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Mergers & Acquisitions

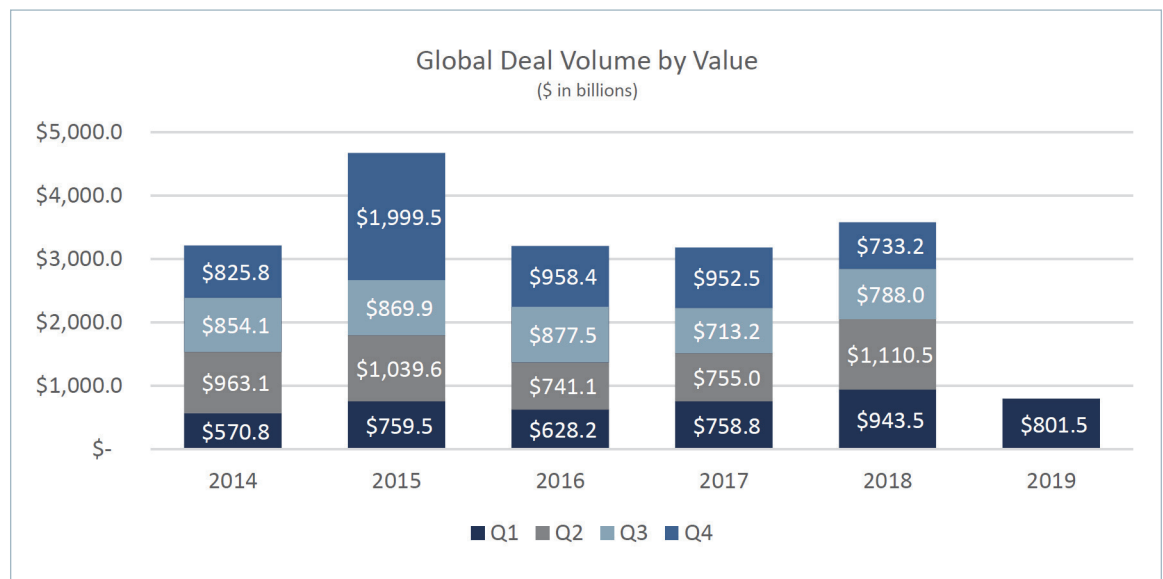
TRENDS¹

Following near record levels of deal activity in the first half of 2018, greater market volatility, geopolitical tensions, global uncertainty and increased economic headwinds combined to dampen the global M&A environment in Q1 2019 relative to Q1 2018. This was not surprising, as CY 2018 was the third highest on record in terms of dollar value, featuring a first half with thirty megadeals (greater than \$10 billion) and the second highest deal volume of all time in terms of value. The factors cited as exerting downward pressure on the M&A market in the first part of 2019 actually started to become apparent in the back half of 2018. So, in some sense, these factors simply continued to play out in early 2019 as corporate boards and executives grappled with the need to find growth and to respond to changing dynamics in their industries, while also facing uncertain geopolitical conditions and the expected cool down in the global economy, especially in the United States.

Global Deal Making Drops by 15%;

Remains Healthy Relative to 5-Year Period

The first quarter of 2019 saw 3,558 transactions worth a total of \$801.5 billion, a 15% reduction in value compared to Q1 2018, which featured 5,085 deals worth \$943.5 billion. The first half of 2018 was the second most active for deal making in terms of dollar value, so some reduction is not unexpected. However, despite lower volumes to date relative to the same period last year, Q1 2019 was the second highest quarter in terms of global deal value since 2014, and on par with first quarter deal counts over the past five years. Q1 2019 saw nine megadeals, including six deals over \$20 billion; these deals collectively represented 36% of the overall global deal volume for the quarter, showing how a small number of large cap deals can drive global volume data.



Source: Mergermarket

¹ All data regarding M&A activity from Mergermarket unless otherwise indicated.

