

Bill Ackman's Resignation from J.C. Penney Board Serves as Reminder of Challenges for Both Activists and the Boards They Sit On

By Spencer D. Klein and Enrico Granata

In the March issue of *Unsolicited Views*, we published an article entitled "Practical Tips on Board Confidentiality."¹ In that article, we warned that "the increasing number of board members selected by activists and other investors has increased the likelihood of informational conflicts involving stockholder-designated directors." We also noted that the exercise of vigorous dissent is fully consistent with board member's responsibilities, but that as articulated by Delaware courts,² dissent must be exercised within the bounds of the board members' fiduciary duties and legal requirements in a manner intended to benefit all shareholders, not just those that nominated, elected or designated them to the board.

The recent controversy regarding Bill Ackman's tumultuous tenure as a member of J.C. Penney's board of directors, including public statements by Ackman that disclosed confidential boardroom deliberations and ultimately resulted in his resignation from the company's board, serve as a prescient reminder of these challenging issues. To be sure, Ackman was also being held to account for his lead role in bringing Ron Johnson to J.C. Penney as CEO, but it was his public statements and the threat of legal action by J.C. Penney that served as the catalyst for his resignation.

In fairness to Ackman, his resignation from the J.C. Penney board may also serve his interests and those of his investors. If he is interested in selling down Pershing Square Capital's position in the company, his position as a director, frequently in possession of material, non-public information, would limit his flexibility. Now that he has resigned, he and Pershing will be free to trade, once any material non-public information he currently has goes stale or is disclosed by the company.

As was the case following the board-leak-investigation scandal at Hewlett-Packard in 2006, it can be expected that Bill Ackman's resignation from the board of J.C. Penney will refocus the attention of boards on the obligation of directors to maintain the confidentiality of corporate information.

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¹ See <http://www.mofo.com/files/Uploads/Images/130312-Practical-Tips-on-Board-Confidentiality.pdf>

² See, e.g., *Shocking Technologies, Inc. v. Michael*, 2012 Del. Ch. LEXIS 224, at *31 (Del. Ch. Sept. 28, 2012).