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The Road Ahead for Shareholder Activism

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Editor's note: Gail Weinstein is senior counsel, and Warren S. de Wied and Philip Richter are partners at Fried, Frank, Harris, Shriver & Jacobson LLP. This post is based on a Fried Frank memorandum by Ms. Weinstein, Mr. de Wied, and Mr. Richter. Related research from the Program on Corporate Governance includes The Long-Term Effects of Hedge Fund Activism by Lucian Bebchuk, Alon Brav, and Wei Jiang (discussed on the Forum here), Dancing with Activists by Lucian Bebchuk, Alon Brav, Wei Jiang, and Thomas Keusch (discussed on the Forum here), and Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System by Leo E. Strine, Jr. (discussed on the Forum here).

Notwithstanding that shareholder activist funds themselves continue to have below-market returns, shareholder activism continues to expand and intensify. While many commentators have cited 2018 as a "record year" for activism in terms of number of campaigns, capital deployed, number of activists involved, first-time activists, and board seats obtained, the growth of activism from 2017 to 2018 was modest, particularly when campaigns against an announced merger and short seller campaigns are excluded. In addition, first time targets in the U.S. represented less than 43% of financial activist's targets.

While statistically activism continues to grow, statistics alone do not tell the story. In our view, the activist investing market in the U.S. is mature. Moreover, the pervasiveness of activism has driven critical transformations in the mindset and actions of corporate boards, management teams and institutional investors. Although we expect that activism will continue to evolve and will remain a prominent feature of the corporate landscape and that new themes and changing market conditions will create opportunities for activists, we believe the road ahead contains many pitfalls for activists.

In our view, it is likely that:

Market conditions will remain uncertain, with political uncertainty driving continued market volatility and more challenging financing conditions. With an election year looming in 2020, that volatility and uncertainty are likely to cast a shadow over the next couple of years; and it is possible that the recent market correction could become a downturn. While the early stages of a downturn could bring a surge in activism, an extended slump would likely result in a substantial contraction of activist activity in the equity market.

Over time, and particularly if there is a significant market disruption and/or tightening of liquidity, we expect that there will be a concentration of the ranks of activists. Activist

hedge funds are particularly exposed to market forces, as they hold large, illiquid positions. The recent announcement by JANA Partners, one of the most prominent activist firms, that it is liquidating two hedge funds to focus on a $1.5 billion activist fund and a new social activism fund, as well as reports of a significant exodus of investors at occasional activist Greenlight Capital, underscore that activists are as vulnerable to business challenges as the companies they target.

M&A-related issues are likely to continue to be a major focus of activism, but there will be increased activity in the area of ESG (possibly including non-conventional ESG), and workplace issues (such as sexual harassment issues) likely will be an area of scrutiny for activists and a catalyst for activism.

As activists seek to drive improvement in their own financial results, they may become even more aggressive—such as, possibly, by proactively pressing for sales of companies to identified buyers and bidding for companies themselves (rather than primarily being responsive to announced transactions and rumored sale or restructuring processes) and/or by seeking CEO replacements or other high-impact changes; and

Activism will continue to be focused on the U.S., but with further expansion in Europe and Asia and, over time, even into emerging markets (where there are significant structural impediments, but also a wide disparity between market prices for companies and their underlying value given the inefficiency of the markets).

2018 Was a "Record Year" for Activism[1]

Record number of campaigns. Shareholder activist campaigns increased in 2018 to a record number, with about 250 campaigns initiated during the year (up from the 2017 record of about 210 campaigns initiated). Notwithstanding significant market volatility in the last quarter of 2018, there were more activist campaigns initiated than in any other fourth quarter. Moreover, the average market capitalization of the companies targeted has continued to increase. However, the increase in activity in the U.S. was modest, particularly when campaigns against an announced merger and short seller campaigns are excluded. In addition, first time targets represented less than 50% of U.S. targets of financial activists.

Record capital deployed. A record amount of capital ($65 billion) was deployed in new activist campaigns in 2018 (up 30% over the average annual amount deployed from 2015-2017).

Record number of activists. A record number of investors engaged in activism in 2018 (about 130, up from about 110 in 2017). The number of first-time activists (about 60) roughly doubled from 2017 (and is up about one-third from the previous high in 2016).