Cross-Border Deals Decline by 15%; Major Reduction in Mega Deals

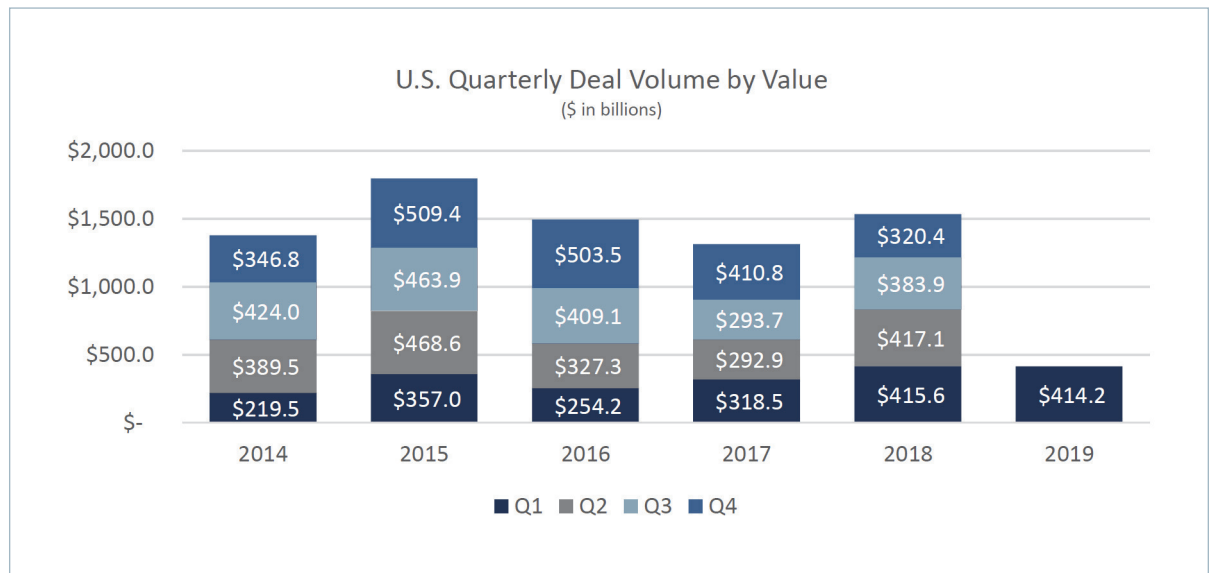
Q1 2019 cross-border deals declined by 15% to \$246.9 billion compared to the first quarter of 2018. Cross-border deals accounted for only 30.8% of global M&A volume in Q1 2019, relative to 38-40% on average over the last three years, and included only one deal greater than \$10 billion. These numbers are not surprising given the political and geopolitical conditions that currently exist. Increased protectionist regulatory approaches have cast uncertainty on cross-border M&A execution. Changes to CFIUS and enhanced EU foreign direct investment scrutiny are two such examples of countries and regions adopting or changing regulatory approaches directly affecting M&A. Brexit (including its effect on the EU), trade wars and other tit-for-tat governmental actions inject further uncertainty. Deal activity has also borne this out on a regional basis, with Europe, Latin America, Asia Pacific (excluding Japan) and Japanese M&A markets being down 54.7%, 41.3%, 24.5% and 14.2% on a dollar volume basis, respectively. The one exception is the Middle East and Africa, which posted its highest quarter on record and dramatic increases over prior quarterly periods. However, this figure was significantly skewed by Saudi Aramco's \$70.4 billion acquisition of 70% of Saudi Basic Industries Corporation (Sabic), which comprised 73.9% of the overall deal value in the region for the quarter.

Decreased Private Equity Deals Despite Record Amounts of "Dry Powder", But an Overall Robust PE Market, Particularly in the U.S. and Europe

After four years of increases in the value and volume of private equity deals globally, private equity deals decreased in Q1 2019 as firms have been forced to select from fewer quality targets and continued competition from strategics. Overall, the largest impact was to deal count—while Q1 2019 featured \$103 billion worth of deals relative to \$107 billion worth of deals in Q1 2018, the number of deals was only 629, relative to 920 in the first quarter of the prior year. Despite these figures, on the whole, PE activity was healthy—buyouts in Europe totaled \$35.9 billion for 259 transactions, accounting for a record 29.2% of European M&A activity. And in the United States, despite significant reductions in deal count and deal value relative to Q1 2018, total deal value of \$47.2 billion (257 transactions) was the second highest quarterly figure in the past five years.

