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Activism: The State of Play

As we approach the 2019 proxy season, developments since September 2017 prompt a brief updated review of the state of play.

- The threat of activism remains high, and has become increasingly global.
- Activist assets under management remain at elevated levels, encouraging continued attacks on many large successful companies in the U.S. and abroad.
- In the current robust M&A environment, deal-related activism is prevalent, with activists instigating deal activity, challenging announced transactions (*e.g.*, the "bumpitrage" strategy of pressing for a price increase) and/or pressuring the target into a merger or a private equity deal with the activist itself.
- "Short" activists, who seek to profit from a decline in the target's market value, are increasingly aggressive in both the equity and corporate debt markets.
- Activists continue to garner extensive coverage in both the business and broader press, including a lengthy profile of Paul Singer and Elliott Management in an August New Yorker article, "*Paul Singer, Doomsday Investor*". "Singer has excelled in this field in part because of a canny ability to discern his opponents' weaknesses and a seeming imperviousness to public disapproval."
- Momentum for enhanced ESG disclosures is growing. The Coalition for Inclusive Capitalism continues to study ways to measure long-term sustainable value creation that will demonstrate the value companies create beyond financial results. *Embankment Project for Inclusive Capitalism*. And earlier this month, two prominent business law professors, supported by investors and other entities with over $5 trillion in assets under management, filed a petition for rulemaking calling for the SEC to "develop a comprehensive framework requiring issuers to disclose identified environmental, social, and governance (ESG) aspects of each public-reporting company's operations."

- In turn, activists have sought to enhance their profile among governance professionals, passive institutional investors and ESG-oriented investors, *e.g.*, JANA Partners' "impact investing" fund which has partnered with CalSTRS to request that Apple address overuse of its devices among youth, and Elliott Management's "Head of Investment Stewardship" position, highlighted in an October 8, 2018 Wall Street Journal article.
- An important new study by Ed deHaan, David Larcker and Charles McClure, *Long-Term Economic Consequences of Hedge Fund Activist Interventions*, has found that on a value weighted basis, long-term returns are "insignificantly different from zero."
- Gender diversity has become an increasingly prominent focus in the corporate governance conversation, with California recently becoming the first state to enact legislation instituting gender quotas for boards of directors of public companies headquartered in the state. In the current climate, it is prudent for public companies to work toward developing policies to promote equality in the workplace and ensure appropriate disclosure and shareholder engagement in that regard.

As we recently noted, with the (1) embrace of corporate purpose, ESG, and long-term investment strategy by BlackRock, State Street and Vanguard, (2) adoption and promotion by the World Economic Forum of *The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporations and Investors to Achieve Sustainable Long-Term Investment and Growth*, (3) enactment of a benefit corporation law by Delaware and some 30 states, (4) introduction of legislation by Senator Warren to achieve stakeholder corporate governance by way of mandatory federal incorporation, and (5) the activities of Focusing Capital on the Long Term, Coalition for Inclusive Capitalism and Investors Stewardship Group, it is clear that we are reaching a new inflection point in corporate governance.

However, it is unlikely that today's elevated level of activism will be curbed by legislation, regulation or market forces in the near term. Companies will have to follow closely activist developments and the opinions of their major investors. Companies should perfect and maintain their engagement activities. Companies should regularly review and adjust their plans designed to avoid an activist attack and to successfully deal with an activist attack if one should occur.

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