

Review and Analysis of 2020 U.S. Shareholder Activism and Activist Settlement Agreements

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Public activism levels were down during the 2020 proxy season in response to the COVID-19 pandemic, with the number of U.S. activism campaigns down approximately 30% through August

Despite decreased activity levels, there have still been a number of high-profile activism campaigns this year, with Starboard, Hindenburg and Elliott leading the way with the most publicly announced campaigns against U.S. issuers through August

Activists and private equity funds are increasingly borrowing from each other's playbooks, further blurring the lines between activists and other investors

Activists are increasingly mentioning environmental, social and political (ESP) themes in their campaigns, although ESP themes have yet to take hold as primary campaign objectives

Activism campaigns during the 2020 proxy season concluded in settlement agreements more frequently and more promptly compared to years prior, with one in three settlement agreements through August being reached within one month of the activist publicly initiating its campaign

Activism activity is expected to pick up during the 2021 proxy season as the economy stabilizes and M&A activity continues its H2 2020 recovery



Introduction

When the COVID-19 pandemic first reached the U.S., some commentators predicted that the resulting market volatility would lead to a sharp spike in shareholder activism. The theory was that depressed stock prices and the uncertainty caused by the pandemic would provide activists with a less costly entry point and a distraction to catch boards and management teams off-guard.

Instead, public activism levels have fallen significantly this year, with the number of activism campaigns in the U.S. down approximately 30% through August of this year compared to the same period in 2019. The most dramatic drop came in April, when only eight new activism campaigns were initiated. There has also been an increase in the proportion of settled campaigns, as a number of campaigns initiated prior to the onset of the pandemic in the U.S. settled in the spring.¹ Anecdotally, in some cases institutional shareholders pressured activists and issuers to settle pre-pandemic campaigns so that the issuer could focus on its business without the distraction of the ongoing activism campaign.

As many issuers focused on shoring up their businesses and, in some cases, addressing near-term liquidity needs, some activists may have decided that initiating or maintaining public activism campaigns would be poorly received by the institutional investors on whose support the activists depend. Further, typical activism campaign themes, such as returning capital to shareholders or selling businesses to private equity, do not resonate during a crisis and when many Americans are out of work. In addition, equity valuations in most industries did not stay depressed for long, with overall U.S. equity markets, largely powered by a number of large-cap companies, rallying close to pre-pandemic levels in relatively short order. As a result, many of the low-cost entry points that worried issuers at the onset of the pandemic quickly disappeared.

Despite the decline in overall activism levels, activists have still been busy this year and there have been a number of high-profile new campaigns. The activism that we have seen this year has been dominated by many of the most familiar names. Starboard, short seller Hindenburg Research and Elliott led all U.S. activists in campaigns launched through August, with seven, six and five new campaigns, respectively, and Elliott, ValueAct and ThirdPoint led all U.S. activists in new capital deployed over the first half of this year, with \$6.2 billion, \$2.8 billion and \$2.4 billion, respectively.²

Despite the same players grabbing the headlines, activism campaigns have looked different so far this year compared to years prior. For example, as the pandemic depressed M&A activity and created an increased focus on liquidity in the spring and early summer, activism campaigns with M&A and capital allocation theses decreased, with activists increasingly focusing on board and management changes and operational improvements instead. In addition, we began to see more examples of activists mentioning environmental, social and political (ESP) themes in their campaigns, after years of speculation that this trend would emerge as activists fight to win over institutional shareholders.

The strategies deployed by activists are also changing, including through an increased focus on short strategies, highlighted by Hindenburg's campaign at electric truck maker Nikola.³ We are also continuing to see a blurring of the lines between activists and other investors, as activists increasingly adopt private equity and special purpose acquisition company (SPAC) strategies and private equity funds and other investors foray into activism.

Going forward, we expect the activism landscape to continue to shift as the market reaction to the pandemic and the outcome of the recent U.S. presidential election evolves. With the prospects of the economy stabilizing if COVID-19 vaccine implementation is successful, activists may identify new entry points. Moreover, the apparent reluctance of some activists to initiate (or initiate more) campaigns earlier this year could lead to pent-up demand. Activism activity levels have begun to pick up in the second half of this year⁴ and this is likely to continue as activists who decided to sit out 2020 proxy campaigns gear up for the 2021 proxy season.

1 See Lazard, *Review of Shareholder Activism – H1 2020*. 88% of all board seats won by activists through the first half of 2020 were obtained through settlement agreements. *Id.*

2 See Lazard, *Review of Shareholder Activism – H1 2020*.

3 See WSJ, *Nikola Denies Short Seller's Fraud Allegations* (Sept. 11, 2020).

4 See Lazard, *Review of Shareholder Activism – Q3 2020*.

As the economy stabilizes and clearer distinctions in performance develop between companies in the same industry, it will be easier for activists to identify and target underperformers. In addition, as M&A continues its second-half recovery in 2020, we expect to see a corresponding increase in M&A-focused activism campaigns. In the meantime, issuers would be wise to use the recent lull in activism to focus on their relationships with key stakeholders and communication of their business plans coming out of the pandemic before their nomination windows reopen for the 2021 proxy season.

This publication expands on these trends in shareholder activism from the past year in greater detail. This is followed by: (1) a review and analysis of activism campaign data so far this year; (2) an overview of recent developments impacting voting in proxy contests, including virtual contested meetings; (3) an analysis of key provisions in publicly filed settlement agreements this year as compared to prior years; and (4) an overview of other recent legal developments impacting shareholder activism.

NOTES ON THE SCOPE AND SOURCES OF DATA USED IN THIS PUBLICATION

The information in this publication in the sections titled “Activism Campaign Data” and “Settlement Agreements” is based on the database maintained by FactSet Research Systems, Inc. using a dataset run on August 31, 2019 supplemented by our review of public information and other third-party sources. This dataset includes campaigns against only U.S. companies with market capitalizations greater than \$100 million, although other sections of the publication include global data. Other data sources relied upon in this publication are identified as they arise.

We have followed the FactSet categorization of campaigns as “proxy fights” or “other stockholder campaigns” and have not included those categorized merely as exempt solicitations or Schedule 13D filings with no public activism. We also have excluded (1) the submission of Rule 14a-8 proposals, without more, as “campaigns” and (2) strategic acquisition attempts that involve unsolicited offers by one business entity to acquire another from the “other stockholder campaigns” category, although we have included takeover attempts involving unsolicited offers by activist hedge funds. In addition, in our review of settlement agreements, where one activist launched campaigns against several affiliates we limited our discussion to one settlement agreement. Further, we have categorized activism campaigns based on the calendar year in which a campaign was launched, even if the campaign is completed (*e.g.*, an activist gains a board seat) during the following calendar year.

Every activism situation is unique and none of the statistics and analysis presented in this publication should be construed as legal advice with respect to any particular issuer, activist or set of facts and circumstances.



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1

TRENDS IN SHAREHOLDER ACTIVISM

A. PANDEMIC'S IMPACT ON ACTIVISM STRATEGIES AND RESPONSES

Shifting Focus of Activism Campaigns

The impact of the COVID-19 pandemic on U.S. businesses has extended to shareholder activism—not only have activism levels decreased so far this year, but the strategies deployed by activists, and the ways issuers respond to these strategies, have also changed. After several years of activists focusing on M&A theses, this year we have observed activists shifting their focus towards board change, operational improvements and management change in higher proportions than previous years.

According to Lazard, 34% of global activism campaigns launched during the first half of this year had M&A objectives,¹ compared to approximately 47% of campaigns last year.² Almost one-third of the M&A-focused campaigns were initiated prior to the onset of the pandemic in March. In addition, a number of activist-initiated sale processes were delayed by the pandemic.³ Interestingly, one of the few big ticket M&A deals that signed in the first half of this year, Chevron's \$5 billion acquisition of Noble Energy, drew Elliott's attention; in September, Elliott revealed a stake in Noble and unsuccessfully encouraged the company's stockholders to vote against the transaction.⁴

Anecdotally, we have also observed fewer instances of activists urging issuers to explore stock buybacks so far this year. This is likely because fewer issuers have excess cash to use for buybacks, and those issuers that do have excess cash are focused on conserving liquidity in order to manage the uncertainty caused by the pandemic. In fact, one high-profile campaign this year took the opposite approach, with Dan Loeb urging Disney to end its \$3 billion annual dividend and invest in its streaming business.⁵ Buybacks have become the subject of criticism in the political arena, with members of both major political parties

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- 1 "M&A objectives" is a broad category that includes both pushing for issuers to engage in M&A activity (e.g., a full company sale or sales of non-core assets) and opposing publicly announced M&A transactions, particularly in advance of a shareholder vote on a potential transaction. In Q3 2020, 74% of U.S. campaigns with M&A objectives involved advocacy for the issuer to engage in M&A activity and 26% of such campaigns involved opposition to previously announced deals. See Activist Insight, *Shareholder Activism, Q3 2020* (Oct. 2020).
 - 2 See Lazard, *Review of Shareholder Activism - H1 2020* (looking at "global campaigns by activists at companies with market capitalizations greater than \$500 million at time of campaign announcement and select campaigns market capitalizations less than \$500 million including during the COVID-19 pandemic-induced market downturn").
 - 3 However, some companies were able to keep their sale processes alive with some creativity. For example, industrial company NN Inc., which settled with activist Legion Partners and launched a strategic review in 2019, reportedly recorded drone footage of its facilities to share with potential buyers in order to keep its sale process on track. See The Deal, *Diligence Drones Keep Covid-Era Auctions Alive* (July 22, 2020).
 - 4 See Bloomberg, *Elliott Seeks to Break Up Chevron's Takeover of Noble* (Sep. 9, 2020).
 - 5 See NYTimes, *A New Activist Playbook* (Oct. 8, 2020) (describing the contents of Loeb's letter to Disney).

supporting limits on buybacks⁶ and the Federal Reserve imposing prohibitions on share buybacks for the largest banks through the end of 2020.⁷

In place of M&A objectives and buybacks, activists increasingly turned their focus to board change (34% of campaigns), operational improvements (20%) and management change (7%) through the first half of this year as compared to prior years.⁸ Notable examples include Starboard's successful proxy contest at chemical company GCP Applied Technologies for eight board seats,⁹ Ancora and Macellum's push for retailer Big Lots to refresh its board¹⁰ and Elliott's campaign for Twitter to replace CEO Jack Dorsey.¹¹ Of course, campaigns focused on board change typically also have underlying objectives aside from board refreshment—for example, Starboard's above-mentioned campaign to replace the GCP board of directors was aimed at driving operational, strategic and financial improvements.¹²

Breaking with the trends observed during the first half of 2020, there was a shift back towards M&A objectives in the third-quarter of this year as deal volume also increased.¹³ This trend is likely to continue if M&A activity levels stay elevated through the end of 2020 and into 2021.

Return of the Rights Plan Defense

The onset of the pandemic also led some issuers to shift their strategies in responding to activism, albeit by returning to a familiar tactic. Shareholder rights plans, commonly known as poison pills, were briefly back in vogue this year as a number of issuers felt more susceptible to takeovers and activism due to pandemic-related stock price drops and volatility. Rights plans are a tool used by issuers since the 1980s to prevent stock accumulations above a stated threshold by diluting the acquiring shareholder. In the activism context, rights plans may give a board time to react in the face of potential activist approaches, stop the activist from accumulating a bigger stake, and discourage coordination among shareholders that might trigger the rights or discourage an opportunistic bidder from launching a hostile takeover in the midst of the disruption caused by the activist's campaign. However, a rights plan will not prevent an activist from launching an activism campaign or running a proxy contest (and then potentially eliminating the rights plan after taking control of a majority of the board).

6 See Vox, *Trump Joins Democrats in Opposing Stock Buybacks* (Mar. 21, 2020). The CARES Act included restrictions on buybacks for companies receiving federal coronavirus assistance and future legislation may contain even broader restrictions.

7 See Board of Governors of the Federal Reserve System, *Federal Reserve Board Announces It Will Extend for an Additional Quarter Several Measures to Ensure that Large Banks Maintain a High Level of Capital Resilience* (Sep. 30, 2020). The Federal Reserve also prohibited dividend increases.