U.S. Market Remains Top Market for M&A; Deal Count Down, But Dollar Value Near Record Highs

Despite increased scrutiny on investments from outside the United States and continued political and economic tensions, the U.S. market continued to be the largest region for deal making, with 51.7% of global deals by value. Q1 2019 featured \$414.2 billion in deals by value, just short of the Q1 2018 record high of \$415.6 billion. However, despite near record highs in terms of value, Q1 2019 saw a major decrease in the number of deals relative to Q1 2018 with only 1,081 transactions—the fewest number of transactions over the last five years.

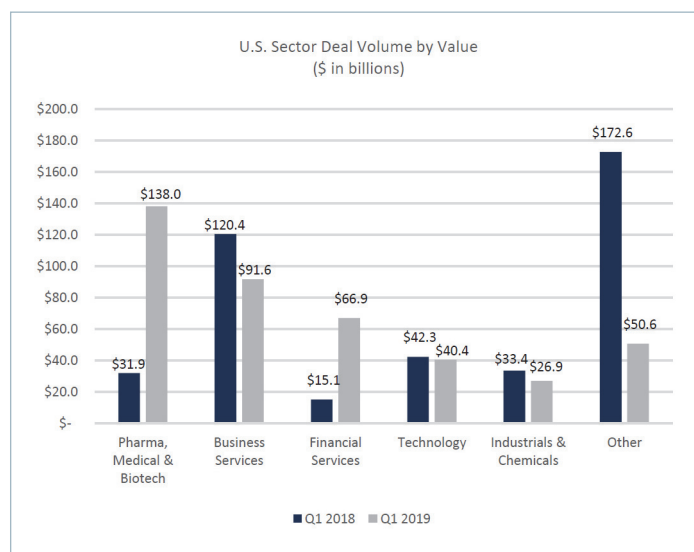
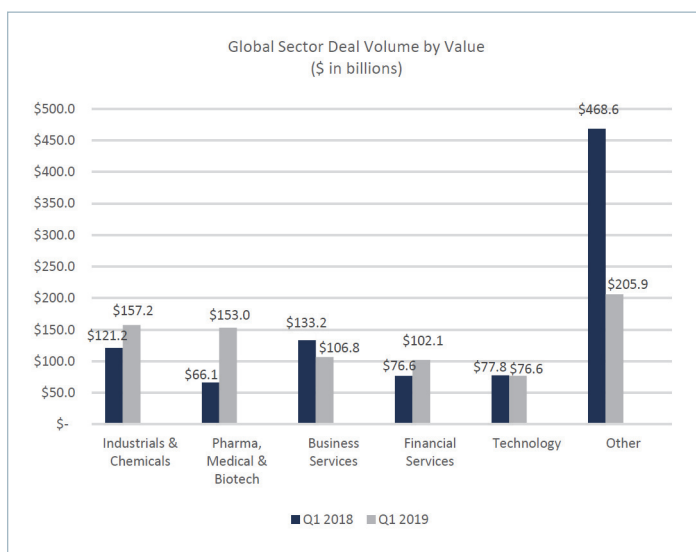


Source: Mergermarket

Major Activity In Certain Sectors

In terms of deal value, Industrials & Chemicals led the way in Q1 2019 with \$157.2 billion worth of deals, with Saudi Aramco's \$70.4 billion acquisition of 70% of Sabic being the largest deal in the sector. Pharma, Medical & Biotech was a close second in terms of transaction value, featuring \$153 billion worth of deals and the largest transaction of 2019 to date (Bristol-Myers Squibb's \$89.5 billion acquisition of Celgene Corporation). Business Services, Financial Services and Technology were the

three other most active sectors, featuring \$106.8 billion, \$102.1 billion and \$76.6 billion worth of deals, respectively. Notably, Q1 2019 featured the largest banking deal since the financial crisis—BB&T's \$28.1 billion all-stock merger with SunTrust, creating a combined entity valued at approximately \$66 billion. The “fintech” space also saw two large transactions in the quarter—Fiserv's \$38.4 billion acquisition of First Data, and Fidelity National Information Services' (FIS) \$42.6 billion acquisition of Worldpay.



Source: Mergersmarket

LEGAL DEVELOPMENTS

On the legal front, there were a number of notable cases at the end of 2018 and in the first quarter of 2019 that have implications for M&A practice.

