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Dealing with Activist Hedge Funds and Other Activist Investors

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The SEC rule requiring a universal proxy card in director election proxy fights becomes effective today. The resurgence of activism is already in progress, and the universal proxy card may significantly facilitate some proxy contests in which an activist is seeking to elect one or more directors to a company's board to replace incumbent(s). It will also affect proxy contest strategies, tactical considerations and the behavior of proxy advisory firms assessing competing director slates. As stated by ISS in its report on the universal proxy card:

The indisputable fact about the universal proxy card (UPC) is that it is a far superior way for shareholders to exercise their voting franchise than the two-card system that has dominated proxy contests for decades. But like the kid that receives the hot new toy at Christmas, only to become frustrated by its complex instructions, proxy advisors and investors will have to carefully navigate the first few UPC contests. Although UPC contests will increase the workflow of institutional investors, many funds have ramped up teams to evaluate these situations in recent years, so they are likely well prepared for this shift.

As we have previously noted, regardless of industry, size, performance or "newness" to the public markets, no company should consider itself immune from activism. No company is too large, too new or too successful. Even companies that are respected industry leaders and have outperformed the market and their peers have been, and are being, attacked. And companies that have faced one activist may be approached, in the same year or in subsequent years, by other activists or re-visited by the prior activist. The past two years of substantial economic, societal and market shifts have created new vulnerabilities and opportunities for activists and for companies.

Although asset managers and institutional investors will often act independently of activists, the relationship between activists and asset managers and investors in recent years has encouraged frequent and aggressive activist attacks. A number of hedge funds have also sought to export American-style activism abroad, with companies throughout the world now facing classic activist attacks. In addition, the line between hedge fund activism and private equity continues to blur, with some activist funds becoming bidders themselves for all or part of a company, and a handful of private equity funds exploring activist-style investments in, and engagement with, public companies.

Traditional activism, focused on short-term profit, stock price and total shareholder return (TSR), continues alongside a new form of activism emphasizing climate and other environmental, employee/human capital, social and governance (ESG) considerations. The activism landscape has also evolved to include dual purpose activists who combine both TSR and ESG arguments, as well as "pincer attacks" from ESG and TSR activists acting independently or in concert against the same company. The outcomes of recent economic and ESG-related proxy fights, activism campaigns and non-public activist approaches across industry sectors underscore the importance of advance preparedness to anticipate...

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