8 See Lazard, *Review of Shareholder Activism – H1 2020*.

9 See The Deal, *Starboard Wins Control of GCP Board* (May 29, 2020).

10 See WSJ, *Activist Investors Macellum, Ancora Take More Than 10% Stake* (Mar. 6, 2020).

11 See NYTimes, *Twitter Reaches Deal with Activist Fund That Wanted Jack Dorsey Out* (Mar. 9, 2020). In November, a special committee of Twitter's board, which was formed after Elliott's approach and included Elliott's head of U.S. equity activism, recommended that Dorsey continue as CEO of the company. See WSJ, *Twitter's Jack Dorsey Survives Scrutiny from Activist Investor* (Nov. 2, 2020).

12 See Business Wire, *Starboard Delivers Open Letter to GCP Shareholders* (May 26, 2020).

13 See Lazard, *Review of Shareholder Activism – Q3 2020* (finding that 50% of Q3 2020 campaigns globally featured an M&A objective, consistent with 2019 levels).

In recent years, there have been some instances in which issuers have adopted rights plans in response to an actual or perceived activism threat. From 2017 – 2019, we observed at least 26 instances of issuers explicitly adopting rights plans in such circumstances. Many more companies prepared “shelf” rights plans behind the scenes prior to and during this period, readying the documentation and educating the board on rights plans proactively so that a rights plan could be implemented on short notice if deemed advisable by the board.

This year, rights plans have been adopted in much higher numbers than prior years—including 17 plans in March alone and a total of 60 plans through August.¹⁴ Notably, a number of 2020 rights plans have been adopted prophylactically, or without any disclosed threat by an activist or hostile acquiror. The terms of the rights plans adopted this year generally track market practice for rights plans in prior years, with many of the rights plans having one-year terms and not requiring shareholder approval, consistent with proxy advisor guidance.¹⁵ These plans typically had ownership thresholds of 10% to 15%. Notably, however, according to data from the Council of Institutional Investors, seven rights plans adopted this year had a 5% ownership threshold (not including Net Operating Loss-focused plans). The Williams Companies’ 5% rights plan is currently the subject of litigation in the Delaware Chancery Court focused on its low threshold, which is discussed in more detail below.¹⁶

In the event there is another increase in market volatility due to health, economic, political or other conditions, additional issuers may wish to consider adopting rights plans. In addition, current issuers may consider whether it is in their shareholders’ best interests to adopt a second rights plan or extend the terms of their existing rights plans. In such case, it will be interesting to see whether proxy advisor guidance shifts to tolerate, in these circumstances, issuers maintaining rights plans beyond a one-year period without a shareholder vote.

B. BLURRING LINES BETWEEN ACTIVISTS AND OTHER INVESTORS

Recently, we have begun to observe a convergence of private equity and activism strategies as private equity funds and activist hedge funds have become increasingly willing to borrow from each other’s playbooks. On the private equity side, this is taking the form of sponsors making minority investments in public companies with the intention of engaging with management (rather than acquiring control). For example, in January, KKR announced a minority stake in entertainment and dining chain Dave & Busters.¹⁷ KKR has not expressed any interest in acquiring control of Dave & Busters; instead, it has stated that its intention is to engage constructively with Dave & Busters’ management team. In May, Dave & Busters agreed to add a KKR executive to its board.¹⁸

¹⁴ Based on data from DealPointData (not including Net Operating Loss-focused pills).

¹⁵ Although ISS encourages issuers to put poison pills to a shareholder vote, ISS guidance indicates that ISS will not necessarily recommend “withhold votes” against directors if a rights plan with a term of one-year or shorter is not put to a shareholder vote. See ISS Policy Guidance, *Impacts of the Covid-19 Pandemic* (Apr. 8, 2020) (available at: <https://www.issgovernance.com/file/policy/active/americas/ISS-Policy-Guidance-for-Impacts-of-the-Coronavirus-Pandemic.pdf>).

¹⁶ See *Wolosky v. Armstrong et al.*, case number 2020-0707.

¹⁷ See Pitchbook, *KKR Reveals Activist Stake in Dave & Busters* (Jan. 17, 2020).

¹⁸ See *The Deal*, *KKR Gains Seat at Dave & Busters Board* (May 13, 2020).

Some private equity funds have even shown that they are willing to go hostile. In June, Cerberus launched a campaign at German bank Commerzbank, sending a letter to the bank's Chairman criticizing the board and management team and demanding two board seats.¹⁹ In January, middle market private equity funds Atlas Holdings and Blue Wolf Capital launched a proxy contest against paper producer Verso Corporation, which ultimately ended in a settlement.²⁰ It is worth noting, however, that while private equity funds have adopted activist strategies, private equity funds are typically careful not to launch fully hostile campaigns—in fact, some fund documents prohibit hostile activities.

On the activist side, activist investors are also adopting traditional private equity strategies such as full company acquisitions, private investments in public equity (PIPEs) and forming special purpose acquisition companies (SPACs).²¹ Elliott has perhaps been the most publicly active on the M&A and PIPE fronts, through its private equity arm, Evergreen Coast Capital, although other activists are beginning to join in these approaches as well. In November, Elliott made a proposal to acquire specialty foods company Aryzta²² and, in September, Elliott revealed a 15% stake in transportation and defense services company Cubic and said it was partnering with private equity fund Veritas Capital in a bid for the company.²³ This follows a busy 2019, in which Elliott teamed up with Francisco Partners to acquire technology company LogMeIn for \$4.3 billion in December²⁴ and also agreed to take retailer Barnes & Noble private earlier in the year.²⁵ More recently, as M&A activity slowed in the spring and early summer of this year, activists joined private equity funds in making PIPE investments to provide issuers with much needed liquidity. For example, in May, Elliott teamed up with Fidelity and Bluescape to invest \$1.4 billion in utility CenterPoint Energy.²⁶ ValueAct has invested at least \$119 million in PIPEs in recent years²⁷ and, in February 2019, Starboard announced a

19 See *The Deal, Cerberus Demands Commerzbank Board Seats* (June 10, 2020). This is not the first time that Cerberus has deployed activist strategies. For example, in August 2015, Cerberus reported a 22% stake in Pacific DataVision, and disclosed that it was engaging with the company's management regarding board composition, operations, financial performance, share price and other matters. See Schedule 13-D/A for Pacific DataVision, Inc. filed by Cerberus Capital Management LP on August 13, 2015 with the SEC. There was no publicly disclosed resolution to the discussions, and Cerberus sold below the SEC beneficial ownership reporting threshold earlier this year. See Schedule 13-D/A for Anterix Inc. filed by Cerberus Capital Management LP on May 8, 2020 with the SEC.

20 See *Business Wire, Verso, Atlas and Blue Wolf Announce Agreement to End Proxy Contest* (Jan. 31, 2020).

21 A SPAC is a blank-check company that is formed for the sole purpose of raising capital through an IPO in order to acquire an existing operating company. SPAC IPOs have recently increased in popularity. According to data from SPACInsider, there were 59 SPAC IPOs in 2019 and 182 SPAC IPOs through November 17, 2020, compared to 34 and 46 SPAC IPOs in 2017 and 2018, respectively.

22 See *The Deal, Elliott Proposes Buyout of Aryzta* (Nov. 23, 2020).

23 See *Barrons, Elliott Management Bought 15% of Cubic. Now Comes the Interesting Part* (Sep. 22, 2020).

24 See *TechCrunch, LogMeIn Agrees to be Acquired by Francisco Partners and Evergreen for \$4.3 Billion* (Dec. 17, 2019).

25 See *CNBC, Elliott Management to Acquire Barnes & Noble for \$683 Million* (June 7, 2019).

26 See *Reuters, Elliott, Fidelity Pump \$1.4 Billion into Utility CenterPoint Energy* (May 7, 2020).

27 See *The Deal, Ubben Continues ESG Drive with Nikola* (June 17, 2020).

\$200 million investment in restaurant chain Papa John's.²⁸ Activists are also experimenting with SPAC investment strategies. In January, Far Point, a SPAC formed by Third Point, agreed to acquire Swiss payments company Global Blue from Silver Lake.²⁹ In August, Starboard announced the launch of its own SPAC, Starboard Value Acquisition Corp.^{30,31}

This blending of investment strategies has not been limited to activists and private equity funds; we have also observed other historically non-activist investors adopting more activist-like strategies, including active managers, shareholder proposal proponents and even institutional investors. Most notably on the active management front, last year, Neuberger Berman launched a proxy contest against software company Verint Systems, seeking to replace three directors over concerns about the company's capital allocation strategy and governance practices.³² Further, in June of this year, Trillium Asset Management, a frequent proponent of ESP-focused shareholder proposals, issued a press release criticizing business process service provider Conduent's management team and urging the company to separate its three businesses.³³ Trillium's M&A thesis stands in stark contrast to its historic strategies and is more in line with what would be expected from an activist hedge fund. Lastly, on the institutional investor side, in May, Vanguard issued its first-ever company-specific report, offering analysis on its decision to vote against a Boeing director and in support of a shareholder proposal at the company.³⁴ A Vanguard spokesperson later stated that its future reports will not always be company-specific.³⁵

These recent entries into activist-like strategies suggest that companies would be wise to stay up-to-date on all their significant shareholders, regardless of investment strategy. As for the activists, their recent forays into private equity-like and SPAC strategies are in many ways a natural progression. As issuers increasingly address their vulnerabilities proactively, there are fewer ill-prepared companies to target. This leaves activists, who have accumulated significant amounts of capital,³⁶ in need of alternate methods for putting their

28 See Reuters, *Papa John's Picks Hedge Fund Starboard Over Founder for Investment* (Feb. 4, 2019).

29 See WSJ, *Far Point to Buy Global Blue from Silver Lake* (Jan. 16, 2020). Notably, Third Point's CEO, Dan Loeb, later opposed the deal and urged shareholders to vote against it; however, shareholders voted in favor of the deal in August. See Institutional Investor, *Dan Loeb's Hated SPAC Deal Survives a Shareholder Vote* (Aug. 25, 2020).

30 See The Deal, *Starboard Value Joins Activist SPAC Frenzy* (Aug. 19, 2020).

31 In May, Elliott agreed to finance a patent lawsuit filed by interactive-video company Eko against streaming service Quibi. Reportedly, Elliott will obtain an equity stake in Eko as part of the terms of the financing. See WSJ, *Hedge Fund Elliott Management to Finance Lawsuit Against Streamer Quibi* (May 4, 2020). Elliott's foray into litigation finance is another example of its willingness to pursue strategies outside of traditional shareholder activism.

32 See Business Wire, *Neuberger Berman Files Proxy Statement Seeking to Replace Three Verint Directors* (May 13, 2019). As discussed in last year's [publication](#), other notable examples include M&G Investments nominating four directors to methanol supplier Methanex's board in April 2019 and Wellington Management's public opposition to Bristol-Myers Squibb's acquisition of Celgene in February 2019.

33 See ActivistInsight, *Trillium Urges Conduent to Split, Stock Jumps* (June 9, 2020).

34 See The Deal, *Spotlight: Vanguard Lumbers Toward Activism* (May 8, 2020).

35 See *id.*

36 See J.P. Morgan, *COVID-19 Impact on Shareholder Activism: What Might the Future Hold?* (June 2020).

capital to work. It is no surprise then that investors who are already focused on identifying companies' weaknesses and finding ways to capitalize on them would take to private equity models. One way for an activist to implement changes and potentially unlock value in a company is to buy it outright.

C. INTEGRATING ESP AND ACTIVISM

ESP themes have increasingly come to the forefront of shareholder discourse over the past several years, moving from discrete proposals by a small number of "socially conscious" organizations into corporate disclosures, legislation and regulations. Recently, the largest institutional investors and a number of business leaders reaffirmed this trend with statements that they will be intensely focused on issuers' "purpose," how corporations treat all their stakeholders (in addition to shareholders) and similar concepts.³⁷ ESP themes have remained prevalent this year in the context of the pandemic, economic recession and racial justice initiatives, as well as climate change.