In re Xura, Inc. Stockholder Litigation, C.A. No. 12698-VCS, 2018 WL 6498677 (Del. Ch. Dec. 10, 2018): This decision, issued in December 2018, shows how the Delaware courts are scaling back the power of the *Corwin* doctrine, which provides for business judgment rule standard of review in non-entire fairness transactions where the transaction is approved by a fully informed, uncoerced vote of a majority of disinterested shareholders. In *Xura*, the Delaware Chancery Court denied a motion to dismiss on *Corwin* grounds in connection with shareholder breach of fiduciary duty claims arising out of the acquisition of *Xura* by an affiliate of Siris Capital Group. The court found that *Xura* did not properly disclose that the then-CEO of *Xura* was engaging in side negotiations with the acquirer regarding his

role following the transaction, and guided the transaction to Siris in order to retain his job post-closing. *Xura* is another example of courts being unwilling to apply the business judgment rule standard of review in transactions with adequately pled conflicts on disclosure deficiency grounds. *Xura* is also notable because the case began as an appraisal proceeding, with the discovery obtained by the appraisal petitioner being then used to bring a post-closing damages case based on a breach of fiduciary duty.

Sciabacucchi v. Salzberg, C.A. 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018): In this decision, the Delaware Chancery Court held that Delaware corporations cannot regulate the litigation forum for 1933 Act federal securities claims through forum-selection bylaws or charter provisions because they are not “internal claims”, stating, “[a] charter-based forum-selection provision cannot govern these claims because the provision would not be addressing ‘the rights and powers of the plaintiff-stockholder as a

stockholder.”² An initial appeal was dismissed because an outstanding application regarding attorneys’ fees is yet to be resolved at the trial court level, but the final outcome of the case will be something to closely watch, as practitioners and academics note it could also have implications for mandatory arbitration provisions in company bylaws as well, which is discussed in more detail below.

Drulias v. 1st Century Bancshares Inc., No. H045049 (Cal. Ct. App. 6th Dist. Dec. 21, 2018): The California Court of Appeal confirmed that California courts will recognize the enforceability of forum-selection bylaws designating Delaware courts as the exclusive forum for fiduciary litigation. These provisions had been recognized as enforceable in lower California courts and in other jurisdictions throughout the country, but this decision bolsters the validity of such provisions, which are a useful tool to reduce the scope of stockholder litigation risk in M&A transactions.

Vintage Rodeo Parent, LLC v. Rent-a-Center, Inc., 2019 WL 1223026 (Del. Ch. Mar. 14, 2019): The Delaware Chancery Court again reinforced the notion that contracts must be interpreted in accordance with their terms by allowing Rent-a-Center to terminate its planned merger with Vintage Capital Management, LLC (“Vintage”) after Vintage failed to extend the “End Date” for closing under the terms of the agreement. The court rejected a series of arguments by Vintage focused on whether the efforts by the parties to achieve antitrust approval waived the written notice requirement or resulted in a form of constructive notice to Rent-a-Center. The court similarly dismissed the argument that the commercially reasonable efforts standard to consummate the transaction created a “duty to warn” (in the words of the court) under the terms of the contract. Next up in the case is whether Rent-a-Center is entitled to receive a reverse termination fee of \$126.5 million, for which the court requested supplemental briefing.

FrontFour Capital Group LLC v. Taube, 2019 WL 1313408 (Del. Ch. Mar. 22, 2019): This decision offered a reminder of how inadequate disclosures can jeopardize the consummation of a transaction, but also demonstrated that Delaware courts will be reluctant to grant certain types of shareholder relief if it will

effectively re-write the agreed upon terms of a contract entered into by an innocent third party. In *FrontFour*, the court enjoined a shareholder vote on the basis of inadequate disclosures related to interest from other potential buyers and conflicts that tainted the negotiations. Notably, however, this was not the requested relief of the plaintiffs, who asked for a curative shopping process devoid of improper influence and free of any deal protection. Despite the court’s acknowledgement that this would be “the most equitable relief”, the court determined such a ruling would be inappropriate because it would require the Court to “blue-pencil” the agreement, effectively changing the agreed upon terms negotiated and agreed to by a counterparty that was innocent of wrongdoing.

² *Sciabacucchi*, C.A. 2017-0931-JTL, at *34 (quoting *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 952 (Del. Ch. 2013)).

