SULLIVAN & CROMWELL LLP

Review and Analysis of 2019 U.S. Shareholder Activism

November 06, 2019

Starboard, Ancora, Icahn and Elliott lead the way with the most publicly announced campaigns against U.S. issuers through August

Board seats obtained per announced campaign remain at elevated levels, as activists on average obtained 0.7 board seats per 2019 campaign (a 35% increase from 2017)

Despite the recent focus in shareholder discourse on "purpose" and maximizing value for all stakeholders, institutional investors appear to give activists a pass on ESP topics

Active managers are increasingly adopting activist tactics, highlighted by Neuberger Berman's proxy contest at Verint Systems

Activists are focused on M&A in record numbers, either by agitating for sales or divestitures or by intervening to break up previously announced transactions

Almost 50% of issuers that added activist designees to their boards in 2017 or 2018 have since either sold themselves or engaged in a meaningful divesture

Activists continue to hone in on issuers without a permanent CEO or with impending CEO retirements, evidenced by several prominent 2019 campaigns

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Introduction

Activism activity levels thus far in 2019 have remained largely consistent with prior years. Activists launched 205 new campaigns through the end of August and won 76 board seats, as compared to 203 new campaigns and 113 board seats through the end of August last year. Starboard has led the pack, launching 10 new campaigns, and many of the other leaders are also well-known activists: Icahn initiated four new campaigns during the same period followed by Elliott with three. Elliott, Icahn and Third Point led all funds with $3.4 billion, $2.8 billion and $1.5 billion in capital deployed in activist campaigns in the first half of 2019, respectively.[1]

Although the well-known activists grab the headlines in number and volume of campaigns, new activists continue to enter the space at a steady clip. First-time activists accounted for 26% of announced campaigns in the first half of 2019, roughly in line with the prior two years when first-time activists accounted for 31% and 21% of announced campaigns, respectively.[2] We have also observed active managers entering the activism arena—some even going so far as to launch proxy contests in certain instances.

M&A has been a particular focus of activists so far this year, more than ever before, demonstrated by activists both calling for issuers to initiate a sale or divestiture process and opposing previously announced transactions. Nearly half of activism campaigns in the first half of 2019 have focused on M&A, up from prior years when M&A has consistently accounted for only roughly one-third of campaigns.[3] It is also the case that, when an activist designee is added to a company's board, the company will be more likely to engage in M&A going forward. This year, we conducted a proprietary review of companies that added activist designees in 2018 and 2017 and found that almost 50% of them were either sold or engaged in a meaningful divestiture following the addition.[4] In addition, we continue to observe succession vacuums, which occur when companies lack a permanent CEO or their current CEO has an impending retirement, as a key factor correlating to an activist challenge. Further, activists are increasingly looking outside of the U.S. for potential targets—roughly 40% of capital deployed by activists in the first half of 2019 targeted European or Asian issuers.[5]

These developments are taking place against a backdrop of an intensified debate in the corporate governance world over the "purpose" of a corporation. A number of both institutional investors and business leaders have begun to emphasize the importance of all a corporation's stakeholders and question how directors should consider these stakeholders in their decisionmaking. This debate raises the question of whether, and how successfully, activists will seek to implement these ideas, or at least introduce the terminology into their messaging, in order to win support from key shareholders in activism contests. Moreover, the approaching 2020 U.S. Presidential election is catalyzing more vocal criticism of share buy-backs and some candidates are cautioning corporations to be more "employee-friendly." These concerns could constrain those activists who seek a

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1 *See* Lazard's Shareholder Advisory Group, *Review of Shareholder Activism – H1 2019, available at* https://www.lazard.com/media/451008/lazards-h1-2019-review-of-shareholder-activism.pdf.

2 *See* Id.

3 *See* Activist Insight, *The Activist Investing Half-Year Review, available at* www.activistinsight.com/resources/reports.

4 We studied 83 companies who added activist designees to their boards pursuant to publicly filed settlement agreements in 2018 and 2017 based on data from Shark Repellent.

5 *See* Lazard's Shareholder Advisory Group, *Review of Shareholder Activism – H1 2019*.

return of capital and cost-cutting measures or companies seeking to preempt or respond to these lines of attack.

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

The information in this publication in Section 2 (Activism Campaign Data) and Section 4 (Settlement Agreements) is based on the database maintained by FactSet Research Systems, Inc. on SharkRepellent.net, using a dataset run on August 31, 2019 supplemented by our review of public information and other third-party sources. This dataset only includes campaigns against U.S. companies, although other sections of the memo include global data.