Given the growth of the largest index funds over the past few years, winning the support of these funds is crucial in almost every activism situation.³⁸ Accordingly, many anticipated that activists would begin to reference ESP themes in order to attract support from institutions like BlackRock, Vanguard and State Street. This year, we began to see this become an observable trend. For example, during Third Point's campaign at insurer Prudential, Dan Loeb noted that splitting the company into two businesses would, among other things, reduce the company's carbon footprint.³⁹ We also observed examples of this trend playing out as activists criticized issuers' responses to the pandemic. For example, Standard General criticized broadcast and media company Tegna's employee furloughs in a proxy contest fight letter, stating that the furloughs would "cause lasting damage to Tegna's reputation, community standing and, importantly, its employees."⁴⁰

Despite these recent examples, it remains to be seen whether activist references to ESP topics will become a primary campaign objective rather than a marketing tool. Notably, Jeff Ubben of ValueAct, who has been at the forefront of the activist-ESP movement,⁴¹ announced in June he was leaving the activist hedge fund that he founded in order to launch a new fund, Inclusive Capital Partners.⁴² Inclusive Capital Partners will continue to run the ESP-focused

³⁷ See, e.g., Larry Fink's 2020 Letter to CEOs, *A Fundamental Reshaping of Finance* (2020), available at <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>; Business Roundtable, *Statement on the Purpose of a Corporation* (Aug. 19, 2019), available at <https://opportunity.businessroundtable.org/ourcommitment>.

³⁸ Outside of the largest index funds, ESP themes are still a focus of other investors as well as shareholder advisory firms such as ISS. In November, Deutsche Boerse agreed to acquire 80% of ISS and noted its vision for ISS's business, saying: "together, ISS and Deutsche Boerse have complementary ingredients to become one of the globally leading [ESP] players of the future." See Reuters, *Deutsche Boerse to Buy 80% of ISS for \$1.8 Billion* (Nov. 17, 2020).

³⁹ See The Deal, *Activist Hedge Funds Jump on ESG Bandwagon* (March 6, 2020).

⁴⁰ See Standard General, *Letter to TEGNA Shareholders* (Apr. 24, 2020).

⁴¹ ValueAct recently launched a \$1 billion ESP-focused fund, ValueAct Spring Master Fund LP. See The Deal, *Ubben Sees Profits in Sustainability* (Jan. 15, 2020). Jana Partners launched a similar "social impact" fund in 2018, which later targeted Apple, urging the technology company to address concerns about teenage iPhone addiction. See WSJ, *Wall Street Fights, Do-Gooders—And Sting—Converge in New Jana Fund* (Jan. 7, 2018).

⁴² See NYTimes, *The Activist Investor Done With Finance* (June 24, 2020).

ValueAct Spring Fund that Ubben launched in 2018 while still at ValueAct.⁴³ Ubben's departure demonstrates the tension between standard activist objectives and ESP themes—Ubben told the *Financial Times* as much, stating that he does not think these two strategies “peacefully coexist.”⁴⁴

D. MULTIPLE CAMPAIGNS AT THE SAME COMPANY

When an issuer brings an activist onboard through a settlement, it may view itself as less susceptible to other activism campaigns. However, we have recently seen a number of situations in which an issuer who had previously added an activist designee to its board was targeted by a different activist. One example of this phenomenon was Starboard's recent campaign at software company Commvault. In 2018, Elliott announced a roughly 10% stake in Commvault and criticized the company's management team.⁴⁵ One month later, Commvault agreed to appoint two new directors identified by Elliott to its board and form operations and CEO search committees.⁴⁶ This year, in March, Starboard disclosed a roughly 9% stake in Commvault and later nominated six directors to the Commvault board.⁴⁷ The company ultimately agreed to add three directors to its board in a settlement with Starboard.⁴⁸ Notably, both of Elliott's designees remained on Commvault's board when Starboard initiated its approach, although Elliott had reportedly already exited its position.⁴⁹ Overseas, Toshiba prevailed in a proxy contest launched by two activists just one year after the company settled with King Street Capital Management.⁵⁰

It is also not uncommon to see the same activists return to a company, either following a defeat in a prior campaign or following a settlement once the underlying standstill restrictions expire. For example, in April, Ancora reached a settlement with J. Alexander's one year after making an unsolicited bid⁵¹ for the restaurant chain. Other notable examples include Starboard's campaign at eBay for four new directors⁵² one year after the e-commerce company conceded

43 See Schedule 13-D/A for Nikola Corporation filed by ValueAct Capital on August 4, 2020 with the SEC. See also, CNBC, *Nikola is a Social Investing Home Run for Jeff Ubben as He Launches New Fund* (Jun. 27, 2020).

44 See *Financial Times*, *Jeff Ubben Quits ValueAct for Social Investing* (June 23, 2020).

45 See TechCrunch, *Activist Investors [sic] Elliott Snag 10.3 Percent Stake in Commvault* (Apr. 2, 2018).

46 See Institutional Investor, *Morning Brief: Elliott Reaches Deal with Commvault* (May 2, 2018).

47 See Reuters, *Starboard Launches Proxy Fight at Commvault, Nominates Six to Board* (Apr. 9, 2020).

48 See *The Deal*, *Commvault Installs Starboard-Backed Directors* (June 8, 2020).

49 See CNBC, *Activist Investor Starboard, which has Track Record of Big Returns in Tech, Finds its Next Target* (Apr. 18, 2020).

50 See *The Deal*, *Toshiba Prevails Against Activist Pair* (July 31, 2020).

51 See CNBC, *Activist Investor Ancora Making a Bid for Southern Restaurant Chain J. Alexander's* (Apr. 8, 2019). J. Alexander's rejected Ancora's bid, but the activist, which already owned shares in the restaurant chain when it announced its initial stake, reengaged the following proxy season and reached a settlement for a director seat in April. In connection with the settlement, the company announced it would resume its previously announced strategic review once “COVID-19-related uncertainties in the [industry] and financial markets are resolved and the Company's performance has returned to levels which will support an attractive valuation.” See *Business Wire*, *J. Alexander's Enters into Cooperation Agreement with Ancora Advisors* (Apr. 20, 2020).

52 See Reuters, *Starboard Ends Proxy Fight at eBay, Withdraws Director Nominations* (Apr. 16, 2020). Starboard abandoned its campaign in April after eBay named a new CEO. *Id.*

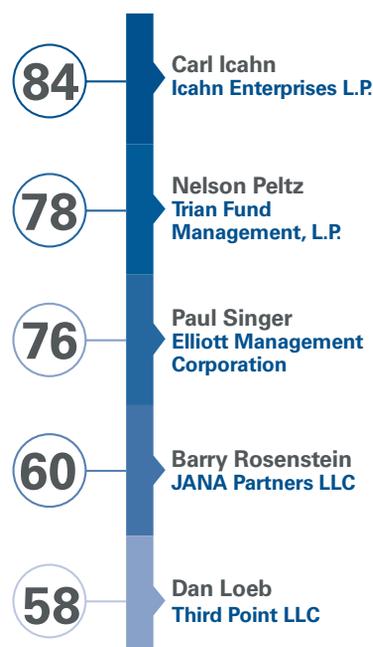
two board seats to Starboard and Elliott in a settlement⁵³ and Hestia Capital and Permit Enterprise's proxy contest for two board seats at GameStop in June, one year after adding a director to the video game retailer's board through a settlement.⁵⁴

These campaigns underscore the importance for issuers of continuing to engage with shareholders and monitor stock positions even after an activist designee joins their boards. Just because one activist is under the tent does not preclude another activist from taking issue with the company's management team or business strategy. Further, once an activist is brought onboard through a settlement, it may still not be satisfied with its level of influence on the company's strategy and agitate for more board seats or other changes once the standstill restrictions in the underlying settlement agreement expire.

E. THE CHANGING FACE OF ACTIVISM

Jeff Ubben's departure from ValueAct, the fund he founded, received substantial attention this year in part because of how much stability there has been at the top activist hedge funds over the past decades. However, there may be more turnover in the not-so-distant future. A number of other prominent activists are aging towards retirement, which would result in new faces at the forefront of U.S. activism. For example, there has been speculation for years regarding who will succeed Carl Icahn, who turned 84 years old in February, and when he will retire. In October, Carl Icahn announced that his son, Brett Icahn, is rejoining his fund and that Brett is Carl's likely eventual replacement

Ages of Notable Activists



Jeff Ubben made waves when he left ValueAct this year to start a new, ESP-focused fund, Inclusive Capital Partners. A number of other prominent activists are aging towards retirement, which may leave room for new faces at the forefront of U.S. activism. Careful succession planning will be important for these activists going forward. Consider Dan Loeb, who took back the reins at Third Point this year less than one year after appointing Munib Islam as his Co-Chief Investment Officer.

⁵³ See Financial Times, *eBay Agrees to Strategic Review to Pacify Activist Investors* (Mar. 1, 2019).

⁵⁴ See Barron's, *Activist Investors Join GameStop's Board* (June 12, 2020).

as chairman and chief executive.⁵⁵ Other prominent activists are likely considering, or will be considering, similar questions—Trian’s Nelson Peltz is 78 years old and Elliott’s Paul Singer is 76 years old.

Succession is important in any industry, but especially so for activist hedge funds, where dynamic leaders have leveraged their long-standing reputations to obtain results and play a key role in drawing attention to campaigns, persuading key stakeholders and raising capital for their funds. Succession may not always be consistent with succession planning. For example, in 2019, Dan Loeb appointed Munib Islam as Co-Chief Investment Officer, leading to speculation that Islam would lead the fund upon Loeb’s retirement.⁵⁶ In May 2020, Loeb announced that he was taking back the reins as sole-CIO and that Islam would leave the fund.⁵⁷ Third Point, like many other funds, lost money in the first quarter of the year (prior to Islam’s exit); Loeb told investors in a letter that the fund was not adequately prepared for the pandemic.⁵⁸ It will be interesting to see whether the largest activist funds are able to have continued success following the retirements of their founders, especially considering that a number of known protégés have left the flagship funds that trained them over the years in order to found their own funds.⁵⁹

F. “SHORT” STRATEGIES

Recently, we have observed an increase in investors deploying short selling investment strategies targeted at individual issuers. Although we have not historically considered these strategies to be activism *per se* and have therefore not always included short sale activists in our data, we think these strategies are worth highlighting this year given their increased prevalence.

Hindenburg Research’s campaign at Nikola is an illustrative, high-profile example of how short selling activists operate. On September 10, Hindenburg issued a report detailing alleged fraud by Nikola surrounding its battery technology, stating that it had “never seen this level of deception at a public company, especially of this size.”⁶⁰ The report details allegations that Nikola’s founder had exaggerated the capabilities of its *Nikola One* hydrogen fuel cell electric semi-truck and that the company posted staged videos on its YouTube channel in order to overstate the capabilities of its vehicles. In the

55 See CNBC, *Activist Investor Carl Icahn Brings Son Back, Lays Out Succession Plan* (Oct. 1, 2020).

56 See Institutional Investor, *Dan Loeb’s Big Decision* (Jul. 29, 2019).

57 See Reuters, *Exclusive: Third Point Founder Daniel Loeb Takes Over as Munib Islam Leaves Firm* (May 19, 2020).

58 See CNBC, *Third Point Hedge Fund Founder Daniel Loeb Takes Over as Munib Islam Leaves Firm* (May 19, 2020).

59 For example, Keith Meister famously left Icahn’s fund to found Corvex a decade ago. See NYTimes, *Former Icahn Lientenant Plans Fund* (Dec. 16, 2010). More recently, in April, a top Elliott portfolio manager, Franck Tuil, left Elliott after almost 20 years of service. Although not necessarily a leading successor candidate, Tuil spearheaded Elliott’s entry into European activism, leading the fund’s campaigns at Bayer and Pernod Ricard, among others. Tuil is reportedly planning to found his own London-based activist hedge fund next year. See Financial News, *Former Top Elliott Manager Franck Tuil to Launch London-based Activist Hedge Fund* (Jul. 24, 2020).

60 See Hindenburg Research, *Nikola: How to Parlay an Ocean of Lies into a Partnership with the Largest Auto OEM in America* (Sep. 10, 2020) (available at: <https://hindenburgresearch.com/nikola/>).

two days following the release of the report, Nikola's stock fell 11% and 14.5%, respectively. The company responded with a statement that the allegations were "false and misleading" and "designed to manipulate the market"; and Nikola subsequently announced it had hired a law firm to explore legal action against Hindenburg and that it planned to bring the matter before the SEC.⁶¹ The SEC responded by initiating an investigation into Nikola, rather than the short seller.⁶² Several days later, Nikola's founder, Trevor Milton, resigned as the company's executive chairman amid fallout from the fraud allegations and investigation.⁶³ Nikola's stock price had fallen dramatically since Hindenburg's report, with daily trading volumes as high as 135 million shares.⁶⁴

Hindenburg's report was likely produced at a relatively low cost compared to the costs associated with a traditional activism campaign, and Hindenburg was not required to make any disclosures regarding the size or nature of its short position. The activist could have closed its short positions after the initial market reaction following its reports without waiting around to see if Nikola's stock price falls to the near zero value Hindenburg claims it is worth.

