A TEMPORARY CEASEFIRE

AN INTERVIEW WITH PAUL SCHULMAN, MANAGING DIRECTOR AND CO-HEAD OF M&A AND ACTIVISM ADVISORY GROUP AT MORROW SODALI.

What was the initial activist response to COVID-19 and did that change over the proxy season?

Prior to the rumblings surrounding the virus outbreak in late February and early March, when the implications were still very uncertain, we had a very robust pipeline of activism situations in-house. Most public companies' nomination deadlines had passed before the pandemic took its dramatic toll on the stock market, creating significant uncertainty.

The initial reaction to this uncertainty was that the volatility in stock prices would render companies more vulnerable and bolster an activist's case, leaving activists less likely to settle. In the end, many companies prioritized the need to hold on to precious capital – just to survive in many cases, rather than spend it on a costly proxy fight – while activists were uncertain as to the support they would get from other shareholders for attacking companies during a global pandemic. More situations found a suitable middle ground and were resolved.

How has the shift to virtual meetings been received? Are these the way of the future, even in contested situations?

For many public companies the shift to virtual meetings has generally been very smooth but I believe there will be a return to live meetings, including hybrid formats, once those are possible again. Historically Glass Lewis and a number of funds have opposed the virtual-only format and will exercise their displeasure through director election votes.

In contested situations, virtual shareholder meetings still lack certain features that are desirable, and as a result, there have had to be procedural changes to the meeting protocol and conduct that have now become standard. Going forward, the risk of being attacked by an activist for hiding behind a virtual wall is not worth taking for what is almost always a perfunctory event, even in the most contentious battles.

How has the importance of ESG in activism evolved this year?

Environmental and social issues were clearly becoming more prominent topics generally for investors coming out of 2019, and we see activists adding these more frequently to their attack theses in the future as their importance for institutional voters increases. We've just seen the announced launch of Jeff Ubben's ESG-focused activist firm as further evidence that ESG will start to become a core theme in activist campaigns.

Board diversity, which has been almost exclusively focused on gender, will likely be more broadly applied to include racial and other diverse characteristics.

Has there been much concern among issuers that there will be activism around capital raises?

We have seen some concern but had only one situation we were involved in where activism escalated into a public battle. Clearly not every capital raise needs a shareholder vote and it remains to be seen whether activists will argue that the terms surrounding the funding are not in shareholders' best interests, that funds are being misused, or that a dilutive raise was, in hindsight, unnecessary as a key component of any 2021 campaigns.

Do you anticipate that U.S. activists will continue to explore foreign markets, or will they focus on opportunities closer to home in the near future?

We fully expect that activism will continue to play out across the globe, with U.S.-based funds primarily picking their targets domestically, but as we have seen, continuing to expand primarily into Europe and Japan.

The major unknown is still the impact that the COVID-19 pandemic and the risk that a resurgence would have on the activism landscape generally both here and abroad. But with so many campaigns put on the back burner during the 2020 proxy season, and the opportunity for bargain buying when the market dropped earlier this year, there is plenty of speculation that 2021 and possibly the back half of this year will be a very busy time in the shareholder activism arena.