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Annual Meetings and Activism in the Era of ESG and TSR

During the past five years we have been experiencing: (1) activism seeking greater total shareholder return or a price enhancing transaction or the abandonment of a merger or other financial transaction, (2) activism to achieve a change in management to accomplish the activist's objective, either TSR or ESG, and (3) activism to seek both TSR and ESG with the activist seeking to leverage one to achieve the other. The proxy advisors, Institutional Shareholder Services and Glass Lewis, have taken various positions in proxy solicitations raising these issues, sometimes inconsistent and sometimes using their Say on Pay vote or withholding a vote for one or more directors to show their position on an issue. The major asset managers have also taken various positions and, with increasing frequency, have been supporting activists. In large measure, the proxy advisors and the major asset managers, especially, BlackRock, Vanguard, State Street, Fidelity and T. Rowe Price, together vote or influence the vote in manner sufficient to determine every significant proxy contest.

This proxy season, now coming to an end, has numerous examples of the key ESG issues, climate, environment, diversity, executive compensation, and employee working conditions and compensation and the TSR issues. What is particularly striking is the large number of "surprises" where proxy contests were lost due to failure to effectively present an issue or failure to ascertain, and where appropriate change, the views of the voters in advance of the meeting. Activism will continue to grow. To avoid surprises, careful review of this season's proxy voting and effective engagement, well in advance of next season, with the proxy advisors and asset managers is essential. Also essential is a team of outside advisors and corporate officers to plan the premeeting investor engagement and the presentation of the issues to be voted upon.

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