Activism³

In April 2019, Lazard released its Q1 2019 Quarterly Review of Shareholder Activism, which offers key observations regarding activist activity levels and shareholder engagement in the first quarter of 2019.

Key findings/insights from the report include:

- lower levels of activism relative to Q1 2018 (but on pace with historical levels);
- large numbers of contested board seats in the upcoming proxy season;
- robust international activity;
- continued (and even greater) emphasis on M&A-related themes;
- increased engagement by active managers, as well as passive investor focus on environmental, social and governance issues (ESG);
- Starboard leading all activists in the quarter in terms of new campaigns initiated; and
- information on select campaign developments.

TRENDS

Campaign Activity Down Relative to Near Peak Levels in Q1 2018, But Consistent with Historical Figures; Fewer Board Seat Wins, But Large Number of Contested Board Seats in the Upcoming Proxy Season

Q1 2019 featured 57 new campaigns against 53 companies globally, down relative to Q1 2018's near peak levels, which featured 71 campaigns initiated against 67 companies. However, despite low figures relative to Q1 2018, Q1 2019 levels were consistent with historical quarterly numbers, which have featured on average 55 new campaign initiations globally since 2016. Global capital deployment towards

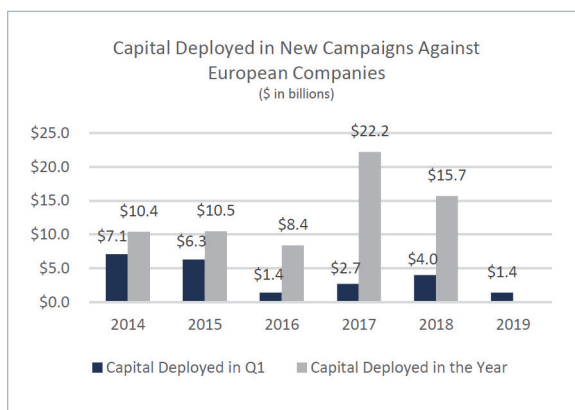
new campaigns was significantly down, at \$11.3 billion, relative to Q1 2018's record levels of \$25.3 billion. However, relative to historical averages, global capital deployment remained only slightly down, as mean quarterly deployment towards new campaigns since 2016 has been \$13.1 billion.

A total of 39 board seats were won by activists in Q1 2019, fewer than the 65 board seats that were won in Q1 2018. All of the board seats won in Q1 2019 were secured via settlements. However, the upcoming proxy season will feature activists targeting 103 board seats, including 65 seats targeted as a part of campaigns to replace more than 50% of the board.

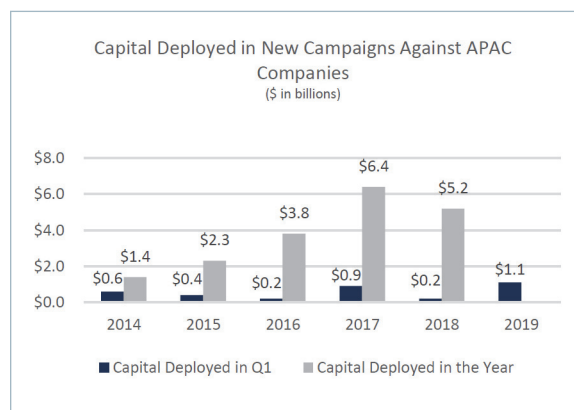
International Activism Remains Strong, Continuing to Comprise Approximately 33% of Global Activity

Q1 2019 featured \$1.4 billion of capital deployed in 10 campaigns against European companies. The percentage of capital deployed against European companies comprised 13% of overall capital deployed, a decrease relative to 2018, in which capital deployed in Europe comprised 24% of the overall total. However, despite fewer new campaigns, there were still significant levels of activist activity against European companies as activists dug in on existing campaigns.

APAC companies (including all of Asia, Australia and New Zealand) saw increases in capital deployed in 2019, with \$1.1 billion deployed in six new campaigns. Canada also saw heightened activity, with capital deployed constituting 10% of the global total, with activists targeting companies such as TransAlta and Methanex.



