December 28, 2018

Activism: The State of Play at Year-End 2018

As we noted earlier this year, the threat of activism continues to be high, and has become a global phenomenon. The conclusion of a volatile and dynamic 2018 prompts a brief update of the state of play.

- Activist assets under management remain at elevated levels, encouraging continued attacks on large successful companies in the U.S. and abroad. In many cases, activists have been taking advantage of recent stock market declines to achieve attractive entry points for new positions. These trends have been highlighted in several recent media reports, including in The Wall Street Journal and Bloomberg.
- While the robust M&A environment of much of 2018 has recently subsided, deal-related activism remains 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, remain highly aggressive in both the equity and corporate debt markets. In debt markets, we have also recently seen a rise in "default activism," where investors purchase debt on the theory that a borrower is already in default and then actively seek to enforce that default in a manner by which they stand to profit.
- Elliott Management was the most active and in many cases aggressive activist of 2018. The Wall Street Journal noted that Elliott has publicly targeted 24 companies in 2018, with Icahn and Starboard runners-up with nine public targets each. The New Yorker published a lengthy profile of Paul Singer and Elliott in August, "*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."
- Enhanced ESG disclosure remains a topic of great interest to institutional investors and the corporate governance community. In October, 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 November, the Embankment Project of the Coalition for Inclusive Capitalism issued its report outlining proposed ways to measure long-term sustainable value creation beyond financial results. And earlier this month, ESG disclosure was the subject of a lively discussion at a meeting of the SEC's Investor Advisory Committee, with various views expressed regarding the merits of regulatory efforts versus private ordering in this area.

It has become increasingly evident that the activism-driven corporate world is relatively fragile and is proving to be unsustainable, particularly when viewed in the broader context of rapidly changing political and social norms and increasing divisiveness across many planes of the social contract. A number of initiatives have been underway to establish a modern corporate governance framework that is calibrated to the current environment. For our part, at the request of the World Economic Forum, we prepared a paper titled, *The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporations and Investors to Achieve Sustainable Long-Term Investment and Growth*, which was issued in September 2016 and most recently updated in our memo, *Some Thoughts for Boards of Directors in 2019*.

In essence, *The New Paradigm* conceives of corporate governance as a collaboration among corporations, shareholders and other stakeholders working together to achieve long-term value and resist short-termism. While we have seen considerable interest in *The New Paradigm* and similar initiatives from major institutional investors and other key stakeholders, until such a framework is widely adopted, it is unlikely that absent legislation, there will be any decrease in activism. Accordingly, companies should regularly review and adjust their plans to avoid an activist attack and to successfully deal with an activist attack if one should occur. Effective engagement with major shareholders is the essential element of activist defense.

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