

Amylin Pharmaceuticals Inc. vs. Eastbourne Capital Management

Summary

Beginning in August 2008 and ending at the shareholder meeting in May 2009, Eastbourne Capital sought to elect five directors (of 12 up for election) to the board of Amylin Pharmaceuticals.

Eastbourne had been a significant investor in the company beginning in 2005 and believed that the current board and management had failed to maximize the commercial value of its principal product, Byetta (a breakthrough Type-2 diabetes drug) and had destroyed approximately \$5 billion of shareholder value through mismanagement, poor expense control, and an unfavorable commercial agreement with Eli Lilly. The company was nearing the launch of a once-weekly version of Byetta, and Eastbourne believed that new leadership was needed to ensure that past mistakes were not repeated and that the company took advantage of a limited window for commercial success in a highly competitive industry.

The dissident developed a proxy campaign strategy that focused on management accountability and stressed the urgent need for change. The campaign focused on the need for new independent directors with varied experience to complement

the other directors. Eastbourne wanted the new board to actively drive management, analyze the current sales and marketing strategy, review the relationship with Eli Lilly, and assess strategic alternatives available to the company.

The proxy contest was complicated by the fact that Carl Icahn had nominated five directors and was running an independent campaign. Eastbourne was unable to confer with Icahn because, if it did, the two would be deemed a “Group” under SEC rules and their combined share holdings would trigger the poison pill. In addition, should more than five nominees from either Eastbourne’s or Icahn’s slate be elected, it would have constituted a change of control per Amylin’s debt covenants and approximately \$900 million of debt would come due immediately.

The SEC took the unprecedented step to grant “no-action” relief under the short slate rule to allow Eastbourne and Icahn to “round out” their slates with each others nominees; effectively negating the poison put issue by having the two slates mirror each other with the same five nominees (three Eastbourne, two Icahn).

Background	
Dates	8/08 – 5/09
Dissident demand	3 directors
Company Profile	
Ticker symbol	AMLN
Industry	Biotech/Pharma
Revenues (millions)	\$840
Share price	\$9.66
Enterprise value	1.57 billion
EBITDA (millions)	\$209 (FY 2008)
(\$ values at record date)	
Governance	
Board structure	Elected annually
Poison pill	Yes; poison puts on debt
Investor Profile	
Principal activist	Eastbourne Capital
Shares held	17.2 million
Percent outstanding	12.5 percent
Participants	
Legal (Dissident)	Cleary Gottlieb Steen & Hamilton LLP
Legal (Company)	Sullivan & Cromwell LLP
PR (Dissident)	Sard Verbinnen
PR (Company)	Joele Frank, Wilkinson Brimmer Katcher
Proxy (Dissident)	MacKenzie Partners
Proxy (Company)	Innisfree M&A

Major Investors	
1. Eastbourne Capital Management LLC	12.2%
2. FMR LLC	13.9
3. Wellington Management Co. LLP	8.4
4. Goldman Sachs Asset Management LP (US)	6.9
5. Icahn Capital L.P.	9.1
Vote Recommendation	
RiskMetrics	2 Eastbourne, 1 Icahn
Glass Lewis	2 Eastbourne, 1 Icahn
PROXY Governance	3 Eastbourne, 2 Icahn
Egan Jones	2 Eastbourne, 1 Icahn

Sequence of Events

August 29, 2008

Eastbourne changed its filing status with the SEC from 13G (passive investor) to 13D (active investor), disclosing a 12.5 percent ownership stake in Amylin, automatically terminating a standstill agreement the investment firm had with the company so long as it owned more than 15 percent. With the standstill terminated, Eastbourne publicly disclosed that it may have discussions with company management on ideas to enhance shareholder value as it believed the company's stock price was "substantially undervalued."

January 30, 2009

Amylin confirmed receipt of a notice from Eastbourne to nominate five directors at the 2009 annual meeting. Another shareholder group led by Carl C. Icahn had also nominated a five-person slate for election at the 2009 annual meeting. Eastbourne advised that it was not seeking to compete with Icahn's slate; rather, it was seeking to provide the company with an additional five qualified nominees for appointment to the board.

Eastbourne expressed concern over the "poison put" provisions in Amylin's credit agreements, which prevented a majority of the board from being composed of non-incumbent directors. Given the competing Eastbourne and Icahn minority slates, Amylin investors could unknowingly elect a majority of dissidents and trigger the poison puts.

March 30, 2009

Eastbourne applauded a lawsuit against the company by Amylin shareholder San Antonio Fire & Police Pension Fund, seeking to invalidate the poison put provisions of the company's credit agreements.

April 3, 2009

Eastbourne sent a letter to the Amylin board announcing that it received a "no-action" relief from the SEC, under the "short slate" rule, effectively allowing Eastbourne to "round out" their slate with Carl Icahn's director nominees. (Previously, the SEC only allowed dissidents to "round out" their slate of director nominees with the nominees submitted by the company.)

Eastbourne also indicated it was willing to negotiate for a "unified minority slate" consisting of both Eastbourne and Icahn group nominees to avoid triggering the poison puts. However, given the combined positions of Eastbourne and Icahn were greater than the 15 percent poison pill trigger, Eastbourne asked that the company either waive the provisions of the poison pill or neutralize its "poison puts" to allow for a fair election. Amylin later stated that it believed, per the terms of its credit agreement, the election of six or more dissident nominees would not result in a change in control.

April 15, 2009

Amylin announced that it had agreed to a partial settlement in connection with the Fire & Police Pension Fund lawsuit. Pending a final judgment from the court, the board would possess the contractual right to approve the Icahn and Eastbourne nominees for the purpose of making them "continuing directors" under the company's credit agreements. However, the board continued to recommend against the election of these alternate slates and called on shareholders to re-elect incumbent directors.

Leading to the May annual meeting

Following pressure from the dissidents, Amylin agreed to permit Icahn and Eastbourne to communicate with one another for the purpose of discussing a unified minority slate. Icahn and Eastbourne ultimately revised their slates, with Icahn reducing his slate from five to two and Eastbourne reducing its slate from five to three. Following SEC regulation, each group could only solicit proxies for its own nominees on the unified slate. This unified minority slate allowed for the election of five nominees without the possibility of triggering the company's poison put provisions.

Eastbourne would use its proxies to vote for its three nominees, Kathleen Behrens, Charles M. Fleischman, and Jay Sherwood; for two Icahn nominees, Alexander J. Denner and Thomas F. Deuel; and seven of 12 management nominees, Adrian Adams, Teresa Beck, Daniel M. Bradb, Paul N. Clark, Paulo F. Costa, Karin Eastham, and Jay S. Skyler.

Eastbourne's slate of nominees received support from Howard E. Greene, Jr., co-founder and former CEO and director of Amylin.

ISS/RiskMetrics Group and Glass Lewis supported the election of two of three Eastbourne nominees, Behrens and Fleischman, and one of two Icahn nominees, Denner. PROXY Governance recommended a vote in favor of all three Eastbourne nominees and both Icahn nominees. Egan Jones Proxy Services recommended a vote for Eastbourne nominees, Behrens and Sherwood, and Icahn nominee Denner.

P. Schoenfeld and Associates, which owned 2.1 million shares of Amylin, announces to Dow Jones that it was backing the dissident slate consisting of Icahn and Eastbourne nominees.

Result

Dr. Kathleen Behrens (Eastbourne) and Dr. Alexander J. Denner (Icahn) were elected as dissident nominees, replacing Joseph C. Cook, Jr., Amylin's chairman, and James N. Wilson, Amylin's lead independent director.