Campaigns like Hindenburg's Nikola campaign are becoming increasingly common, with other notable targets including environmental services company GFL Environmental,⁶⁵ COVID-19 vaccine developer Inovio⁶⁶ and fintech company Ideanomics;⁶⁷ although, these campaigns are not without risk. There is no guarantee how the market will react to the short seller's report, even if it is accurate, and short positions can be incredibly costly to maintain—take, for example, the recent collapse of German fintech company Wirecard. This year, accounting fraud was uncovered at Wirecard when the company disclosed that more than \$2 billion of cash was "missing."⁶⁸ Short sellers reportedly made paper profits of \$2.6 billion off of the corresponding plunge in Wirecard's stock price; however, short sellers had been circling Wirecard for years prior to the announcement, claiming (accurately) that the company was engaging in accounting fraud. According to reports, a number of hedge funds suffered huge losses by maintaining short positions in Wirecard before the accounting fraud was uncovered, including Blue Ridge Capital, which began shorting Wirecard in the mid-2000s and ultimately closed its position in 2017.⁶⁹

61 See CNN, *Electric Truck Startup Hits Back at Short Seller's Report* (Sep. 15, 2020).

62 See Bloomberg, *SEC Examining Nikola Over Short Seller's Fraud Allegations* (Sep. 14, 2020).

63 See NY Times, *Head of Nikola, a G.M. Electric Truck Partner, Quits Amid Fraud Claims* (Sep. 21, 2020).

64 Based on data from Bloomberg. In comparison, Nikola's stock had an average daily trading volume of roughly 10 million shares per day this year prior to the release of Hindenburg's report and had approximately 384 million shares outstanding as of November 5. *Id.*

65 See Spruce Point's report on GFL Environmental, (*available at: <https://www.sprucepointcap.com/gfl-environmental-inc/>*).

66 See The Deal, *Muddy Waters Shorts COVID Vaccine Developer Inovio* (Sep. 3, 2020).

67 See Business Wire, *Ideanomics Responds to Short-Selling Accusations with Facts that Refutes [sic] Claims Made by Short-Selling Companies* (June 29, 2020).

68 See WSJ, *Payments Giant Wirecard's Shares Plunge on \$2 Billion Audit Deception* (June 18, 2020).

69 See WSJ, *Short Sellers Made \$2.6 Billion Off Wirecard's Plunge, but Not Without Scars* (June 20, 2020).

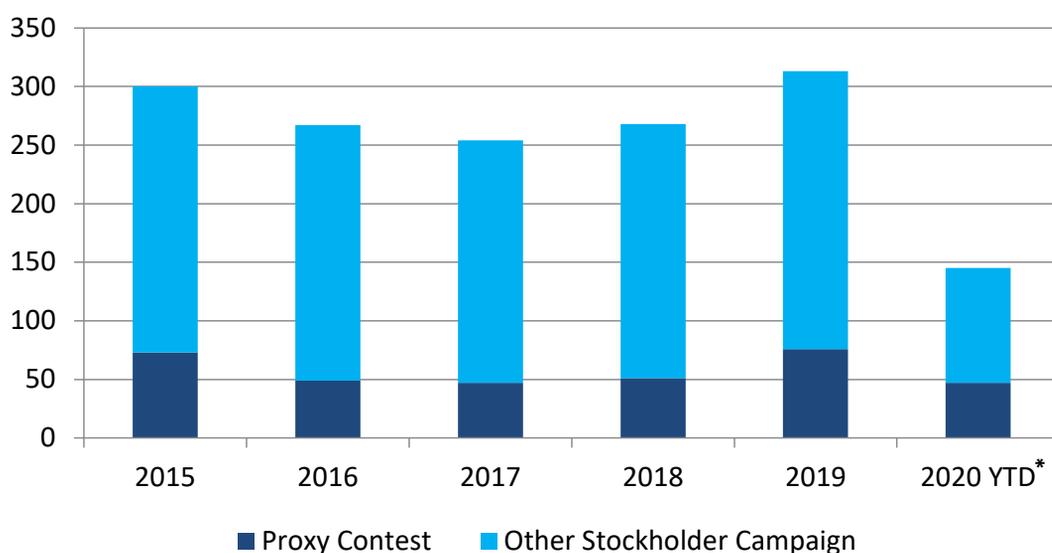
2 ACTIVISM CAMPAIGN DATA

Each year, we review the data underlying U.S. activism to elucidate trends. As activism has matured over the preceding decade, the data had become largely consistent from year to year. However, this consistency eroded in 2020 in response to the changing circumstances brought on by the COVID-19 pandemic.

A. ACTIVISM CAMPAIGNS

Through August, activists announced 145 campaigns against U.S. issuers. Although this period encompassed 66.7% of the year and much of the typical proxy season, this number of campaigns amounts to only 52% of the average number of campaigns per year from 2015 through 2019 of approximately 279 campaigns announced per year.⁷⁰

Activist Campaign Totals



Continuing a trend observed last year, proxy contests have made up a larger percentage of announced activism campaigns (32%) compared to proxy contest levels during the prior three years (19%). Importantly, this statistic does not take into account campaigns that were settled prior to developing into a proxy contest but still resulted in board seats for the activists.⁷¹ Further, the proxy

⁷⁰ It should be noted that the total number of public campaigns in a given year does not paint a full picture, as a significant number of activist situations are resolved without publicity.

⁷¹ We have observed a higher incidence of settlements this year—44% of proxy contests through August ended prior to a vote pursuant to a publicly filed settlement agreement with the activist (up from 35% last year). For more information on settlement statistics this year and the terms of publicly filed settlement agreements, refer to the section entitled “Settlement Agreements” below.

*Based on data through August 2020

contest total may continue to grow this year as campaigns that were previously categorized as “Other Stockholder Campaigns” develop into proxy fights.

Number of Campaigns Announced Per Year				
	Proxy Contests	Other Stockholder Campaigns	Total	Proxy Contests as % of Total
2020 YTD*	47	98	145	32%
2019	76	237	313	24%
2018	51	217	268	19%
2017	47	207	254	19%
2016	49	218	267	18%
2015	73	227	300	24%
2014	62	210	272	23%

Despite a decline in activism, activists have fared exceedingly well at obtaining board seats so far in 2020 compared to prior years, averaging approximately one seat per campaign, through both settlement agreements and shareholder votes in proxy contests. The numbers to date in 2020 could represent a desire for issuers to promptly settle campaigns to avoid distractions and focus attention on pressing COVID-19 response measures.⁷²

Board Seats Obtained by Activists at U.S. Issuers						
	2015	2016	2017	2018	2019	2020 YTD*
Total Board Seats Obtained	173	96	114	116	150	82
Number of Total Completed Campaigns	300	243	221	143	225	83
Average Board Seats Per Campaign	0.57	0.40	0.52	0.81	0.67	0.99

B. PROMINENT ACTIVISTS

The most frequent activists in terms of announced campaigns against U.S. public companies so far in 2020 have been Starboard, Hindenburg and Elliott. Elliott has remained in the top-three of announced campaigns for each of the six years for which we have tracked data (with the most announced campaigns across three consecutive years from 2016-2018). Elliott has obtained seven board seats to date and announced some of the higher profile campaigns of the year, including at Twitter and Evergy. Notably, Elliott is also very active internationally,⁷³ but as noted in “Notes on the Scope and Sources of Data Used in This Publication,” our dataset does not include non-U.S. campaigns.

⁷² For purposes of this section, board seats are recorded as obtained during the year in which the activism campaign was initiated.

⁷³ For example, in February, Elliott urged investment giant Softbank Group to make changes that would boost its share price, including through \$20 billion in share buybacks. See WSJ, *Elliott Management Builds More Than \$2.5 Billion Stake in SoftBank* (Feb. 6, 2020).

Starboard has also been one of the most prolific activists in recent years. This marks the third consecutive year in the top three for Starboard, which has also staged some of the most high-profile campaigns of the year, including at eBay, Box and GCP Applied Technologies. Hindenburg, a newcomer to the top three, is a short sale-focused activist, which made headlines in connection with its widely reported public short position in Nikola, as discussed above. Hindenburg’s six campaigns this year, along with Spruce Point’s 12 campaigns in 2019, further highlight the growing short sale activism trend discussed earlier in this publication.

Announced U.S. Campaigns by Most Frequent Activists	
2020 YTD ^{#74}	
Starboard Value LP	7
Hindenburg Research LLC	6
Elliott Management Corporation	5
2019	
Spruce Point Capital Management LLC	12
Starboard Value LP	11
Elliott Management Corporation	6
2018	
Elliott Management Corporation	8
Starboard Value LP	8
Icahn Associates Corp.	5
2017	
Elliott Management Corporation	10
GAMCO Asset Management, Inc.	9
City of London Investment Management Co. Ltd.	9
2016	
Elliott Management Corporation	8
Bulldog Investors, LLC	7
GAMCO Asset Management, Inc.	4
2015	
GAMCO Asset Management, Inc.	11
Bulldog Investors, LLC	9
Elliott Management Corporation	8

The activists that have been the most successful at obtaining board seats are generally those who are the most prolific in terms of number of campaigns

⁷⁴ We have excluded campaigns by activists against closed-end funds as outside the scope of our dataset; however, please refer to “Activist Campaign Data—Industry Focus: Closed End Funds” for a discussion of legal developments impacting this space.

(excluding short selling activists such as Hindenburg and Spruce Point, which generally do not seek board seats). In particular, Starboard Value has been remarkably successful, obtaining, on average, 1.9 board seats in each completed campaign over the last six years. In addition to the public campaigns discussed above, many board seats are also obtained through “quiet” campaigns where an activist engages with the issuer “behind the scenes.”

Number of Board Seats Obtained by Selected Activists at U.S. Issuers						
	2015	2016	2017	2018	2019	2020 YTD*
Starboard Value LP	13	5	7	12	18	16
Elliott Management Corporation	6	9	6	5	3	7
Icahn Associates Corporation	9	3	0	14	8	0

Icahn has notably been quiet this year; his high-profile campaign at Occidental Petroleum, which yielded 3 board seats in 2020, is counted as a 2019 campaign for purposes of our dataset because it was initiated last year.

C. SIZE OF ACTIVIST TARGET COMPANIES

In general, the frequency of campaigns in each band of market capitalization has remained relatively steady since 2015. The following table sets forth the percentage of companies targeted by activism campaigns announced since the beginning of 2015 by market capitalization, with the first row indicating the percentage of companies in the Russell 3000 Index in each range.⁷⁵

Target Company Market Capitalization					
	\$100m–\$500m	\$500m–\$1b	\$1b–\$10b	\$10b–\$50b	>\$50b
Percentage of total companies	26%	13%	42%	13%	5%
2020 campaigns	45%	20%	30%	5%	1%
2019 campaigns	43%	12%	34%	8%	3%
2018 campaigns	40%	13%	34%	8%	3%
2017 campaigns	41%	16%	29%	7%	6%
2016 campaigns	44%	19%	29%	6%	2%
2015 campaigns	45%	15%	29%	8%	3%
Five-year average	43%	15%	31%	7%	3%

Smaller companies tend to be targeted in greater proportions relative to larger companies, with companies whose market cap is between \$100 million and \$500 million representing 45% of campaigns thus far in 2020 and 43% across the past six years, while representing only 26% of Russell 3000 companies. In contrast, companies with market caps between \$1 billion and \$10 billion

⁷⁵ The Russell 3000 data excludes companies with market caps below \$100 million, consistent with the FactSet dataset it is being compared against.

are less likely to be targeted disproportionately, as these companies have represented 30% of campaigns so far in 2020 and 31% since 2015, while making up 42% of Russell 3000 companies. On average, approximately 10% of campaigns in each year targeted companies with market caps of greater than \$10 billion, with companies with market caps of greater than \$50 billion making up around 3% of total campaigns aside from a one-year increase in 2017. These trends have been even more pronounced than usual so far this year, with a six-year high of 65% of campaigns occurring at companies with market caps of less than \$1 billion, compared to 58% on average and 39% of total companies in the Russell 3000.