We have followed the SharkRepellent 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 the mere submission of Rule 14a-8 proposals as "campaigns," although the section "Types and Objectives of Activist Campaigns" discusses shareholder proposals brought in conjunction with the activist campaigns covered in this publication. We also have excluded from the "other stockholder campaigns" category strategic acquisition attempts that involve unsolicited offers by one business entity to acquire another, though 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 activist 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.

Data in Section II regarding hedge fund assets under management (AUM), performance and formation is based on the Q1 2019 and year-end 2018 Hedge Fund Industry Report issued by Hedge Fund Research (HFR), unless otherwise indicated. Other data sources are identified as they arise.

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. INTEGRATING "PURPOSE" AND ACTIVISM

Environmental, social and political (ESP) themes have increasingly come to the forefront of shareholder discourse over the past several years, moving from proposals by a small number of "socially conscious" organizations into corporate disclosures, legislation and boardrooms. Recently, a number of the largest institutional investors and business leaders reaffirmed this trend with clear statements that they continue to be intensely focused on issuers' "purpose," how corporations treat all their stakeholders (in addition to shareholders), and similar concepts. In January 2019, Larry Fink (CEO of BlackRock) kicked off the year in his annual letter to CEOs by describing "purpose" as "a company's fundamental reason for being – what it does every day to create value for its stakeholders," while still emphasizing shareholder primacy.[1] In August, Business Roundtable, an organization made up of leading U.S. CEOs, issued a statement signed by 181 CEOs on the purpose of a corporation that highlighted the signatories' commitment to all their stakeholders, which they divide into five categories: customers, employees, suppliers, communities and long-term value creation for shareholders.[2] Mr. Fink's CEO Letter and the Purpose Statement have fueled a broader conversation on the duties of a corporation and the role of stakeholders in director decisionmaking.

Given the explosive growth of the largest index funds over the past few years,[3] winning the support of these funds is crucial in any activism situation. Accordingly, in future activism campaigns, one might expect to see activists trying to attract support from institutions like BlackRock and State Street with arguments about "stakeholders" and "purpose," although this behavior has yet to be an observable trend. The consequence is an asymmetry, with institutional investors expecting issuers to address these topics in their direct engagements and in their public disclosures but rarely demanding that shareholder activists address these topics directly (and these topics rarely headline activist white papers or fight letters). For example, notwithstanding institutional investors' calls for more gender diversity on boards, only 18% of activist appointees in 2018 were female,[4] as compared to 45%

1 *See* Larry Fink's 2019 Letter to CEOs – Purpose & Profit., *available at* https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.

2 *See* Business Roundtable, *Statement on the Purpose of a Corporation* (Aug. 19, 2019), *available at* https://opportunity.businessroundtable.org/wp-content/uploads/2019/09/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures-1.pdf.

3 *See* Morningstar, *Midyear 2019 Active/Passive Barometer*, *available at* https://www.morningstar.com/lp/active-passive-barometer?utm_source=mstarcom_content&utm_medium=referral (finding that the amount of capital being passively managed now exceeds the amount being actively managed).

4 *See* Lazard's Shareholder Advisory Group, *2018 Review of Shareholder Activism*. Further, based on a review of SEC filings, since 2001, only 14 out of 157 directors

of new Russell 3000 directors in the first half of 2019.[5] Nonetheless, institutional investor support for activist nominees has steadily increased in recent years with some exceptions (as discussed further in the section "Institutional Investors" below).

B. ACTIVE MANAGERS TURNED ACTIVISTS

In addition to a record number of first-time activists entering the activism space in recent years, we are also beginning to see a new class of activist emerge—active managers. Active managers are portfolio fund managers who *actively* make specific investments in companies and re-allocate investments based on short-term trends. Historically, active managers have voted with their feet (*i.e.*, sold their stock) instead of engaging with management and attempting to persuade them to change direction. Increasingly, however, active managers are taking their concerns public. In 2017 and 2018, active managers "went public" with their demands 79 times and 60 times, respectively, compared to just 40 such demands in 2014.[6]

This trend has continued to build in 2019,[7] with multiple high-profile examples of active managers using activist tactics. In February, 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.[8] Other notable campaigns include M&G Investments nominating four directors to methanol supplier Methanex's board in April over governance and business strategy concerns[9] and Wellington Management's public opposition to Bristol-Myers Squibb's acquisition of Celgene in February.[10]

Where active managers do not engage in activist tactics directly, they continue in increasing numbers to be receptive to activist arguments. According to a recent survey of active managers, 87% of active managers consider activism to be a useful market force.[11] Active managers' support for activism differs greatly by strategy type, with 79% of respondents indicating they typically support board member-

nominated by some of the most prolific activists (Icahn, Elliott, Starboard, Third Point and JANA) during this period have been women.

