surprise – but an outline noting key members of the team, along with their responsibilities. Allergan had a list of public relations and stockholder advisors that we were ready to pick, if the time came. But most critically, we had a talented legal team and good bankers at the ready — the team that had advised us since 2001 — who knew our plan and defenses.

We thoroughly reviewed our plan every year, and asked ourselves some important questions: what are we seeing in the marketplace from activists? from strategists? what do our defenses look like?

Also, update your bylaws to permit the board more time to get increased value for your shareholders, as we did. With additional time, the board might consider other strategic options, and can press a bidder to get the highest price. The management team should be fully vetting those options with the board to prepare the board for a hostile proposal.

Lastly, I recommend reviewing your shareholder rights plan to ensure it is state-of-the-art. In doing this, we were able to call a meeting one day after the bid and quickly slow down any further acquisitions by the hostile bidders.

### The Role of Inside Counsel in the Preparation Process

**Gerstein:** How can inside counsel prepare?

**Pinkston:** The company's ability to deliver value to shareholders is its best defense. Ensure that the board and management team understand that perspective. Also, surround yourself with experts — both in-house and externally — and know your strategic plan and dissenting opinions. As you do this, you will become familiar with all of the alternatives, which you must consider closely, while comparing them to and aligning them with your business plan.

**Tosetti:** Back in the '80s, companies did not want to commit their exact plans in proposed takeover situations to writing. Now, such plans are considered prudent to recognize your organization's vulnerabilities, place your rights plan on the shelf, have your advisory SWAT team on call and know your principal stockholders. Requiring your board and advisors to plan, focus and know their strategic options is a very useful exercise.

**Gerstein:** What is the general counsel's role in managing the various players, ranging from board members and outside advisors, to the workforce and customers?

**Pinkston:** The general counsel is the fulcrum of the motion you described — our role includes being a master of project management. The board is here to make all of the decisions, and they need a wealth of information from you

as a general counsel. You are the person who needs to hold all the meetings with the various internal and external teams and distill relevant information to the board. On the flip side, you also need to take the strategic plan the board decides upon, and ensure the key players have detailed plans in their respective areas. This facilitates consistency and synergy, instead of chaos.

## Success Stories

**Gerstein:** Given Latham's success defending Allergan from Valeant and Pershing Square, what are some of the more effective strategies and responses from a litigation perspective?

**Johnson:** One of our best strategies was to start analyzing the litigation options and possibilities very early on. The hostile environment is moving away from reflexively filing litigation, though it used to be one of the pieces of the playbook — you either ran immediately to Delaware or to federal court, and started battling each other. Instead, we question whether litigation is going to be a strategic arrow for us. Do we have a good chance of winning something? Did we want to bring Section 14 disclosure claims, based on the information that Valeant was disseminating. It was very important for us to start analyzing all of this from the beginning.

## The Role of the Public Relations Team

**Gerstein:** How important is a good public relations team during this process?

**Hyden:** It is critical to a successful defense. Sometimes perception is more important than reality. Even more important is how your case is perceived by the media and the investment community, and coordinating efforts to get the word out to your investors and stockholder investment community. This is something we did very well. We won this part of the overall process, which is not to say that we won every day, but there were certainly more good days than bad.

## The Role of the Board of Directors and Management

**Gerstein:** How can the board help in takeover situations such as these?

**Hyden:** Ensure your board supports your strategic business plan and value proposition. Allergan's board's support provided extraordinary value, because it helped the board hold their ground when they were being vilified by the other side and the media. They stood by their view of what the future success was going to allow regarding a stock value proposition. Management and the board were unwavering about that value and the company's prospects. And so once the negotiations started, the value proposition was left to the management teams with the board's support. Due to the strength of Allergan's board, we were able to negotiate the largest M&A transaction in the last six years, and the third largest healthcare deal ever.

## For More Information

You can hear the full discussion at [Defending Against The Hostile Bid: Lessons Learned From Allergan](#), a webcast featuring Cary Hyden, Paul Tosetti, Michele Johnson and Mark Gerstein, with Allergan Former Executive Vice President and General Counsel Arnold Pinkston.

## CONTACTS

Mark D. Gerstein  
Chicago, New York  
T +1.312.876.7666  
[mark.gerstein@lw.com](mailto:mark.gerstein@lw.com)

Cary K. Hyden  
Orange County  
T +1.714.755.8254  
[cary.hyden@lw.com](mailto:cary.hyden@lw.com)

Paul D. Tosetti  
Los Angeles  
T +1.213.891.8770  
[paul.tosetti@lw.com](mailto:paul.tosetti@lw.com)

Michele D. Johnson  
Orange County  
T +1.714.755.8113  
[michele.johnson@lw.com](mailto:michele.johnson@lw.com)

#### **You Might Also Be Interested In**

[Activism](#)

[Corporate Governance](#)

[Hostile Takeovers & Unsolicited Bids](#)

[Mergers & Acquisitions](#)

[Public Company Representation](#)

[Securities Litigation & Professional Liability](#)