D. INDUSTRIES OF ACTIVIST TARGET COMPANIES

The most targeted industries, which have generally remained consistent in each year, include investment vehicles (including investment trusts and mutual funds), pharmaceutical companies, software companies and other commercial service providers.

<i>Most Targeted Industries 2014 to 2020 YTD^{*76}</i>	
<i>Industry</i>	<i>Total Campaigns</i>
Investment Trusts/Mutual Funds	124
Real Estate Investment Trusts	100
Packaged Software	89
Integrated Oil	70
Pharmaceuticals: Major	60
Miscellaneous Commercial Services	56
Medical Specialties	54

The “pharmaceuticals” and “medical specialties” industries, both of which saw large spikes in 2019 (17 pharmaceutical campaigns in 2019, up from an average of eight per year, and 13 medical specialties campaigns in 2019, up from an average of seven per year), have returned to numbers more aligned with their historical trends, with four pharmaceutical campaigns and seven medical specialty campaigns through August 2020. Campaigns in the “integrated oil” category, which includes businesses engaging in the production, exploration, refinement and distribution of oil and gas, have been at a lower level this year after a busy couple of years, but have begun to pick up since August, highlighted by Elliott’s campaign at Noble Energy.⁷⁷

E. INDUSTRY FOCUS: CLOSED-END FUNDS

Closed-end funds historically have been popular activist targets; however, recent action by the SEC staff may result in these funds taking steps that

⁷⁶ Industry classifications based on data from FactSet. See “Notes on the Scope and Sources of Data Used in This Publication”.

⁷⁷ See Bloomberg, *Elliott Seeks to Break Up Chevron’s Takeover of Noble* (Sep. 9, 2020). Also, notably, our dataset categorizes activism campaigns by the year they are initiated; so, for example, Icahn’s high-profile Occidental Petroleum campaign is a 2019 campaign, rather than 2020.

decrease the attractiveness of these companies as activist targets. A closed-end fund is a portfolio of assets that raises capital through an IPO and lists its shares on a stock exchange. Different from a mutual fund, it does not continuously offer its shares at the net asset value (NAV) of its portfolio assets and does not permit redemption of shares at NAV. Instead, after a closed-end fund's initial public offering and listing on an exchange, investors typically purchase and sell shares of a closed-end fund on that exchange. As a result, a closed-end fund's share trading price is determined by supply and demand, which may lead its shares to trade at a discount to NAV.

Closed-end funds that trade at a discount to NAV for a long period of time often draw attention from activists, who buy the fund's shares at a discount and then agitate for the fund's board to take action that will lead to narrowing or eliminating the discount between the NAV and its trading price, including by "open-ending" the closed-end fund or having the fund liquidated. For example, earlier this year, Saba Capital Management, L.P., perhaps the most high-profile closed-end fund activist, after acquiring almost 25% of the Voya Prime Rate Trust, initiated a proxy contest with the fund that resulted in the replacement of the fund's board and obtained shareholder approval for a self-tender by the fund for 40% of the fund's shares at or close to NAV.⁷⁸

Prior to 2010, some closed-end funds protected themselves from approaches by activists by relying on state control share statutes. Control share statutes differ by state, but they generally provide that, when a shareholder acquires a certain percentage of a company, the shareholder will have no or limited voting rights without first obtaining approval from disinterested shareholders.⁷⁹ However, in 2010, the SEC staff issued a no-action letter to Boulder Total Return Fund (the "Boulder Letter") asserting that Boulder's reliance on state control share statutes "would be acting in a manner inconsistent with Section 18(i) of the Investment Company Act."⁸⁰ Section 18(i) of the Investment Company Act provides that every share of stock issued by a registered management company shall be voting stock and have equal voting rights with all other outstanding voting stock.⁸¹ The director of the SEC's Division of Investment Management at the time stated that control share statutes constitute "a denial of equal voting rights and may violate the fundamental requirement that every share of fund stock be voting stock."⁸² As a result, closed-end funds have not been able to rely on state control share statutes since 2010.

However, on May 27, 2020, the SEC staff announced the withdrawal of the Boulder Letter, emphasizing that the staff "would not recommend enforcement action . . . against a closed-end fund under [S]ection 18(i) of the [Investment Company Act] for opting into and triggering a control share statute if the decision to do so by the board of the fund was taken with reasonable care on

78 See Business Wire, *Voya Prime Rate Trust Shareholders Elect Full Slate of Saba Capital Nominees to the Board* (July 14, 2020).

79 See The National Law Review, *SEC Staff Reverses Position on State Control Share Statutes for Closed-End Funds* (July 6, 2020).

80 See Boulder Total Return Fund, *SEC No-Action Letter* (Nov. 15, 2010).

81 See 15 U.S. Code § 80a-18(i).

82 See Andrew J. Donohue, Director, Division of Investment Management, SEC, *Keynote Address at the Independent Directors Council Investment Company Directors Conference* (Nov. 12, 2009).

a basis consistent with other applicable duties and laws and the duty to the fund and its shareholders generally.”⁸³ In particular, the staff reminded market participants that “any actions taken by a board of a fund, including with regard to control share statutes, should be examined in light of (1) the board’s fiduciary obligations to the fund, (2) applicable federal and state law provisions, and (3) the particular facts and circumstances surrounding the board’s action.”⁸⁴ Since that withdrawal, a number of closed-end funds have “opted in” to control share statutes. We expect that closed-end funds will increasingly decide to “opt in” to applicable control share statutes going forward and may even decide to re-domesticate to jurisdictions that have control share statutes.⁸⁵ Funds doing so will need to consider the potential for litigation.⁸⁶

83 See Staff Statement, Division of Investment Management, SEC, *Control Share Acquisition Statutes* (May 27, 2020).

84 See *id.* The statement also suggested in a footnote that shareholder rights plans and other corporate defensive measures may also implicate the Investment Company Act, but that the staff was not particularly addressing that question in this statement.

85 According to the SEC, as of May 2020, the following states had control share statutes in effect: Arizona, Florida, Hawaii, Idaho, Indiana, Kansas, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Wisconsin and Wyoming. See *id.* Re-domestication may require shareholder approval depending on the circumstances.

86 Consider pending litigation between Saba and an Eaton Vance fund. The Eaton Vance fund amended its bylaws in March changing its voting standard in contested director elections from a plurality vote to a “majority of all shares outstanding”. A few months later, Saba launched a campaign to seize control of the Eaton Vance Fund’s board and subsequently sent a demand letter to the fund alleging that the bylaw amendment was invalid and demanding that the fund commence judicial action against the fund’s board of trustees and investment adviser. Instead, the fund sought a declaratory injunction in state court regarding the validity of the bylaw amendment. See *Eaton Vance Senior Income Trust v. Saba Capital Master Fund, Ltd.* (Complaint filed on July 15, 2020 in the Commonwealth of Massachusetts, Business Litigation Session (20-1533-BLS2)).

3 DEVELOPMENTS IMPACTING PROXY CONTESTS

Although the vast majority of board seats this year have been obtained through settlement, there were still a number of U.S. campaigns that “went the distance” and ended in a shareholder vote. The number of U.S. proxy contests proceeding to a vote increased from 6 during the first half of last year to 13 through the first half of this year.⁸⁷ Activists were successful in these contests, winning 25 board seats during this period compared to four board seats in the first half of 2019,⁸⁸ led by Starboard’s successful campaign for eight board seats at GCP.

In this section, we highlight a number of recent developments affecting proxy contests, including (A) voting trends of the largest institutional investors; and (B) virtual meetings.

A. INSTITUTIONAL INVESTOR VOTING

The influence of large index funds and other institutional investors is central to outcomes of shareholder activism contests. Despite the growth of activist investing over the past decade, activists in the aggregate hold a very small percentage of public company stock. Even in companies where they launch campaigns, activists usually do not hold enough stock for their holdings to play a determinative role in voting outcomes. Thus, activists must garner support from other shareholders in order to win proxy contests. In the case of most U.S. public company targets, this requires activists to turn to institutional shareholders.⁸⁹

The level of equity ownership of large institutional investors, particularly among the largest three index fund providers, continues to be a key component in the activism landscape. BlackRock, Vanguard and State Street are consistently among the largest stockholders of U.S. public companies. Fidelity is the fourth-largest institutional investor and its ownership also significantly contributes to the institutional investor level of equity ownership of the S&P 500.

Although institutional investors are among the top shareholders for many public companies, it is not always the case that institutional investors hold the most voting power in a contested election. In some cases, institutional investors loan their shares to other investors (*e.g.*, short sellers); if the shares remain on loan on the record date for a contested election, then the lending

⁸⁷ See Mackenzie Partners, *A Look Back at Shareholder Activism During the 2020 Proxy Season* (Aug. 9, 2020).

⁸⁸ See *id.*

⁸⁹ On the other hand, BlackRock released a report last year downplaying the role of institutional investors in voting decisions; emphasizing that the vast majority of ballot items are won or lost by margins greater than 30%. See Barbara Novick, BlackRock, *Proxy Voting Outcomes: By the Numbers* (Jul. 24, 2019).

institutional investor will not be able to vote the shares. Depending on the circumstances, this can have a large impact on institutional voting power. For example, the *Wall Street Journal* reported in June that BlackRock, State Street and Fidelity beneficially owned approximately 40% of video game retailer GameStop's outstanding common stock, but only controlled approximately 5% of voting power at the company's annual meeting because the majority of their shares had been loaned to short sellers.⁹⁰

B. VIRTUAL MEETINGS IN CONTESTED ELECTIONS

This year, social distancing guidelines and other public health responses to the COVID-19 pandemic led many companies to shift their shareholder meetings to a virtual format. By May 1, 65% of S&P 500 companies had held or announced plans to hold virtual-only annual shareholder meetings, and 90% of those companies were adopting annual virtual-only meetings for the first time.⁹¹ Also, for the first time ever, two companies, Tegna and GCP Applied Technologies, held contested elections through a virtual-only format.

Virtual meeting platforms are not traditionally set up for contested meetings; so, special procedures must be put in place in order to accommodate a contested meeting.⁹² For example, issuers were required to work with their virtual meeting provider to allow for investors to submit a vote when there is more than one ballot and to accommodate technologically the activist's participation in the meeting. Reportedly, some vendors declined to host virtual contested meetings because they did not believe the technology was ready.

Despite these challenges, the virtual-only contested meetings at Tegna and GCP reportedly took place without any technical difficulties,⁹³ with Tegna prevailing over Standard General in April⁹⁴ and Starboard winning eight board seats at GCP in June.⁹⁵ In order to avoid issues in contested virtual meetings, issuers may want to connect with the activist prior to the meeting in order to establish "rules for the road" regarding how the meeting will be run. This avoids surprises and ensures that the activist is able to participate in the meeting if the activist wishes to do so on terms that are acceptable to the issuer. Also, issuers that are considering using a virtual-only format would be wise to engage with their proxy solicitors and virtual meeting providers early on in order to ensure that the proper infrastructure is in place.

90 See WSJ, *How Investing Giants Gave Away Voting Power Ahead of a Shareholder Fight* (June 10, 2020).

91 See *Intelligize*, Clabaugh et al., *Proof of Concept: An Intelligize Report on Virtual Annual Shareholders Meetings* (May 19, 2020).

92 See *The Deal*, *Director Contests Head Toward Virtual Showdowns* (Apr. 3, 2020) (citing Paul Schulman, co-head of Morrow Sodali's M&A and Activist Advisory Group).

93 See Bloomberg, *Tegna Contest Becomes First All-Virtual Board Fight* (Apr. 24, 2020).

94 See Reuters, *Tegna Wins Proxy Contest as Investors Re-Elect All 12 Board Members* (Apr. 30, 2020).

95 See *The Deal*, *Starboard Wins Control of GCP Board* (May 29, 2020).

4 SETTLEMENT AGREEMENTS

Often a company will agree to settle with an activist before an activist's campaign develops into a full-blown proxy contest. At a minimum, settlement agreements typically provide for the appointment of one or more persons selected by (or in consultation with) an activist to the company's board in exchange for a "standstill," which generally includes limitations on share ownership and prohibitions on proxy solicitation and other activist actions. This section analyzes the publicly filed settlement agreements that have been reached for activism campaigns announced in 2020 as compared to prior years, including the frequency of settlements, the timing of reaching a settlement and the key provisions of settlement agreements. For the purpose of comparison and review, we have chosen not to examine settlement agreements that are either simple appointment letters without any standstill provisions and confidentiality agreements that do not have customary settlement agreement provisions.