Record number of board seats won. Activists won a record number of board seats in 2018—over 150 seats (up over 50% from 2017 and 10% from the previous record number in 2016). As in prior years, few proxy fights went to a vote and the year's most closely watched fight, by Third Point at Campbells, settled shortly before the vote when it was apparent that Campbells would prevail due to support from members of the founding Dorrance family. While some commentators

[1] Our data is derived from SharkRepellent and other publicly available sources and reflects global campaigns against U.S. and foreign companies with a market capitalization of more than $500 million.

have noted an increased percentage of "long slate"[2] proxy contests, only a handful of such contests went to a vote and the activist replaced a majority of the board in only two long-slate campaigns. We note that one activist (Starboard), which was involved in one of these campaigns that led to a change in a majority of the board, has been routinely submitting nominations for 50% or more of the board seats in its campaigns.

Global expansion. Although about 60% of activist campaigns (by both number of campaigns and capital deployed) in 2018 targeted U.S. companies, activism has been spreading globally. In 2018, about 25% of the campaigns targeted European companies and 10% targeted Asia-Pacific companies.

The Statistics Overstate Activism's Success

While there is no doubt that the energy and expansion of activism continues, the growth of activism in the U.S. has slowed and the number of repeat activism targets exceeds the number of first time targets. The following should be noted:

Concentration of activity among a small number of leading activists. A small number of top activists, and a small number of campaigns, account for much of the activist activity at issuers of scale. In 2018, one activist (Elliott) alone accounted for 10% of the total number of new public campaigns; and the top five activists (measured by the number of *new campaigns* launched in 2018) (Elliott, Gamco, Starboard, ValueAct and Icahn) accounted for almost a quarter of the campaigns. Just one campaign (TCI's campaign at Altaba[3]) accounted for 11% of the total capital deployed in new activist campaigns. The top five activists (measured *by capital deployed* in new activist campaigns in 2018) (TCI, Elliott, ValueAct, Icahn and Third Point) accounted for 30% of all capital deployed in new activist campaigns during the year. With respect to board seats won by activists, the top five activists gaining the most board seats from 2013-2018 (Starboard, Elliott, Icahn, JANA and Engaged Capital) accounted for almost 40% of all of the board seats won during that period (with the top two activists alone accounting for almost 25%). The top five activists measured by number of board seats won in 2018 (Starboard, Elliott, Icahn, Legion and ValueAct) accounted for almost half (and the top two of these alone accounted for almost a third) of the seats won during the year. Thus, while the number of investors engaged in activism and the number of first-time activists have been increasing in recent years, these statistics belie the reality that it is a small number of activists that has been driving most of the activity and having most of the success.

The overstated significance of "board seats won."

- While the number of board seats obtained by activists in 2018 (about 160) exceeded the number obtained in 2017 (about 100), just three activists (Starboard, Elliott and Icahn) accounted for over 70% of the seats won in 2018. Just 11 activists account for a majority of all of the board seats won by activists from 2013-2018. Of the companies that ceded board seats to activists in 2018, roughly 40% ceded only one board seat; roughly 30% ceded two seats; and roughly 30% ceded three or more seats.

[2] "Long slate" contests seek replacement of all or a majority of the board in order to obtain control of the board.

[3] TCI called for Altaba (which owned the legacy assets of Yahoo! and a large stake in Alibaba) to liquidate. TCI contended that the company was trading at an unnecessarily large discount to the net asset value and should take advantage of recent US tax law changes by liquidating.

- While the significance of *any* activist director in the boardroom should not be understated, in most cases activism leads to a "seat at the table" and a "voice on the board," not a sea change in corporate strategy. Of course, some activist nominees prove to be highly effective and wield outsized influence in the board room.
- Most board seats won by activists are obtained through settlement with the company rather than a proxy contest. Very few proxy contests that are initiated by activists go to a vote.[4] While the proportion of seats won in 2018 in proxy contests initiated by an activist increased compared to 2015-2017, the percentage was in line with that in 2013-2014.[5] Also, while there has been an increase in the number of long-slate contests by activists and these campaigns attract significant attention, they remain infrequent. In 2018, although activists replaced a majority of the board of directors at Forest City Realty and Sandridge Energy, these were outliers. It remains highly unusual for an activist to run a successful campaign to replace a majority of the board.
- Increasingly, activists have designated directors who are independent of the activist and similar in experience to directors who would have been nominated by the company itself. Of all the directors designated by activists since 2013, a majority have *not* been employees of the activist. In 2018, a record 80% were not employees of the activist; about 30% had experience as a CEO or CFO of a public company; and about 70% had experience as a public company director. Companies typically conduct interviews and background checks on directors added via a settlement, so the issuer usually has a reasonable understanding of the potential designee before it agrees to add him or her to the board.

