

Shareholder Activism & Engagement

Contributing editors

Arthur F Golden, Thomas J Reid and Laura C Turano



2018

GETTING THE
DEAL THROUGH 

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Shareholder Activism & Engagement 2018

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Davis Polk & Wardwell LLP

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Preface

Shareholder Activism & Engagement 2018

Third edition

Getting the Deal Through is delighted to publish the third edition of *Shareholder Activism & Engagement*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria and Ireland.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Arthur F Golden, Thomas J Reid and Laura C Turano of Davis Polk & Wardwell LLP, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
January 2018

Introduction

Arthur F Golden, Thomas J Reid, Laura C Turano and Thomas D Malinowsky

Davis Polk & Wardwell LLP

In 2017 shareholder activism remained front-page news, with activist mainstays doubling down on their strategies and pursuing high-profile target companies. As in 2016, there were examples of shareholder activists suffering difficult investment returns, regulatory or legal challenges and trying proxy contest defeats. Despite these challenges, however, shareholder activism remained an undiminished force to be reckoned with, and shareholder engagement continued to be front of mind in the boardroom and the c-suite. It has become a 'chronic', as opposed to an 'acute', part of the landscape and boards regard it as such as they regularly review company strategies, risks and challenges.

In the past year, the size of average shareholder activist investments has grown, with activists investing considerable amounts in large-cap, household-name companies. For example, campaigns in the past year have included: ADP (Pershing Square), BHP Billiton (Elliott Management), Bristol-Myers Squibb (JANA Partners), CSX (Mantle Ridge), DowDuPont (Glenview, Third Point, Trian Partners), GE (Trian Partners), Honeywell (Third Point) and Procter & Gamble (Trian Partners). At an increasing rate, activists are seeking company management transitions and pushing ambitious operational changes and strategic transactions. This bull's-eye focus on company management and operational overhauls has sharpened the rhetoric on both sides of the table and has been a reminder of the importance and evolving nature of effective communications during shareholder activist battles. We have also seen the line continue to blur between activist fund and institutional investor. Institutional investors, with ever-increasing amounts under management, have also continued to demonstrate a willingness to wield (publicly and privately) their influence at portfolio companies in furtherance of their own agenda and the agenda of shareholder activists.

The chapters of this third edition of *Shareholder Activism & Engagement* are the results of the efforts of practitioners from all around the world, including some of the foremost experts in the expanding and global field of shareholder activism. This introduction identifies some of the trends and topics that we have seen as 2017 comes to a close, and we look forward to providing readers with in-depth, country-by-country coverage in the chapters that follow.

The adage remains true, no company is immune to shareholder activism

In 2017, the number of activist campaigns against target companies is reported to be relatively stable from 2016. Similarly, the breakdown of companies targeted by market capitalisation also largely remained unchanged from 2016. Despite the stagnant number of campaigns and size of companies targeted, 2017 has seen a sharp increase in deployed capital to the tune of more than double that of 2016, in effect raising the stakes from the prior year. For example, in 2017 there was Pershing Square's approximately US\$4.2 billion stake in ADP, Trian Partners' approximately US\$3.5 billion stake in Procter & Gamble, Elliott Management's approximately US\$2.2 billion stake in NXP Semiconductors and Mantle Ridge's investment of the entirety of its inaugural approximately US\$1 billion fund in CSX. Related to the increased size of individual investments, we have also seen activist funds (such as other hedge funds) attempt to persuade their investors to lock up their money with the fund for longer. This is a development that over time may impact the size and number of companies targeted by an activist fund, as well as the average holding period by the activist

prior to making a public demand and after settlement with the target company.

We would also note that while the number of campaigns and size of companies targeted has remained stagnant, the rhetoric of campaigns has been anything but monotonous. Perhaps reflecting the personal aspect of shareholder activist campaigns when management is targeted and significant changes are proposed, we have seen company spokespeople and activists speak publicly in no uncertain terms about one another. Carlos Rodriguez (the CEO of ADP) saying on CNBC that the founder of Pershing Square reminds him of a 'spoiled brat' and that the founder 'doesn't know what he's talking about', is just one example. We expect the rhetoric of the past year to cause renewed focus on maintaining a scripted message, while at the same time causing some to question (especially after ADP defeated Pershing Square) whether fiery rhetoric (within limits and depending on the circumstances) can sometimes help a company effectively deliver its message to shareholders. However, having been in the midst of many such campaigns, we continue to think that the ad hominem comments shed more heat than light on these contests, and can be counter-productive. Most shareholders, especially institutional shareholders, are more interested in, and likely to be persuaded by, the economics and value implications of the positions taken.

Institutional investors in the forefront

One focus of last year's discussion was the rise of institutional investors in the activist marketplace. At the same time that institutional investors have shown an increased desire to engage (publicly and privately) with their portfolio companies, they have also experienced a sharp rise in assets under management. In 2016, institutional investors experienced approximately US\$250 billion in net investment inflows, and net investment inflows have been estimated to be approximately US\$500 billion in 2017. The larger amount of capital at the disposal of institutional investors has had many effects on the shareholder activism and engagement landscape, including larger percentage holdings in, and resulting influence over, portfolio companies, as well as more personnel and resources dedicated to identifying and pursuing engagement strategies and policies.

In January 2017, the Investor Stewardship Group was formed. The group's initial signatories hold over US\$17 trillion in assets under management and include both institutional investors such as BlackRock, State Street and Vanguard and perennial activists such as Trian Partners and ValueAct Capital. The group is reported to have been formed in response to public criticism that governance campaigns generally amounted to no more than well-intentioned window dressing, and that words should be put into action. The group is an important reminder that institutional investors and traditional shareholder activists do not work in separate silos.

International engagement continues to climb

As in prior years, the United States remains the epicentre of shareholder activism. However, the relative rate of global campaigns continues to rise. In particular, as of the date of this writing, more capital had been deployed on activist campaigns in Europe in 2017 than in the previous three years combined, fuelled in large part by sizable engagements by activist mainstays Elliott Management (Akzo Nobel) and Third Point (Nestlé). Outside Europe, global markets for shareholder activism

continue to emerge. The number of campaigns in Asia (by nearly 50 per cent) and Australia (modestly) each rose in 2016, a trend that is likely to hold once 2017 comes to a close, and even smaller markets such as Israel and South Africa have seen recent upticks. The reasons for this trend vary, and run the gamut, from investors looking for opportunities competitors may not have identified (consider that as many as 20 per cent of US public companies are estimated to have already been targeted by activist campaigns) to seeking to apply strategies that, while hackneyed in the United States, are novel elsewhere. While global campaigns are still in their relative infancy, we expect international activist engagement to continue to rise in the coming years.

Final note

In this third edition of *Shareholder Activism & Engagement* we and the other contributing editors have prepared a number of updates to reflect the rapid evolution of the landscape of shareholder activism and engagement across various jurisdictions of interest, and are pleased to announce the addition of Austria and Ireland to this year's edition. Throughout this year's publication, we and the other contributors have identified key changes in regulations and market practice over the past year to enable our readers to better engage with the marketplace. We look forward to following continued developments with great interest as participants adapt their strategies to position themselves for future campaigns.

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