A. FREQUENCY AND SPEED OF SETTLEMENT AGREEMENTS

The percentage of settlement agreements that have been filed with the SEC for 2020 campaigns to date as compared to the total number of completed activism campaigns⁹⁶ was higher than for 2019 and 2018. Both proxy contests and other shareholder campaigns (*i.e.*, an activism campaign that did not involve a formal proxy contest) reached settlement at higher rates than in previous years, with settlement agreements being filed for 44% of proxy contests, up from 35% in 2019.

	Settlement Agreements Filed with the SEC (All Campaign Types)		Filed Settlement Agreements for Proxy Contests		Filed Settlement Agreements for Other Shareholder Campaigns	
	Number	Percentage of Total Completed Campaigns	Number	Percentage of Total Proxy Contests	Number	Percentage of Total Other Shareholder Campaigns
2020	32	39%	15	44%	17	35%
2019	69	29%	26	35%	43	26%
2018	62	17%	21	37%	41	13%
2017	61	15%	17	33%	44	12%
2016	66	41%	15	43%	33	40%
2015	81	25%	22	28%	59	24%

The duration of shareholder campaigns appears to have returned to more normal levels after 2017, for which one-third of campaigns lasted six months or longer and two-thirds of campaigns lasted three months or longer. Reportedly,

⁹⁶ Completed campaigns refer to activism campaigns that ended in (a) a vote (in the case of a proxy contest), (b) the activist exiting its position or (c) a settlement.

institutional shareholders pressured activists and issuers in some cases to settle pre-pandemic campaigns when the pandemic first took hold in the U.S. so that the issuers could focus on their businesses. This is in contrast to prior years, during which institutional shareholders expressed skepticism over quick settlements.

For the purposes of calculating the duration of activism campaigns, an activist is deemed to have initiated a campaign when it makes the first public step towards achieving its goal, either by publicizing a letter sent to the company, sending a letter to the other shareholders, filing a Schedule 13D or otherwise publicly announcing its intent to initiate a campaign. Of course, in many cases the company and the activist will have had extensive discussions prior to any public acknowledgement of the campaign, and the first public announcement may come in the form of a finalized settlement agreement between the parties. We excluded instances where the campaign and settlement agreement were publicly announced on the same day for purposes of calculating the durations outlined in the table below, although they represented 41% of the settlements we reviewed for 2020. This is up from 32% of such campaigns in 2019, reflecting an increase in settlements that were reached before the public announcement of campaigns and possibly a greater frequency of activists approaching company boards in private.

<i>Time Between the Initiation of Campaigns and the Date of the Settlement Agreements</i>	<i>Less than 1 Month</i>	<i>1–2 Months</i>	<i>2–3 Months</i>	<i>3–6 Months</i>	<i>6 Months or More</i>
2020	32%	21%	16%	26%	5% ⁹⁷
2019	13%	28%	17%	30%	13%
2018	24%	24%	13%	26%	13%
2017	10%	10%	13%	33%	33%
2016	23%	19%	21%	25%	12%
2015	15%	23%	19%	21%	21%

B. NOMINATION PROVISIONS AND MINIMUM SHAREHOLDING PROVISIONS

The majority of settlement agreements relating to 2020 activism campaigns provide for the appointment of a director to the board. The remaining agreements either provide for the nomination of a director candidate or some other arrangement, such as a change in committee composition. Generally consistent with 2019, 94% of settlement agreements provided for the nomination and/or appointment of at least one director to the board. However, 2020 settlement agreements were more likely to involve *only* one new director, with 45% of agreements providing for one director, up from 34% in 2018.

⁹⁷ 2020 data for longer-term periods is likely artificially low, because the data includes only completed campaigns, and long-running campaigns announced in mid-2019 have not yet been completed. This played out in our 2019 analysis of settlement agreements where we reported that 4% of 2019 settlement agreements had been reached in six months or more year-to-date. Now that more agreements have been reported, this number is up to 8%. We would similarly expect an increase in the 2020 numbers.

<i>Directors in Settlement Agreement</i>	<i>2020 YTD* Percentage</i>	<i>2019 Percentage</i>
4+ directors	12%	9%
3 directors	21%	14%
2 directors	18%	32%
1 director	45%	34%
No directors	3%	11%

The appointment of one or more new directors pursuant to a settlement agreement led to a board size change in order to accommodate the new activist designee(s) in 57% of 2020 settlement agreements reviewed, down from 70% in 2019. Additionally, several agreements provided for an initial increase to the size of the board followed by an eventual decrease in board size following the subsequent annual meeting. For agreements in which some or all of the new directors are added not by increasing the size of the board but by the replacement of a resigning director, some agreements specifically designate which incumbent director(s) would resign.

Settlement agreements in 2020 have been less likely to include provisions requiring minimum shareholding of the activists in order to keep the directors nominated by such activists on the board (or to nominate replacements if such directors resign or are otherwise unable to serve), with 55% of 2020 settlement agreements including such a provision, down from 70% in 2019. While the minimum share ownership level varies, the investor is often permitted to dispose of around 50% of its holdings at the time of the agreement. Failure to maintain the minimum ownership threshold typically results in the nominee(s) being required to resign from the board, the activist losing the right to name a replacement nominee, the termination of the agreement or all of the above. Additionally, some agreements set multiple minimum ownership thresholds, with the activist incrementally losing rights after falling below the various thresholds. This is more common where the activist gains multiple board seats.

C. COMMITTEE MEMBERSHIP

In 2020, the percentage of settlement agreements providing for committee membership for the activist-nominated directors was consistent with what we saw in 2019, with 73% of total agreements including such a provision. Many agreements provide for appointment to specific committees, while others mandate that any new committee formed in the future contain one or more of the activist's directors. Additionally, 27% of the agreements we reviewed require the formation of new board committees, compared to 14% for 2019 and 10% for 2018. Common names for these committees, which are indicative of their purpose, include "Strategic Review & Operations Committee," "Management Structure Committee," "Operating Committee," and "Capital Allocation Planning Committee." Notably, in February, utility company Evergy's settlement agreement with Elliott provided for the creation of a new strategic review and operating committee consisting of two Elliott designees and two current directors. The agreement provides that if there is a strategic path forward supported by the two Elliott designees that does not receive majority support from the entire committee, then the new committee will present both the Elliott designees' recommendation and other committee

members’ recommendation to the board and both recommendations will be publicly disclosed.⁹⁸

Where the settlement agreements we reviewed do not provide for committee membership, the agreement often notes that the company must consider the nominee/appointee for committee membership along with other members of the board.

Committee Membership	2020 YTD* Percentage	2019 Percentage	2018 Percentage
Nominee on committee	73%	71%	52%
Formation of new committee	27%	14%	10%

D. INFORMATION SHARING

66% of 2020 agreements specifically address the topic of information sharing by the new director with the activist, consistent with prior years: 9% of agreements expressly permitted such sharing of information, similar to 2018 levels after increasing to 13% in 2019; 18% of agreements subject new directors to the board’s standard policies regarding confidential information; and an additional 24% of agreements also involved separate confidentiality agreements entered into with the activist fund itself. Companies should be mindful of antitrust considerations, which can arise when an activist sits on the board of more than one company in the same industry, in determining whether to permit directors to share information with the activist. Issuers and activists alike will also have to consider the impact of information sharing on the activists’ ability to trade.

E. STANDSTILL PROVISIONS

Almost every settlement agreement includes a standstill provision, which prohibits activists from engaging in certain activities within a prescribed period of time. The main purpose of the standstill provision is to restrict the activist from initiating or participating in any further campaigns. The standstill period generally runs one annual meeting election cycle from the date of the settlement agreement. Often, the length of the standstill period is synced with the time when the director nominated by the activist is no longer required to be nominated to serve on the board (or earlier upon a material breach by the company of provisions in the settlement agreement).

The following table lists the types of activities typically restricted by the standstill provisions and the frequency of their inclusion in 2020 vs. 2019.

⁹⁸ Evergy’s strategic review and operating committee ultimately recommended that Evergy pursue a standalone plan, which was unanimously approved by the full Evergy board. Elliott’s designees supported the proposal and Elliott portfolio manager Jeff Rosenbaum was quoted in Evergy’s announcement press release in support of the plan. *See* Evergy, *Evergy Announces ‘Sustainability Transformation Plan’* (Aug. 5, 2020). However, in November it was reported that NextEra had recently made a bid to acquire Evergy in an all-stock deal. Evergy subsequently said in a statement that it was focused on executing its standalone plan (consistent with the Board’s unanimous decision in August); however, Elliott released a statement of its own prodding the company to engage with NextEra. *See* The Street, *Elliott Management Prods Evergy to Resume NextEra Merger Talks* (Nov. 10, 2020).

% of 2020 YTD* Agreements	% of 2019 Agreements	Activities Prohibited
91%	95%	<i>Soliciting proxies or consents.</i> Prohibits activists from making, engaging in or in any way participating in, directly or indirectly, any “solicitation” of proxies or consents to vote, or advising, encouraging or influencing any person with respect to the voting of any securities of the company.
85%	93%	<i>Forming a group or a voting trust or entering into a voting agreement.</i> Prohibits activists from forming or participating in any Section 13(d) “group” with any persons who are not their affiliates with respect to any securities of the company or seeking to deposit any securities of the company in any voting trust, or subjecting any such securities to any voting agreements (other than any such voting trust, arrangement or agreement solely among the activists and their affiliates).
88%	89%	<i>Seeking board additions or removals.</i> Prohibits activists from seeking to elect or remove any directors or otherwise seeking representation on the board.
85%	93%	<i>Presenting a shareholder proposal.</i> Prohibits activists from making any proposal at any annual or special meeting of the shareholders.
91%	88%	<i>Publicly disparaging the company or its directors or officers.</i> Prohibits activists from disparaging or negatively commenting on the company or its affiliates or any of their respective officers or directors, including the company’s corporate strategy, business, corporate activities, board or management. Of the 2020 settlement agreements we reviewed, 90% include a mutual non-disparagement clause that also prohibits the company from publicly disparaging the activists.
82%	77%	<i>Calling shareholder meetings or referendums.</i> Prohibits activists from calling or seeking the company or any other person to call any meeting of shareholders, as well as action by written consent, or conducting a referendum of shareholders.

SETTLEMENT AGREEMENTS *continued*

% of 2020 YTD* Agreements	% of 2019 Agreements	Activities Prohibited
82%	70%	<i>Seeking amendments or waivers from the standstill or challenging validity of the standstill.</i> Prohibits activists from publicly requesting any waiver of or amendment to the standstill provision or contesting the validity thereof. A majority of the settlement agreements include an exception that such actions could be pursued through non-public communications with the company that would not be reasonably determined to trigger public disclosure obligations.
73%	70%	<i>Requesting a shareholder list or books and records.</i> Prohibits activists from exercising their rights under state law to request a shareholder list or books and records of the corporation.
73%	68%	<i>Bringing litigation or other proceedings (other than to enforce the settlement agreement).</i> Prohibits activists from instituting or joining any litigation, arbitration or other proceeding (including any derivative action) against the company or its directors or officers other than to enforce the provisions of the settlement agreement. Many settlement agreements also include exceptions for counterclaims with respect to any proceeding initiated by the company against the activists, exercise of statutory appraisal rights or responding to or complying with a validly issued legal process.
55%	63%	<i>Seeking to control or influence the company or management.</i> While many settlement agreements simply provide for a flat prohibition on any actions designed to control or influence the company or management, some settlement agreements specify the types of activities that are prohibited, including any proposal to change the composition of the board, any material change in the capitalization, stock repurchase programs or dividend policy, any other material change in the company's management, business or corporate structure, amendments to the certificate of incorporation or bylaws, causing a class of securities of the company to be delisted from any securities exchange or become eligible for termination of registration pursuant to Section 12(g)(4) of the Exchange Act.
58%	71%	<i>Entering into third-party agreements that go against the settlement agreement.</i> Prohibits activists from entering into any discussions, negotiations, agreements or understandings with any third party with respect to any activities restricted by the standstill provision.