Non-U.S. activism has slowed. The uptick in non-U.S. activism in recent years ceased in 2018. The aggregate market value of new activist positions in Europe in 2018, as a percentage of global capital deployed in new activist campaigns during the year, was 24%, reflecting a decrease from 28% in 2016 and 35% in 2017. The aggregate market value of new activist positions in Asia in 2018, as a percentage of global capital deployed in new activist campaigns during the year, was 8%, down from 13% in 2016 and 10% in 2017. On the one hand, global macroeconomic and legal trends should lend force to the global expansion of shareholder activism, as developing countries try to create well-functioning markets with the free flow of capital and investments, and corporate law systems internationally continue to converge (as part of the larger globalization of the world economy). In addition, some countries afford greater minority rights to shareholders than is the case in the U.S., offering activists additional legal tools in those countries to use as pressure points. On the other hand, however, there are significant structural challenges in many

[4] Although 2017 was known for high-profile proxy fights by activists (for example, at P&G, Arconic and ADP), there have been fewer activism-related proxy contests in each of 2016, 2017 and 2018 than in prior years. In each of these years, fewer than 20% of activist campaigns involved a full-blown proxy contest (*i.e.*, where the company filed a proxy statement in response to an activist).

[5] In 2018, 22% of board seats obtained by activists were obtained in a shareholder vote rather than through settlement (and most of the seats won in shareholder votes related to just two campaigns—the campaign by Elliott against Telecom Italia and the campaign by Icahn against SandRidge). In 2015-2017, an average of 14% of the seats won were obtained in proxy contests. In 2013 and 2014, about one-third of board seats won were obtained in proxy contests. Issuers in general are more willing to settle with activists nowadays rather than engage in a protracted and costly public fight with an uncertain outcome. In many cases a settlement may involve adding new independent directors, but does not require the issuer to add a representative of the activist to its board. Most settlements are achieved before a preliminary proxy statement is filed. Once parties have begun to trade blows by the filing of preliminary proxy materials and other pre-commencement materials, it becomes more difficult to settle, and settlements after the mailing of the definitive proxy materials are rarer still. As a general rule, activists tend to accede to more favorable terms for the issuer in earlier settlements.

jurisdictions (including economic, legal, corporate structure, and cultural impediments) which have slowed the global spread of activism.[6]

***Campaigns targeting super-cap companies remain infrequent*.** While the average size of companies targeted by activists has been getting larger, and while very large capitalization companies are sometimes targeted, companies with a market capitalization in the range of $100-500 million continue to be the most frequently targeted. In 2018, roughly 15% of public activist campaigns (29 campaigns) targeted companies with a capitalization over $20 billion (only 14 of which companies had a capitalization over $50 billion; and only 2 of them had a capitalization over $100 billion).[7]

***Returns for activist funds have been low and highly volatile*.** Critically, while some activist hedge funds have been very profitable, most have significantly underperformed market indexes. According to the HFRI Activists Index produced by Hedge Fund Research, Inc., the return to investors in activist funds in 2018 averaged -10.53% (while the average return for hedge funds overall was -6.09%). These results significantly lagged the returns of the Dow Jones Industrial Average (-3.48%) and the S&P 500 Index (-4.39%). As noted above, JANA Partners and Greenlight Capital are two prominent players that have encountered challenges. Only a very few activist funds posted notable gains in 2018 (namely, CIAM, Voce Capital, and Corvex) and there may be additional casualties of the market correction of 2018. Further, returns for activist funds have continued to be highly volatile from quarter to quarter. These generally dismal results have been consistent since the advent of activism and probably will lead over time to a concentration of capital in those activist funds with name recognition and/or demonstrably better returns.

Transformation in the Board Room and Executive Suite and Among Institutional Investors

A critical consequence of the pervasiveness of activism has been a transformation in the mindset and actions of directors, senior executives and institutional investors.

