

November 7, 2019

Shareholder Activism in France—A Model for the U.S.

In response to the sharp increase in campaigns by activist hedge funds in France and Europe generally, a French commission has conducted an extensive investigation and issued a carefully researched, reasonable and balanced [report](#) recommending regulatory and procedural changes to rebalance the relationship between companies and activists. The key recommendations are:

1. “[S]tronger transparency measures applicable to investors taking public positions, directly or indirectly, aimed at influencing an issuer’s strategy, financial position or governance. An activist taking a public position should disclose, *inter alia*, the number of shares and voting rights and the type of securities held in the issuer, along with any hedging position. This information should be updated as the campaign progresses. The AMF [the French financial markets regulator] could also ask the investor to confirm or deny the rumors that an activist campaign is being prepared.”
2. “[T]hat information made public by activists as part of a campaign should be subject to rules inspired by those applying to investment recommendations, in order to ensure the objective nature of information included in the white papers published by activists and the appropriate treatment of conflicts of interest.”
3. “[T]hat activists apply similar rules [to those applying to investment recommendations] in the context of their campaign. It is also proposed that, during a public campaign, the activist (i) explains to what extent its approach considers “the company’s social interest and takes into consideration the social and environmental issues related to the company’s activity” and (ii) publishes all documents that it sends privately to other shareholders. Finally, the legal framework applicable to activist campaigns could be partly inspired by the rules on active solicitation of proxies to ensure transparency regarding the rationale for their vote.”
4. Facilitate the ability of a company to respond to an activist attack during a “quiet period,” which would otherwise restrict the content of a company’s response.

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5. Increase disclosure with respect to activist short positions.
6. Consider rules to curb “empty voting” of borrowed shares or purchased voting rights.
7. Facilitate collective investor engagement with a portfolio company [bringing to mind The Investor Forum in the UK].
8. Improve engagement between companies and their shareholders as the best way to deter activist campaigns.
9. Require a dialogue process between an activist and a company before the activist can launch a campaign.
10. Companies, investors and regulators jointly develop a “guide to shareholder dialogue.”
11. Clarify the behavior likely to be viewed as “acting in concert” in the context of an activist campaign.
12. Strengthen the AMF’s resources and broaden its role in activist situations.

There was no direct recommendation with respect to “bumpitragage” – an activist buying shares of a company being acquired after the acquisition is announced for the purpose of foreclosing a full 100% takeover of the company unless the acquirer “bumps” the price originally offered. A legislative solution could be to take any shares purchased after a takeover is announced out of the vote necessary for a merger or to limit voting to shares that have been held for a period of time before the takeover was announced.

In light of the continuing activist campaigns in the U.S., it would be well for the SEC to consider creating a similarly tasked commission. With the recent action of the Business Roundtable in embracing stakeholder corporate governance, the recent publication by Hermes Investment Management of [\*Stewardship: The 2020 Vision\*](#), and the progress being made on acceptance by companies and investors of [\*The New Paradigm\*](#), a commission appointed by the SEC could be a major factor in promoting corporate adherence to social responsibility (ESG) and sustainable long-term investment.

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