Source: Lazard, *Review of Shareholder Activism – Q1 2019*



³ Activism data from Lazard, *Review of Shareholder Activism – Q1 2019*, which includes all data for campaigns conducted globally by activists at companies with market capitalizations greater than \$500 million at the time of campaign announcement; companies that are spun off as part of the campaign process are counted separately.

M&A-Related Campaigns Continue to be a Major Theme

M&A related objectives comprised nearly 50% of new campaigns in the first quarter of 2019, a significant increase relative to last year, in which M&A related themes comprised 33% of all campaigns for CY 2018. The most common M&A objectives in Q1 2019 were sale of the company or break-ups / divestitures. Sale of the company and break-up / divestiture goals constituted 39% and 38%, respectively, of all M&A-related campaigns, with “bumpitriage” and opposition to deals comprising 23% of M&A-related campaigns.

Notable examples of M&A related campaigns in the first quarter included:

- Icahn targeting Caesars Entertainment, calling for a strategic review and sale of the company, ultimately resulting in a settlement with Icahn for three board seats (and reports the company was entering into merger discussions).
- Elliott targeting eBay, calling on the company to divest its Classifieds and StubHub businesses (a position that Starboard had privately advocated), resulting in the company settling, adding two Elliott-backed directors to the board and launching a strategic review.
- Starboard and Wellington Management’s opposition to Bristol-Meyers Squibb’s acquisition of Celgene, citing potential risks in the deal; Starboard withdrew its campaign after ISS and Glass Lewis recommended that stockholders approve the transaction; in April 2019 the transaction was approved by the stockholders of both Bristol-Myers Squibb and Celgene.

Active Managers Continue to Increase Engagement, and Passive Managers Continue to Focus on ESG

Active managers in high-profile campaigns and in campaigns globally continued to be vocal regarding activist campaigns and corporate objectives, with the most notable example being Wellington Management’s opposition to Bristol-Myers Squibb’s acquisition of Celgene. Another notable example was Neuberger Berman intervening in the Ashland / Cruiser Capital campaign, which resulted in Ashland agreeing to work with Neuberger Berman to appoint two additional independent directors to its board and a settlement with Cruiser Capital granting consultation rights on the director additions. Additionally, passive managers continued to emphasize corporate culture and purpose, focusing on how such attributes impact long-term performance.

Top Activists Feature Elliott as the Leader in Terms of Market Value of Current Positions, But Starboard is the Most Active in Q1 2019 in Terms of New Campaigns Initiated

Elliott continued to lead all activists in terms of current market value of activist positions (\$15.2 billion), of which \$1.7 billion reflect 2019 activist positions.⁴ Other activists in the top 5 in terms of market value of current positions include ValueAct (\$10 billion), Cevian (\$9.6 billion), Triam (\$8.7 billion) and TCI (\$8 billion). However, in terms of new activist initiations, Starboard was the leader in Q1 2019, initiating seven new campaigns, targeting companies such as Bristol-Myers Squibb, eBay and Dollar Tree.

SELECT CAMPAIGNS / DEVELOPMENTS

Company	Market Capitalization (\$ in billions) ⁵	Activist	Outcome
Bristol-Myers Squibb	\$81.4	Starboard / Wellington Management	<ul style="list-style-type: none"> • Starboard / Wellington separately oppose Bristol-Myers Squibb’s \$74 billion acquisition of Celgene • ISS and Glass Lewis support the deal; Starboard withdraws campaign • Shareholders approve transaction on April 12, 2019
Barclays	\$49.8	Sherborne Investors	<ul style="list-style-type: none"> • Sherborne nominated founder Edward Bramson to Barclay’s Board • Three Directors retire and investment banking head resigns
Pernod Ricard	\$44.9	Elliott Management	<ul style="list-style-type: none"> • Pernod Ricard appoints Lead Independent Director and announces new strategic plan • Elliott is dissatisfied with new strategic plan
Marriott	\$41.5	Land and Buildings	<ul style="list-style-type: none"> • Land and Buildings nominated founder / CIO Jonathan Litt to the Board; wants Marriott to divest brands and return capital to shareholders
eBay	\$31.7	Elliott Management / Starboard	<ul style="list-style-type: none"> • Elliott sends five-step plan – the Enhancing eBay Plan – to eBay’s board outlining value creation opportunities; Starboard also reportedly separately engaged with eBay since late 2018 • eBay settles with Elliott and Starboard—Elliott gets two board seats (one Elliott representative); Starboard gets one board seat; Company announces strategic and operational review
Hyundai	\$31.0	Elliott	<ul style="list-style-type: none"> • Elliott proposes dividends and new independent directors at Hyundai Motor Company and Hyundai Mobis • Both proposals rejected
Dollar Tree	\$23.3	Starboard	<ul style="list-style-type: none"> • Starboard criticizes acquisition of Family Dollar and Dollar Tree’s performance; advocates major changes including possible sale and changes to pricing • Starboard nominates seven Directors; early April 2019 Starboard withdraws director nominations, but remains invested in the stock
Toshiba	\$19.5	King Street	<ul style="list-style-type: none"> • King Street announces plan to nominate majority slate to help with turnaround efforts
Telecom Italia	\$13.6	Elliott	<ul style="list-style-type: none"> • Vivendi continued campaign to remove five Directors backed by Elliott • Vivendi withdraws nominees and shareholder proposals day of annual meeting and ultimately supports Telecom Italia CEO
EDP	\$13.2	Elliott	<ul style="list-style-type: none"> • Elliott calls on EDP to reject takeover offer by China Three Gorges; instead proposes divestitures and reinvestment in the Company’s renewables business • EDP announced strategic update; plans for €6 billion in divestitures; plans to invest in renewables