Boards and Senior Executives are "thinking like an activist." Boards now routinely take into account the potential of an activist challenge in connection with their oversight of companies' operations, capital allocation, management, corporate transactions and board composition. Adopting the general approach of "thinking like an activist," boards and senior executives have been working to identify and address possible areas of vulnerability to an activist's challenge. They have been ever more mindful that the best defense to an activist approach is a well-run company with a strong stock price, have focused on corporate best practices, have adopted many ideas from the activists' playbook, have enhanced their investor engagement programs and have improved their public relations strategies and messaging. When planning and executing

[6] In many EU jurisdictions, the proxy and corporate governance rules that exist favor companies and incumbent boards. In emerging market jurisdictions, it is considerably more difficult to engage in activism because the regulatory, corporate and legal systems are less developed, offering less precedent and transparency. In many of these jurisdictions, company share ownership is concentrated, frequently in the hands of controlling families or oligarchs through cross-shareholding blocks; it can be difficult to communicate directly with shareholders because of the use of bearer shares; proxy advisory firms do not have a large presence; local institutional shareholders may not be inclined, for political and cultural reasons, to challenge controlling stockholders or incumbent management; and shareholder litigation is minimal, as the court systems may tend to be slow and (due to a lack of precedent and other factors) unpredictable.

[7] The largest companies targeted in 2018 were Citigroup (targeted by ValueAct), PayPal (Third Point), and United Technologies (Third Point and, separately, Pershing Square).

corporate transactions, boards generally now consider whether the transaction would attract the interest of activists and whether a different structure would reduce the likelihood of attracting that interest or would facilitate an effective response to such interest. In this context, most boards and management teams have redoubled their focus on formulating and executing their long-term strategies and on developing and maintaining good communication and ongoing relationships with their key investors.

Institutional investors are more involved and vocal. The relationship between companies and their long-term institutional investors has been transformed. Given the concentration of equity ownership among institutional investors,[8] an activist's success typically will depend on convincing only a small number of investors of the credibility of the activist's thesis. The most frequent activists have developed significant relationships with the largest institutional investors. Institutional investors, who previously had been passive in connection with their investments, have become more involved and vocal. The largest investors have developed in-house capabilities to evaluate companies' proposed transactions and other events (which has led to some decline in the influence of proxy advisory firms as an intermediary between companies and their institutional investors) and they increasingly have weighed in on and been willing to support activist campaigns, both behind-the-scenes and publicly.[9]

Boards have responded by ramping up their engagement with institutional holders, including through more proactive, ongoing and expansive shareholder engagement programs than in the past, including "non-deal roadshows." At the same time, certain limitations are to be noted. First, it can be difficult for companies—particularly smaller ones—to develop decision maker-level relationships with the major institutional investors, who have limited availability and have many companies competing for space on their calendars. Also, the top institutional investors need to be careful about taking public (or even non-public) positions (ahead of a vote) on disputes between activists and boards due to concerns about potentially losing their status as "passive" investors.[10]

The cadence of M&A activity has changed. In about one-third of newly announced public activist campaigns in 2017 and 2018, the stated key objective related to M&A—that is, (i) calling for the sale of the company (as in Third Point's campaign for Campbell's to explore a sale of the company; Bunge's and DE Shaw's campaign for Continental Grain to explore a sale; and Ciam's campaign for Scor not to reject Covea's offer for the company); (ii) calling for a break-up of the company or the divestiture of non-core assets (as in Starboard's campaign at Magellan Health

[8] Institutional investors own in the aggregate 80% of the market value of the S&P 500 and the Russell 3000 (with the largest ten institutional investors owning over 30% and the largest two alone owning 20%).

[9] Examples in 2018 of notable public support for activists by passive managers included the following: After Elliott's offer to acquire athenahealth, institutional investor Janus Henderson urged in a regulatory filing that athenahealth explore a sale of the company and institutional investor ClearBridge sent a letter to the athenahealth board advocating for a sale (after which athenahealth entered into an acquisition agreement with Elliott). Also, after activist Cevian urged ABB Ltd. to spin off its Power Grids division, institutional investor Artisan called for ABB to pursue a break-up of the company (after which ABB sold the Power Grids division to Hitachi and distributed the sale proceeds to the stockholders). In addition, at a conference in London, Janus Henderson expressed support for ValueAct's "shining a light" on Rolls Royce in its ongoing campaign there. Cases in 2018 in which institutional investors supported management rather than the activist included the following: After Detour Gold had added two dissident directors to its own slate and had committed to replace its CEO, institutional investor BMO voiced support for the Detour Gold slate in the proxy contest with activist Paulson (and Paulson then won 5 of the 8 seats it sought). Also, amidst ongoing pressure at Nestle from Third Point, T. Rowe was quoted in a newspaper article on Nestle's governance as continuing to be supportive of Nestle's board and management; and, after Elliott commenced a public campaign at Pernod Ricard, institutional investor Gamco Investors voiced support for the company's "family values" and long-term creation plan.

