

# Shareholder Activism & Engagement

*Contributing editors*

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2017

GETTING THE  
DEAL THROUGH 

# Editor Q&A - Shareholder Activism & Engagement



Following the launch of *Getting the Deal Through - Shareholder Activism & Engagement 2017* earlier in the year, we ask the editors for their take on the latest developments and trends in this fast evolving area in an interview exclusive to subscribers of the *Getting the Deal Through* briefing.

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## Editor Q&A

with *Arthur F Golden, Thomas J Reid and Laura Turano of Davis Polk & Wardwell LLP*

### *What are the hot topics?*

We would note two key trends:

- No company is immune to shareholder activism – in 2017, we have continued to see examples of large-cap companies with household names being targeted by shareholder activists. For example, ADP, Bristol-Myers Squibb, Procter & Gamble, General Motors, Tiffany & Co. and Whole Foods.
- Increased focus on CEO/management – a number of shareholder activist campaigns this year have focused on replacing the CEO and top management. For example, ADP, Arconic, Avon, Buffalo Wild Wings and CSX. At the same time, we have seen a number of campaigns take an increasingly personal tone. For example, Klaus Kleinfeld (the then CEO of Arconic) sending a letter to the founder of Elliott, and 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’. Especially in campaigns calling for the ousting of a CEO, we expect intense focus on maintaining a scripted message.

*Tell us about any key legal developments – recent or pending – and their international impact.*

The SNAP IPO in March 2017 sparked a heated debate in the US and elsewhere regarding dual-class share structures. SNAP issued only non-voting shares in its IPO, retaining all voting power for its founders and a few preIPO investors. Following the IPO, the Council of Institutional Investors and others lobbied the major index providers to bar non-voting shares from their indices, arguing that, absent this change, passive investors such as index funds would be forced to invest in non-voting shares. The S&P Dow Jones Indices and FTSE Russell recently announced plans to revise their index eligibility rules. We believe that this issue will be important to monitor because of the potentially large implications for governance structures, shareholder activism defence, availability of a range of investment choices for retail investors, and the competitiveness of the US markets compared with other international markets.

*What are the biggest opportunities and challenges for practitioners and clients?*

Although the US remains the dominant market for shareholder activism, we believe that it is truly a global phenomenon. In 2017, this has been highlighted by Third Point's campaigns at Nestlé and Philips. As shareholder activism becomes more prevalent abroad, the 'imports' and 'exports' of practice across jurisdictions will become increasingly important. We also expect that there will be a continued focus on settlement practices. This focus does not mean that settlement is not the correct answer. It may mean, however, that more scrutiny is due to the terms of settlements. The value to a target company of a settlement is often détente – in particular, the activist agreeing to a standstill. As more activist funds refuse to agree to standstills, we expect more target companies to question why they should agree to settlements, which could have a meaningful impact on market practice.

## Shareholder Activism & Engagement 2017

Understand the latest regulatory developments affecting activist investors and the companies affected by them – read *Getting the Deal Through – Shareholder Activism & Engagement* online now.

Industries prone to shareholder activism • Typical characteristics of shareholder activists • The operational, governance and sociopolitical focus of shareholder activists • Strategies and tactics used by activist shareholders • Strategies and tactics used by companies in response • Disclosure and transparency requirements • Fiduciary duties of directors and shareholder activists

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## Other Expert Contributions by *Davis Polk and Wardwell LLP*

### Corporate Governance - Global Overview

Authors: *Arthur F Golden, Thomas J Reid, Kyoko Takahashi Lin, Laura C Turano and Morgan Lee*

‘Corporate governance remained a top priority in 2016, demonstrating both its importance and “staying power” as an essential consideration for companies and their investors and advisers...’

### Equity Derivatives

Editors: *John M Brandow, Ray Ibrahim and Mark M Mendez*

‘The election of a pro-business president and the continued expectation that the Federal Reserve will increase interest rates, along with a number of corporates that may be seeking to refinance convertibles coming to maturity in 2017, give 2017 great potential for new convertible issuances...’

### Equity Derivatives - United States

Authors: *John M Brandow, Ray Ibrahim and Mark M Mendez*

‘As of 1 March 2017, the SEC has proposed, but not yet finalised, its uncleared security-based swap margin rules that would apply to security-based swap dealers that are not prudentially regulated by a US banking regulator...’

### Merger Control - United States

Authors: *Ronan P Harty and Mary K Marks*

‘In June 2016, the FTC announced an increase in the maximum civil penalties it may impose for violations of the HSR Act. The maximum civil penalty for HSR violations increased from a daily fine of US\$16,000, to a much larger fine of US\$40,000 per day, which was adjusted to US\$40,654 in January 2017...’

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