% of 2020 YTD* Agreements	% of 2019 Agreements	Activities Prohibited
67%	66%	Acquiring more shares. Prohibits activists from acquiring, offering to acquire or causing to be acquired beneficial ownership of any securities of the company such that immediately following such transaction the activists would have beneficial ownership of securities exceeding a certain prescribed limit. Settlement agreements sometimes clarify that exceeding the limit as a result of share repurchases or other company actions that reduce the number of outstanding shares should not be counted as a breach of this clause.
79%	54%	Publicly announcing intent to go against the settlement agreement. Prohibits activists from making any public disclosure, announcement or statement regarding any intent, purpose, plan or proposal that is inconsistent with the standstill provisions.
76%	59%	Seeking extraordinary transactions not recommended by the board. Prohibits activists from seeking, facilitating or participating in “extraordinary transactions” not recommended by the board. The term “extraordinary transactions” is generally defined to include any tender or exchange offer, merger, consolidation, acquisition, scheme, arrangement, business combination, recapitalization, reorganization, sale or acquisition of assets, liquidation, dissolution or other extraordinary transaction involving the company. Some settlement agreements include an exception that the activists could still tender their shares into any tender or exchange offer or vote their shares with respect to any extraordinary transactions. The prohibition sometimes extends to making public communications in opposition to the extraordinary transactions approved by the board.
39%	38%	Transferring shares to a third party. Prohibits transfers of the company’s securities to a third party that would result in such third party having aggregate beneficial ownership of more than a certain percentage. Many settlement agreements carve out certain parties from this restriction, such as parties to the settlement agreement, directors and officers of the company and/or affiliates of the company. A small number of settlement agreements also prohibit any purchase, sale or grant of any option, warrant, convertible security, stock appreciation right or other similar right.
30%	20%	Short selling. Prohibits activists from engaging in short selling of the company’s securities.

The restrictions imposed by standstill provisions were broader across the board from 2018 to 2019, and these heightened rates have largely been maintained through 2020. Five of the restrictions (soliciting proxies or consents, forming a group or voting trust/entering into a voting agreement, seeking board additions or removals, presenting a shareholder proposal and publicly disparaging the company or its directors or officers) appeared in 85% or more of 2020 and 2019 agreements. No individual restriction appeared in more than 88% of 2018 agreements. This general pattern marks a reversal from the decrease in frequency observed from 2017 to 2018.

Of the 16 restrictions we tracked, only four changed in frequency by more than 10% from 2019 to 2020: seeking amendments or waivers from the standstill or challenging the validity of the standstill, publicly announcing an intent to go against the settlement agreement, seeking extraordinary transactions not recommended by the board and short selling.

The one restriction that decreased by more than 10% in frequency, from 71% in 2019 to 58% in 2020, was the prohibition against entering into third-party agreements that go against the settlement agreement. This marks a reversion to 2017 levels when the restriction appeared in 55% of agreements, down from increased levels we observed of 71% of 2019 agreements and 67% in 2018.

One restriction in particular has experienced a consistent upward trend over the past two years, with 73% of 2020 agreements restricting the activist from bringing litigation (up from 68% in 2019, 65% in 2018 and 57% in 2017).

F. VOTING AGREEMENTS

91% of 2020 settlement agreements include a provision requiring the activists to vote their shares in a prescribed manner within the standstill period, representing an increase from 89% of settlement agreements in 2019 and from 80% of settlement agreements in 2018. 9% of the settlement agreements simply require the activist to vote for all the director candidates nominated by the board, and 6% of the settlement agreements require the activist to vote in accordance with all board recommendations. The remaining 76% of the settlement agreements either specify proposals that the activists must vote for (such as ratification of the appointment of an auditor, “say-on-pay” and “say-on-frequency” proposals, proposals regarding equity incentive plans, change of control transactions and the board slate for the director election) or include exceptions permitting activists to vote in their own discretion on certain proposals.

One of the most common exceptions to the voting agreement provision is when a board recommendation differs from that of the proxy advisors ISS and/or Glass Lewis. This exception has become popular over the past few years, appearing in 42% of settlement agreements reviewed for 2020, which is down from 50% in 2019, but up from 37% in 2018, 30% in 2017 and 22% across 2015 and 2016. Of agreements including such an ISS/Glass Lewis exception, some agreements permit the investor to vote against the board recommendation if *either* ISS *or* Glass Lewis makes a recommendation differing from the recommendation of the board with respect to a proposal, while others require *both* ISS *and* Glass Lewis to make such a differing recommendation. Some agreements also limit the exception to ISS recommendations only. Additionally,

some agreements limit the ISS/Glass Lewis exception only to specified matters, requiring the investor to support most or all other board recommendations notwithstanding an ISS/Glass Lewis recommendation to the contrary.

Other exceptions include extraordinary transactions such as mergers or liquidations, amendments to the company's articles of incorporation, compensation plans or implementation of takeover defenses.

<i>Voting Provisions</i>	<i>2020 YTD* Percentage</i>	<i>2019 Percentage</i>	<i>2018 Percentage</i>
All board recommendations	6%	20%	12%
Specific board recommendations or exceptions	73%	54%	62%
The board slate only	9%	16%	7%
No voting provision	9%	11%	20%
ISS/Glass Lewis exception to voting provision	42%	50%	37%

G. EXPENSE REIMBURSEMENT

Another noteworthy trend in 2020 was the continued increase of settlement agreements pursuant to which the company was required to reimburse the activist for its expenses in connection with the campaign. 75% of 2020 settlement agreements included an expense reimbursement requirement, up from 70% in 2019, and significantly up from 52% in 2018 and 51% in 2017. However, while expense reimbursement obligations have become more frequent, they are not necessarily becoming more costly. We have divided expense reimbursement obligations into three buckets based on the dollar value cap of the obligations—less than \$100,000, \$100,000 to \$500,000, and \$500,000 or greater. Notable changes include a 12-percentage point increase of caps from \$100,000 to \$500,000 and a five-percentage point decrease in the share of agreements with an expense reimbursement cap exceeding \$500,000.⁹⁹ Notably, the size of a reimbursement cap does not appear to track issuers' market capitalizations.

<i>Expense Reimbursement</i>	<i>2020 YTD* Percentage</i>	<i>2019 Percentage</i>	<i>2018 Percentage</i>
Each party pays for its own expenses	27%	30%	48%
Cap of less than \$100,000	21%	23%	18%
Cap of \$100,000 to \$500,000	33%	21%	22%
Cap of \$500,000 or more	15%	20%	7%
Others (including no cap)	3%	5%	5%

In previous publications, we discussed the increased use of special purpose websites and alternative media in activism campaigns in addition to more

⁹⁹ Additionally, there was one settlement in 2020 (between Olin Corporation and Sachem) that provided that the company must reimburse expenses but did not include a cap.

traditional strategies. For example, Third Point produced a YouTube video¹⁰⁰ airing its grievances against Campbell's Soup in October 2018. As activists adapt to alternative media and pressure to adopt new approaches to win over key stakeholders, the cost of engaging in a campaign may be increasing, with the constant evolution of alternative media potentially leading to newer high-cost techniques. Such costs may be offset, however, by the potential repeated use of some techniques that may allow activists to streamline their costs in future campaigns.

H. FUND INSIDERS APPOINTED BY SELECT ACTIVISTS

We conducted further analysis with respect to settlements between target companies and certain prominent activist funds from 2010 to September 2020. In doing so, we reviewed settlements that granted the respective activist the right to appoint at least one director to the target company board to assess both the frequency with which each such activist appointed fund insiders to the board (as opposed to unaffiliated directors) and the length of time that the longest serving fund insider for each such agreement remained on the board.

Although institutional investors may prefer independent designees to fund insiders (BlackRock has expressly stated as much), as shown in the chart below, in 53% of the agreements we reviewed, at least one of the appointed directors was an insider of the activist fund. Icahn and ValueAct appointed an activist insider in over 85% of the settlements reviewed, whereas Elliott, JANA and Land & Buildings chose an insider in 27% or fewer of the settlements; and Starboard and Third Point were almost evenly split between insiders and independents, with at least one insider in 48% and 60% of the settlements reviewed, respectively. In 55% of the agreements for which the duration of the settlement agreement has expired, at least one insider stayed on the board longer than the length of time that the target company was required to appoint and nominate the director pursuant to the settlement agreement. For agreements in which at least one insider remained on the board for longer than the duration provided for by the settlement agreement, the longest-serving insider for each such agreement has served an average of approximately 28 months longer than the period provided for in the agreement.¹⁰¹

100 See <https://www.youtube.com/watch?v=DLptfL5jPDg> and Matt Levine, Bloomberg, *Activist Soup Ad is Mmmm Mmmm Good* (Oct. 19, 2018).

101 However, that average likely understates the total amount of time activist insiders stay on a target board following the expiration of the settlement period, as, in 28% of the agreements for which insider appointees remained on the board beyond the duration of the settlement agreement, at least one such nominee was still on the board as of September 2020. Furthermore, as of September 2020, in 13% of the agreements in which insiders were appointed, the insider nominees were still serving and the duration of the settlement agreement had not yet lapsed.

<i>Fund</i>	<i>Settlements Reviewed</i>	<i>% with Insider</i>	<i>% of Agreements with Insider Appointees on Board Beyond Duration of Settlement Agreement</i>	<i>Average Months Insider Appointees Are on Board Beyond Settlement</i>
Elliott	20	20%	100%	14
Icahn	17	88%	79%	26
JANA	11	27%	0%	N/A
Land & Buildings	4	25%	100%	2
Starboard Value	21	48%	50%	13
Third Point	5	60%	67%	39
ValueAct	11	100%	55%	32
TOTAL	89	53%	63%	24

5 OTHER LEGAL DEVELOPMENTS IMPACTING ACTIVISM

One important tool in the activist’s toolbox is the initiation or threat of litigation. Although this year litigation was not a common strategy used by activists, there have been a number of new legal developments impacting activism strategies more broadly, including: (A) Delaware case law regarding Section 220 (books and records) demands; (B) a pending lawsuit in the Delaware Chancery Court seeking to invalidate a recently adopted shareholder rights plan; (C) Delaware case law regarding the scrutiny applied to board decisions when responding to an activist; and (D) the SEC’s proposed update to the Form 13-F reporting threshold.

A. SECTION 220 DEMANDS

Activist-initiated litigation tends to involve Section 220 (books and records) demands, breach of fiduciary duty claims and/or allegations regarding violations of the federal securities laws. Section 220 of the Delaware General Corporate Law permits shareholders to request (and compels Delaware corporations to provide) corporate books and records, so long as the shareholder has a proper purpose for the request. Section 220 books and records demands, which are sometimes litigated if the activist does not believe that the target company has been responsive to its demand, often serve as launching pads for a broader activism campaign, including litigation.¹⁰²

As discussed in last year’s publication, Carl Icahn’s opposition to Occidental Petroleum’s Anadarko acquisition is illustrative of this point. Icahn’s complaint demanding books and records relating to Occidental’s planned acquisition of Anadarko sets forth many of his arguments in opposition to CEO Vicky Hollub and the decision to acquire Anadarko, which were subsequently widely reported by major media outlets covering the lawsuit.¹⁰³ Icahn later initiated a proxy fight against the company citing similar concerns,¹⁰⁴ and ultimately agreed to settle for three board seats and other concessions in March of this year.¹⁰⁵

Delaware courts have issued a number of decisions with respect to Section 220 demands that bear on what constitutes a “proper purpose” for the demand. In November 2019, the Delaware Chancery Court held in Icahn’s Occidental suit that a stockholder’s disagreement with a board’s business decision and intent to pursue a proxy contest is not a “proper purpose.”¹⁰⁶ Notably, however, the Court

¹⁰² Notably, Section 220 demands have also recently arisen in the context of shareholder rights plans, such as a shareholder suit in the Delaware Chancery Court seeking access to The Williams Companies’ documents with respect to its recent adoption of a poison pill. *See* Bloomberg, *Williams Cos. Sued Over 5% Poison Pill Adopted Amid Pandemic* (June 5, 2020).

¹⁰³ *See* Matt Levine, Bloomberg, *Carl Icahn Wants an Oxydarker Vote* (May 31, 2019) (noting that Icahn’s complaint contains “a surprising amount of voice and energy for what is, after all, a books-and-records demand”).

¹⁰⁴ *See* Reuters, *Icahn Launches Proxy Fight After Stalled Talks with Occidental CEO* (July 18, 2019).

¹⁰⁵ *See* Bloomberg, *Occidental Agrees to Carl Icahn Truce* (Mar. 25, 2020).