[10] An institutional investor's loss of "passive" status would result in the investor becoming subject to the reporting and short-swing profit provisions of Section 16 and the more onerous reporting obligations of a Schedule 13D filer. Since many institutional investors are index funds, it is impracticable for them to engage in activities that would require them to refrain from trading.

pressing for a sale of assets to make up for money-losing contracts; Amber's campaign at Suez for divestitures to finance debt reduction; Elliott's and Sachem's campaign at Whitbread for divestitures; and Elliott's and Bluescape's campaign at Sempra Energy for consideration of a break-up of the company's "disparate" businesses); (iii) seeking to block or improve the financial terms of a proposed deal (as in Icahn's effort to increase the offer price in the Dell/DMVT transaction; Icahn's campaign against the take-private offer at AmTrust Financial; Oasis's opposition to Alp's acquisition of Alpine; and Elliott's opposition to Hyundai's restructuring plan); or (iv) pressing for a merger or private equity deal with the activist itself (as in Elliott's campaign to acquire athenahealth). While board change also was a primary publicly stated objective in about one-third of the newly announced public campaigns in this period, a value maximization thesis usually underpins campaigns for board change.

Of note, the majority of M&A transactions are now initiated *by a bidder* rather than by a target company's decision to initiate a sale process. In addition, concurrent with the increased aggressiveness associated with activism, there has been a significant increase in "hostile" (*i.e.*, unsolicited) M&A bids.[11] Further, the potential for activism has made companies more cautious about rejecting a credible acquisition proposal. In this connection, when a bidder chooses to make its interest in a target company known publicly, it can generally count upon activist investors to emerge and to increase the pressure if the target company resists the bid. Activists may also surface after a failed unsolicited offer seeking to oust recalcitrant board members. Finally, the threat of activist involvement also can discourage companies from proposing a sale or other transaction that may be questioned by shareholders. Of course, there is a risk of a slowdown in M&A and, should that occur, it will have a depressive impact on activist campaigns.

New Campaigns Announced in 2018 by the Top* Five Activists

Activist	Market Value of New Activist Positions Taken in 2018**	# of New Campaigns Initiated in 2018	Size of Targets—# with Market Cap that is Medium / Large / Very Large / Mega / Super-Mega***
TCI	$ 9.82	2	2 Super-Mega
Elliott	6.71	19	6 Large 5 Very Large 4 Mega 4 Super-Mega
Icahn	4.14	6	1 Large 1 Very Large 4 Super-Mega
Third Point	3.09	4	1 Very Large 1 Mega 2 Super-Mega

[11] Unsolicited ("hostile") transactions represented almost 13% of all deals (and total deal value of $575 billion) in 2018—which was down slightly from 2017 (15% and $522 billion) but reflects a greater prevalence of these deals than in the recent past.

ValueAct	2.69	8	2 Medium 4 Large 1 Very Large 1 Super-Mega

* Measured by market value of new activist positions taken in 2018.
** In U.S. $ billions. Valued at the date of announcement of the campaign.
*** Medium Cap= $0.5-1B; Large Cap= $1-5B; Very Large Cap= $5-10B; Mega Cap= $10-20B; SuperMega Cap= above $20B.