5 *See* ISS Analytics, *U.S. Board Diversity Trends in 2019*.

6 *See* Wall Street Journal, *Mutual Fund Managers Try a New Role: Activist Investor* (Dec. 30, 2018) (citing Activist Insight Online).

7 *See* Lazard's Shareholder Advisory Group, *Review of Shareholder Activism – H1 2019* (listing traditionally active managers building on their vocal approach and publicly asserting views on major corporate events as a major trend in the first half of 2019).

8 *See* BusinessWire, *Neuberger Berman Files Proxy Statement Seeking to Replace Three Verint Directors* (May 13, 2019).

9 *See* Reuters, *Methanex Settles with M&G Investments, Offers Board Seats* (Apr. 12, 2019).

10 *See* BusinessWire, *Wellington Management Does Not Support Bristol-Myers Squibb's Acquisition of Celgene Corporation* (Feb. 27, 2019).

11 *See* SquareWell Partners, *Active Managers & Activism* (2019). The survey was conducted from December 2018 to February 2019 using an online survey tool sent to investors pursuing mainly an "active" strategy. The respondents represent total assets under management of approximately $10.4 trillion.

related governance activism (compared to 53% for board-related strategy, 47% for operational activism, 26% for balance sheet activism and 21% for M&A activism).[12] Notably, T. Rowe Price issued a press release in July in support of Toby and Derek Rice's proxy contest against oil and gas company EQT Corporation, emphasizing that the dissidents' proposed board would be more accountable, results-oriented, dynamic and transparent than the current board.[13]

Active managers' recent foray into activism is perhaps partially a reaction to the general acceptance of activism as a reality of the public company environment. It also might be a response to the blurring lines between investment strategies in the realm of shareholder engagement, as historically non-activist investors are adopting activist-like engagement techniques and terminologies. In any event, companies would be wise to consistently engage and build relationships with *all* their significant shareholders, regardless of investment strategy. It is important for all significant shareholders to believe their concerns are being heard and addressed by management or, if they do not have any concerns, that they have a constructive avenue to raise issues with management privately if any were to arise in the future.

C. ACTIVISM AND M&A

Activism has consistently catalyzed M&A either through explicit calls for a target company to initiate a sale or divestiture process or, where a company does not respond to an activist by initiating such a process, attracting interest from unsolicited acquirors. As noted in the introduction, it is also the case that, when an activist designee is added to a company's board, the company will be more likely to engage in M&A going forward. This year, we conducted a proprietary review of companies that added activist designees in 2018 and 2017 and found that almost 50% of them were either sold or engaged in a meaningful divestiture following the addition of the activist designee to their boards.[14]

The link between M&A and activism has been even more prominent thus far in 2019; 46% of activism campaigns through the first half of 2019 were M&A-related, compared to roughly one-third of activism campaigns from 2014 through 2018. Of these 2019 campaigns: 32% called for a sale of the company or encouraged industry consolidation; 33% called for a break-up or divestiture; and 35% sought to intervene in an announced deal.[15] The percentage of M&A campaigns aimed at interfering in announced deals is up slightly from 2018 (34%)[16] and

12 *See* Id.

13 *See* BusinessWire, *T. Rowe Price Supports Rice Group Nominees in EQT Contest* (July 1, 2019).

14 We studied 83 companies who added activist designees to their boards pursuant to publicly filed settlement agreements in 2018 and 2017 based on data from Shark Repellent.

15 *See* Lazard's Shareholder Advisory Group, *Review of Shareholder Activism – H1 2019*.

16 *See* Id.

several of the most high-profile 2019 activism campaigns involved interference in announced deals, including Carl Icahn's opposition to Occidental Petroleum's acquisition of Anadarko and Dan Loeb and Bill Ackman's opposition to United Technologies's proposed merger with Raytheon.

In a few notable instances this year, activists attempted to become hostile acquirors themselves when their campaigns turned into takeover bids by their own private equity affiliates.[17] In June, it was reported that Elliott was in advanced talks to acquire oil and gas producer QEP Resources,[18] but ultimately the parties agreed to change the composition and structure of the QEP board through a settlement instead.[19] In May, it was reported that Mantle Ridge was exploring the possibility of forming a consortium of private equity firms and sovereign wealth funds to make an offer for food services company Aramark;[20] however, Mantle Ridge dropped its plans to buy Aramark in August and instead disclosed it had acquired a roughly 20% stake in the company and planned to hold talks with the company to discuss its strategic direction, governance, board composition and management team.[21] With the exception of Elliott, which in January solicited $2 billion in new investments to engage in take-private transactions,[22] it remains to be seen whether hostile takeover approaches by activists are more than just an additional tactic to force concessions from the target company. As we noted in last year's memo, activists must carefully consider securities laws when engaging in M&A transactions, particularly where the activist obtains material non-public information in the course of discussions with the issuer or where the activist teams up with a strategic acquiror (*e.g.*, Allergan-Valeant).