¹⁰⁶ *See* High River Limited Partnership v. Occidental Petroleum Corp. (Del. Ch. Nov. 14, 2019).

suggested in dicta that it could consider ruling in favor of a shareholder seeking books and records for purposes of facilitating a proxy contest under the right facts and circumstances,¹⁰⁷ which may encourage future books and records requests by activists.

There have also been additional decisions outside the activism context that may be relevant to activist Section 220 demands. In January, the Delaware Chancery Court ordered AmerisourceBergen Corp. to provide its shareholders with records under Section 220 relating to its procedures for complying with opioid distribution laws.¹⁰⁸ In finding that a credible basis for the records request existed, the Court rejected AmerisourceBergen's claim that the shareholders needed to demonstrate that they had an acceptable purpose plus indications of their intended use of the materials (the so-called "purpose-plus-an-end" test), noting that such an approach would improperly "commit" shareholders in advance to what they would do with an investigation before seeing the results of that investigation. This case deviates from similar Delaware cases where courts have applied the "purpose-plus-an-end" test to shareholders' detriment.

In May, the Delaware Chancery Court permitted shareholders bringing a Section 220 demand suit to engage in certain discovery in the form of interrogatories pertaining to the existence and location of the documents at issue, deeming such discovery both relevant and helpful.¹⁰⁹ The Court cited to AmerisourceBergen and noted that a shareholder making a Section 220 demand does not have to prove its entire case prior to discovery in order to gain discovery, as imposing such a requirement would restrict access to information through discovery that is necessary for the plaintiff to show a "proper purpose." The Court also rejected any categorical rule that a shareholder bears the burden to establish a "proper purpose" or to show that the documents it requests are "essential" to that purpose and found that there was "no principled basis for categorically precluding . . . discovery in Section 220 actions, even with the limiting principles applicable to these actions in mind."¹¹⁰

The decisions in AmerisourceBergen and Hollywood Police Officers' Retirement System expressly support a broader right for shareholders to make Section 220 demands, arguably in contrast to the Court's decision in High River. The three cases, taken together, demonstrate uncertainty in this area regarding what will constitute a "proper purpose" and potentially open an avenue for activists to use Section 220 demands to engage in "fishing expeditions" to find information that will inform their campaigns. For more information on recent developments in Section 220 litigation, please refer to our M&A Hot Topics publication (available [here](#)).

¹⁰⁷ See id. ("In doing so, the court observed that the law in this area is unsettled and could use some clarity. I agree. But this case is not the vehicle to provide that clarity.").

¹⁰⁸ See Lebanon County Employees' Retirement Fund v. AmerisourceBergen Corp. (Del. Ch. Jan. 13, 2020).

¹⁰⁹ See Hollywood Police Officers' Retirement System v. Gilead Sciences, Inc. (Del. Ch. May 8, 2020).

¹¹⁰ See id., Tr. at 62.

B. PENDING LAWSUIT REGARDING A 5% RIGHTS PLAN THRESHOLD

In August, Steve Wolosky, a lawyer at Olshan Frome Wolosky LLP who frequently represents activists, filed a proposed class action in the Delaware Chancery Court against the Williams Companies taking aim at the company's shareholder rights plan adopted in March.¹¹¹ Wolosky specifically took issue with the plan's 5% trigger threshold and "acting in concert" language, which provides that two investors are deemed to be "acting in concert" if "each person is conscious of the other person's conduct and this awareness is an element in their respective decision-making process."¹¹²

A 5% trigger threshold for a traditional rights plan is lower than the norm, even considering that the plan in question exempts passive institutional investors. According to data from the Council of Institutional Investors, 10% of rights plans adopted this year through August had a 5% trigger threshold (not including Net Operating Loss-focused plans).¹¹³ Whether or not the Court upholds a rights plan with a 5% trigger threshold is of particular interest to activist investors, because imposing a 5% ownership cap is more relevant to a typical activist investment strategy than ownership caps above 10%. Additionally, while rights plans sometimes contain broad "acting in concert" language to pick up conscious parallelism, this is not the first time such provisions have been subject to challenge.¹¹⁴

C. DIRECTORS' ACTIONS IN RESPONSE TO AN ACTIVIST

The Delaware Chancery Court recently weighed in on whether a board's exploration or completion of a sale process in response to a threat posed by a shareholder activist gives rise to a conflict of interest in Rudd v. Brown (Del. Ch. Sep. 11, 2020). In 2016, an activist investor, Engaged Capital, launched a campaign at Outerwall Inc., the owner of Coinstar and Redbox video-rental kiosks, urging the company to initiate a sale process and threatening a proxy contest. Outerwall agreed to initiate a sale process and later entered into a settlement agreement with Engaged providing for the addition of one director to the Outerwall board; a few months later, Outerwall agreed to be acquired by Apollo.¹¹⁵ After the transaction closed, a class of shareholders brought a derivative suit against certain of Outerwall's officers and directors, alleging they had breached their fiduciary duties in agreeing to sell the company because agreeing to the sale in response to a threat posed by an activist (*i.e.*, to avoid negative publicity and the potential loss of board seats in a proxy contest) gives rise to a non-exculpated conflict of interest. In granting the defendant's motion to dismiss, the Court found that something more than the threat of a proxy contest must be shown in order for the board's decision to be considered conflicted in this context—noting that, "the threat of a looming proxy contest

111 See Reuters, *Activist Lawyer Wolosky Sues Williams Cos Over Poison Pill* (Aug. 28, 2020).

112 See The Deal, *Wolosky's Suit Could Gain Traction* (Sep. 4, 2020).

113 See *id.* NOL rights plans typically have a trigger threshold of 4.99% because they are tied to tax rules on what constitutes an "ownership change" limiting a company's ability to utilize its NOL carryforwards and other tax attributes.

114 See, e.g., Yucaipa American Alliance Fund II L.P. v. Riggio (Del. Ch. July 22, 2010). Notably, the existence of "wolf packs" that do not constitute 13D groups has been used to justify lowering triggering thresholds generally. Third Point LLC v. Ruprecht, et al. (Del. Ch. May 2, 2014).

115 See Law360, *Chancery Ruling Offers Takeaways on Conflicts in M&A Sales* (Sep. 18, 2020).

might inform the inference of conflict at the pleading stage ‘*when coupled with other pled facts*’ (emphasis added).¹¹⁶ For example, the Court cited to a case where the board *could* have been conflicted when there was both a threat of a proxy contest and changes in compensation arrangements.¹¹⁷ Rudd provides a helpful reminder of the importance of identifying actual conflicts at the outset of any activism contest or M&A process.

D. PROPOSED UPDATES TO FORM 13F THRESHOLD AND HSR RULES

Form 13-F Threshold

In July, the SEC proposed to increase the reporting threshold for Form 13F from \$100 million to \$3.5 billion.¹¹⁸ Rule 13f-1 currently requires institutional investment managers to file quarterly holding reports on Form 13F if the accounts over which they exercise investment discretion hold an aggregate of more than \$100 million in “section 13(f) securities,” which generally include listed equity securities included on a list published by the SEC each quarter. Form 13F is an important, but imperfect, tool for issuers to monitor activist investors’ positions in their stock. Investment managers filing Form 13F reports are not required to disclose their positions until 45 days after the end of a quarter. As a result, by the time disclosure is made, it may be too late to warn an issuer about an impending activism campaign. For more information on the SEC’s proposed amendments to Form 13F, please refer to our prior publication on this topic (available [here](#)).

The SEC noted in its announcement of the proposal that the amendment is merely meant to modernize the threshold, since the original threshold of \$100 million was set in 1975 and had not been updated since (despite the overall value of U.S. public corporate equities growing by a 30x multiple).¹¹⁹ In any event, the \$3.5 billion threshold is a significant increase from the current \$100 million amount, and, while the largest activists such as Elliott would still be required to make 13F filings, a number of other activists, potentially those that target smaller-cap companies, would be able to avoid filings under the SEC’s proposal.

The SEC proposal has been met with significant criticism. In September, both the NYSE¹²⁰ and NASDAQ¹²¹ issued formal comment letters opposing the SEC’s proposal, citing concerns over transparency. In addition, 99% out of a staggering 2,262 comment letters received by the SEC during the comment period reportedly opposed its adoption.¹²² The SEC is reportedly considering dropping the proposal in response to this significant opposition.¹²³

116 The Court was specifically focused on “other indicia of gross negligence or disloyalty.” See Rudd v. Brown (Del. Ch. Sep. 11, 2020) at 25.

117 See In re Tangoe, Inc. Shareholder Litigation (Del. 2018).

118 See SEC, *SEC Proposes Amendments to Update Form 13F for Institutional Investment Managers; Amend Reporting Threshold to Reflect Today’s Equities Markets* (July 10, 2020).

119 See *id.*

120 See NYSE, *Reporting Threshold for Institutional Investment Managers* (available at: https://www.nyse.com/publicdocs/NYSE_Group_13F_Reporting_Threshold_Comment_Letter.pdf).

121 See NASDAQ, *Proposed Rule on Reporting Threshold for Institutional Investment Managers* (available at: <https://www.nasdaq.com/docs/2020/09/22/Nasdaq-SEC-Comment-Letter-13F.pdf>).

122 See Bloomberg, *Hedge Funds’ Shot at Keeping Stock Investments Secret Fades* (Oct. 27, 2020) (citing a Goldman Sachs analyst report).

123 See *id.*

HSR Updates

Meanwhile, Form 13-F is not the only activism detection tool that is subject to update. In September, the FTC and the Antitrust Division of the DOJ called for public comment on a Notice of Proposed Rulemaking setting forth changes to the rules promulgated under the HSR Act, including (a) an expansion to the definition of “person” to include an acquirer’s “associates” and (b) a new reporting exemption for investments of up to 10% of a target company’s voting securities—regardless of whether the investor intends to influence management or remain passive—when the acquirer does not have a “competitively significant” relationship with the issuer.¹²⁴

The amendment to the definition of “person” would expand the number of activist transactions that are reportable because it expands the range of affiliated entities that will be aggregated together as a single acquiring “person”. The term “associates” is defined broadly to capture entities that are not affiliates, but that have a management or control relationship with the acquiring entity. This definition, though broad, is still generally narrower than the SEC’s “group” definition, which is relevant for 13D and 13G filing purposes, and covers non-affiliates combined in furtherance of a common objective. The amendment would also increase the amount of information filers are required to disclose because filers will be required to disclose information regarding their associates.

The new reporting exemption, in contrast, stands to make activist detection through HSR filings much more difficult for issuers. This is a significant expansion of the current exemption that covers acquisitions of less than 10% if the acquisition is purely passive. Under the current proposal, an acquirer has a “competitively significant” relationship with an issuer when it (i) operates a competing business, (ii) holds voting securities in excess of one percent of an entity that is a competitor of the issuer, (iii) has a non-trivial vendor-vendee relationship with the issuer, or (iv) has a certain relationship (*i.e.*, employment, an individual serving as a principal or agent, or an individual otherwise acting on behalf of the acquirer) with an individual who is an officer or director of the issuer or a competitor of the issuer. Since in many activist situations, the activist will likely not fit into any of these buckets, it will likely be able to take advantage of this new exemption as proposed. For more information on the proposed HSR amendments, please refer to our prior publication on this topic (available [here](#)).

Of course, Form 13F and HSR filings are not an issuer’s only tools to monitor potential activist approaches. Activist investors are still required to file beneficial ownership reports on Schedule 13D or 13G if they beneficially own 5% or more of any class of an issuer’s equity shares (alone or together in a group). Issuers should also coordinate with their proxy solicitors and other stock monitoring services in order to regularly monitor trading activity in their stock.

¹²⁴ Available at: https://www.ftc.gov/system/files/documents/federal_register_notices/2020/09/p110014hsractamendnprm09182020_0.pdf.

* * *

Activist activity levels have fallen sharply this year in response to the COVID-19 pandemic, and a number of campaigns initiated prior to the onset of the pandemic in the U.S. settled in the spring. Activist objectives also changed, as M&A- and buyback-focused campaigns took a backseat this season in favor of pushes for board and management changes and operational improvements. Going forward, we expect the activism landscape to continue to shift as the market reaction to the pandemic and the outcome of the recent U.S. presidential election evolves. With the prospects of the economy stabilizing if COVID-19 vaccine implementation is successful, activists may identify new entry points. More generally, we expect the uptick in activism activity levels observed toward the end of 2020 to continue into 2021, as activists who decided to sit out 2020 proxy campaigns gear up for the 2021 proxy season.

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