Where Activism Will Go From Here

ESG activism likely is on the upswing. Some have speculated that institutional investors' general focus, and their recent much more vocal emphasis, on corporate "stewardship," "long-termism" and ESG (environmental-social-governance) issues may lead to an accelerated focus by activists on governance-related topics going forward. Indeed, in 2018, institutional investors continued a ramping up of their focus on ESG-related issues, including board diversity and refreshment, employee diversity, environment, sustainability and climate change. Notably, the NYC Pension Fund's Boardroom Accountability Project (which recently completed a very successful campaign for the adoption by companies of proxy access bylaws) began a campaign relating to board diversity, which calls on companies to disclose, on a standard matrix, information about the race, gender and skills of their directors. Also of note, institutional investors BlackRock, State Street, CalPERS and CalSTRS all have added board diversity to their voting policies (and California has adopted a first-of-its-kind law requiring a minimum number of female directors on the boards of corporations incorporated or headquartered in the state). Also in 2018, JANA partnered with CalSTRS to publicly press Apple to facilitate parents' restricting their children's cellphone use; and Trillium publicly urged the Nike board to improve workplace diversity, gender pay parity, and oversight of sexual harassment. We query whether some institutional investors may expand their focus beyond conventional ESG to other political, economic and social issues that appear to directly and significantly impact corporations (such as, possibly, federal immigration or trade/tariff policies).

We expect that workplace conduct issues, including sexual harassment and abuse issues, are likely to become a catalyst for activist activity as more high-profile companies are affected and their boards are confronted with related, unanticipated succession and governance challenges. In addition, activists are scrutinizing the hobbies and social activities of key individuals at target companies. We note that activists (and issuers as well) have long used private investigators to obtain information that can be used in activist campaigns and proxy contests (a practice highlighted in a recent article discussing Elliott's campaign at athenahealth—although Elliott denied a number of statements made in the article). In the current environment, we expect that activists are likely to make aggressive use of private investigators with respect to workplace conduct issues as well as the private lives of key personnel.

M&A-related activism may become more aggressive. In addition to the poor returns that activist funds have experienced, activists have been holding their investments for longer periods, and directors appointed in settlement agreements have been serving longer than the period required under the settlement. Activists have harvested many of the "low-hanging fruit" targets in

the US and repeat campaigns now significantly exceed first time ones. These trends should portend in the near future a decline in activism generally and/or (in our view the more likely given the high level of assets under management by activist funds) a continued thinning of the ranks of lesser-scale activist funds, possibly with an increasingly aggressive posture by activists as they attempt to drive profitability. Increased aggressiveness is likely to be reflected in an expanded emphasis on M&A (as well as other potentially high-impact actions, such as, say, CEO replacement).

In addition, M&A activism may become more aggressive—for example, in addition to activists responding to an announced or rumored deal and an seeking to improve the price and/or terms being discussed or to block the deal, activists may become more aggressive in seeking more often to stimulate the sale of independent companies, and in that connection activists may themselves identify and contact particular potential buyers (likely after acquiring an equity stake in the target) or submit bids for companies. Further, activists may acquire target company out-of-the-money options, in lieu of or in combination with stock, when acquiring their equity stake in the target (when the activist has a relatively high degree of confidence that an M&A transaction or other value-enhancing action is likely to occur, and has a relatively higher risk tolerance in connection with seeking to achieve potentially significantly higher returns).[12]

The Potential Return of Distressed Activism. Credit conditions tightened in the latter part of 2018 and a downturn would present challenges for many issuers confronted with high leverage and/or limited liquidity. These conditions are ripe for hedge funds that invest in distressed securities and the next year could see an upswing in distress-focused activism.

A Shakeout Among Activists? We believe that market conditions will remain uncertain, with political uncertainty driving continued market volatility and more challenging financing conditions. With an election year looming in 2020, that volatility and uncertainty are likely to cast a shadow over the next couple of years; and it is possible that the recent market correction could become a downturn. While the early stages of a downturn could bring a surge in activism, an extended slump would likely result in a substantial contraction of activist activity in the equity market.

The long-running bull market that drove an M&A boom and helped to insulate activists (who in many cases are long-only holders, often with illiquid positions) against downside risk, has stalled and investors endured highly volatile market conditions in 2018, with the likelihood that these conditions will persist or even intensify in the next year or two. As noted, JANA Partners and Greenlight Capital are among the victims of the choppy markets of 2018. If these well-regarded funds have encountered significant challenges, there are likely others. A major correction would exacerbate the challenges to many activists and likely lead to a significant reshaping of the activist landscape.

[12] In this connection, we note that activists have not followed, and are not likely to follow, the Pershing Square-Valeant model used in 2014, where the activist acquired an equity stake in the target after teaming up as a kind of co-bidder with the corporate bidder; and where the activist used *in*-the-money options to acquire the equity stake.