⁴ Lazard, *Review of Shareholder Activism – Q1 2019*. Market value of positions includes publicly disclosed common stock positions only, and is calculated based on activist positions initiated since 2013 in which the activist still holds a stake.

⁵ Market capitalization as of campaign announcement.

Corporate Governance

TRENDS⁶

In Q1 2019 Institutional Shareholder Services (ISS) offered a glimpse into trends that are likely to shape the year in corporate governance in the United States, highlighting four major areas of focus: (1) board composition and governance architecture; (2) shareholder proposals; (3) executive compensation; and (4) activism and M&A.

- **Board and Governance.** Board gender diversity, risk oversight and shareholder rights are expected to be themes in 2019. Pressure from investors for diverse boards and the implementation of California's new law mandating board gender diversity (as well as other states considering similar laws); investor focus on Boards managing and overseeing a wide range of risks (not just related to business strategy and economic trends); and scrutiny towards multi-class share structures with differential voting rights (particularly in the wake of IPO filings for certain prominent technology companies) are all expected to drive board and governance related themes for shareholders in 2019.
- **Shareholder Proposals.** Proponents continue to focus on ESG issues in 2019. ISS's initial look at the year's top 10 shareholder proposals by type revealed nine of the top ten related to environmental and social issues, covering topics such as lobbying, environmental impact, political contributions, greenhouse gas emissions, board diversity, sustainability, linking compensation to social criteria, reporting on climate change and human rights risk.
- **Executive Compensation.** Investors are expected to continue to focus on pay for performance, namely incentive compensation program weaknesses. Metric selection, rigor of performance targets, clarity of disclosure and transparency and use of discretion are all predicted to receive continued emphasis.

- **Activism & M&A.** Despite a low number of proxy contests reaching a vote in 2018, the number of contested elections could increase in 2019. In fact, by the end of Q1 2019 activists had announced proxy contests for 103 seats at upcoming shareholder meetings. And in the context of M&A, this has also continued to be a major theme, with M&A-related campaign objectives comprising nearly 50% of new campaigns in the first quarter of 2019.⁷

POLICY

From a policy standpoint, increased focus from the investor and regulatory communities on the proxy process regime as a whole continues to be an important area to watch. The SEC continues to solicit feedback following the proxy process roundtable that the SEC staff hosted at the end of 2018, which featured discussions on proxy voting mechanics and technology; shareholder proposals; and proxy advisory firms. And while the SEC has yet to take any concrete steps toward reform in any of these areas, three different legislative proposals related to capital formation and corporate governance that were introduced in the last Congress remain pending, including the Corporate Governance Fairness Act, which addresses the proxy process. The Senate Banking, Housing and Urban Affairs Committee held a hearing on these proposals in February 2019.

Another key area of focus relates to shareholder proposals made pursuant to Rule 14a-8 under the 1934 Act. In two recent staff legal bulletins, the staff of the SEC's Division of Corporation Finance clarified its views on the scope and application of the "ordinary business" and "economic relevance" exceptions, including inviting companies to include in their no-action requests a discussion reflecting an analysis by the Board. According to some, the staff's new guidance disproportionately affected the outcome of climate-related no-action requests in 2018 (with more challenges sustained), but did not have a substantial impact on no-action requests overall.⁸ The long-term impact, however, remains to be seen.⁹

⁶ Trend data from Institutional Shareholder Services, *The Corporate Governance World in 2019* (January 2019) and ISS Analytics, *An Early Look at 2019 US Shareholder Proposals* (March 2019).

⁷ Lazard, *Review of Shareholder Activism – Q1 2019*.

⁸ Welsh et. al., *Proxy Preview 2019* (April 1, 2019) available at <https://corpgov.law.harvard.edu/2019/04/01/proxy-preview-2019/> (explaining SEC's new clarifications of the Shareholder Proposal Rule in 2017 and 2018 did not substantially affect the outcome of challenges in 2018 but that climate-related proposals were disproportionately affected).

⁹ *Id.*

Other notable areas to watch include mandatory arbitration provisions in the bylaws of U.S. publicly-listed companies. In February 2019, the SEC staff granted a Johnson & Johnson no-action request to exclude a shareholder proposal requesting adoption of mandatory shareholder arbitration bylaws on the grounds that, per an opinion from the New Jersey attorney general, the provision would violate New Jersey state law (which is the jurisdiction in which Johnson & Johnson is incorporated). The SEC staff explicitly chose not to express an opinion as to whether the proposal would violate federal law if implemented, noting that the parties could “seek a more definitive determination from a court of competent jurisdiction.” In a rare move, the Chairman of the SEC also put out a statement on the matter, in which he stated:

In light of the unsettled and complex nature of this issue, as well as its importance, I agree with the approach taken by the staff to not address the legality of mandatory shareholder arbitration in the context of federal securities laws in this matter, and would expect our staff to take a similar approach if the issue were to arise again. I continue to believe that any SEC policy decision on this subject should be made by the Commission in a measured and deliberative manner.¹⁰

He concluded his statement by saying, “[a] court is a more appropriate venue to seek a binding determination of whether a shareholder proposal can be excluded.”¹¹ The proponent then filed suit in federal court in March in a case that securities and corporate governance professionals are closely watching given that the complaint requests that the court, among other things, declare that Johnson & Johnson will not violate federal law if it amends its bylaws as requested by the proponent and require the company to include the shareholder proposal in its proxy materials.

THE LONG VIEW ON SHAREHOLDER EXPECTATIONS

There continues to be vocal commentary from institutional investors and other constituents that companies should commit to sustainability and the overall social good. In this narrative, investors believe that focusing on these considerations will positively impact long-term financial performance. From a governance standpoint, BlackRock expects companies to identify and report on material, business specific environmental and social risks and explain how those risks are being managed. Vanguard and State Street have similar expectations, each expecting companies to evaluate sustainability in the context of overall corporate strategy. These perspectives are reflective of the broader money management industry as a whole. In a recent survey by BNP Paribas Securities Services,¹² more than 65% of money managers and asset owners indicated they align their investment framework with the United Nation’s Sustainable Development goals. In the same survey, 75% of asset owners and 62% of money managers indicated they are holding 25% or more of their investments in funds incorporating ESG, a major increase from 48% and 53%, respectively, in the previous survey in 2017.

This review relates to general information only and does not constitute legal advice. Facts and circumstances vary. We make no undertaking to advise recipients of any legal changes or developments.

¹⁰ Chairman Jay Clayton, Statement on Shareholder Proposals Seeking to Require Mandatory Arbitration Bylaw Provisions (Feb. 11, 2019) available at <https://www.sec.gov/news/public-statement/clayton-statement-mandatory-arbitration-bylaw-provisions>.

¹¹ *Id.*

¹² Survey information from Paulina Peilichata, *Almost 2 in 3 institutional investors abide by U.N. sustainable goals* (April 10, 2019) available at <https://www.pionline.com/article/20190410/ONLINE/190419976/almost-2-in-3-institutional-investors-abide-by-un-sustainable-goals> and BNP Paribas’s survey of money managers and asset owners, titled *The ESG Global Survey 2019*.