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17 Interestingly, we have also continued to observe issuers implementing rights plans (*i.e.*, poison pills), a classic hostile takeover defense, to give their boards time to react in the face of potential activist approaches, whether to stop the activist from accumulating a bigger stake, 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. There have been at least 26 instances in the last three years where companies have adopted rights plans in response to an actual or perceived activism threat and many more companies have prepared a "shelf" rights plan behind the scenes, readying the documentation and educating the board on rights plans proactively so that a rights plan could be implemented on short notice if the board deems it advisable.

18 *See* Bloomberg, *Elliott Is in Advanced Talks to Buy QEP Resources* (June 26, 2019).

19 *See* Reuters, *Oil Producer QEP Ends Sale Process, Settles with Activist Elliott* (Aug. 7, 2019).

20 *See* Reuters, *Mantle Ridge Explores Bid to Acquire Aramark* (May 30, 2019).

21 *See* Bloomberg, *Activist Investor Mantle Ridge Reports 20% Stake in Aramark* (Aug. 16, 2019). Aramark has since named a new CEO and announced changes to its board. *See* Philadelphia Business Journal, *Aramark Names New CEO, Shakes Up Board Amid Overhaul by Activist Investor* (Oct. 7, 2019).

22 *See* Wall Street Journal, *Elliott Looks Beyond Activism to Full-Blown Takeovers* (Jan. 30, 2019).

D. GLOBAL ACTIVISM

Although the main focus of this memo is activism targeting U.S. issuers, activism campaigns directed at European and Asian companies continue to make up a large share of global activism. In the first half of 2019, roughly 40% of capital deployed by activists was used to target non-U.S. companies.[23] This included $4.4 billion of capital deployed in Europe and $3.9 billion in Asia. Capital deployment for activism in Europe was significantly lower than 2018 and 2017 levels during the same period ($10.2 billion and $11.6 billion, respectively), but still greater than the first half of 2016 ($2.9 billion). In comparison, activist capital deployed in Asia was generally in line with 2018 and 2017 levels during the same period ($3.1 billion and $4.5 billion, respectively) and significantly greater than the first half of 2016 ($0.3 billion). So far this year, Japanese companies have been the most frequent targets of activists initiating non-U.S. campaigns; there were eight campaigns announced against Japanese companies in the first half of 2019 (comprising 21% of all announced non-U.S. campaigns). Other frequent international destinations for activists in the first half of 2019 included the United Kingdom (18% of non-U.S. campaigns), South Korea (11%) and France (8%).[24]

Differing legal and regulatory backdrops and norms in stakeholder engagement may impact the type and frequency of activism campaigns from jurisdiction to jurisdiction. For example, while activist shareholders may be able to avoid U.S. regulatory disclosure regimes by acquiring shares in an issuer without SEC-registered securities, applicable stock exchange or other regulatory rules may still require disclosures regarding the activist's stake (including at different ownership levels).[25] In addition, depending on the jurisdiction, the types of stakeholders that companies are required or expected to consider and the norms governing how companies interact with these stakeholders may differ greatly from the U.S. For example, in certain European jurisdictions, government bodies and works councils tend to have an outsized influence in corporate decisionmaking compared to the U.S.

Despite these differences, international activism is generally dominated by many of the same activists, goals and tactics as we observe domestically. Some of the most notable international campaigns in 2019 included Third Point's call for Japan-based Sony to divest its

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23 *See* Lazard's Shareholder Advisory Group, *Review of Shareholder Activism – H1 2019*.

24 *See* Id. Germany has also received increased activist attention recently, with Elliott announcing stakes in SAP, Bayer and Thyssenkrupp, among others. *See* Reuters, *Elliott Outspends Rivals as Corporate Activism Turns to Germany* (Jul. 10, 2019). Another frequent target is Canada, where there were four campaigns during the first half of 2019. *See* J. Cheung et al., FrontLine, *2019 Proxy Season Review: North America Activism*.

25 For example, in France the Finance Commission of the French National Assembly recently announced its recommendation to reduce the threshold for equity ownership disclosure from 5% to 3% in response to shareholder activism. *See* French National Assembly, *Activisme Actionnarial: Examen d'un Rapport D'Information* (Oct. 2, 2019), *available at* http://www2.assemblee-nationale.fr/15/commissions-permanentes/commission-des-finances/secretariat/a-la-une/activisme-actionnarial-examen-d-un-rapport-d-information.

semiconductor division and focus on its entertainment business,[26] Elliott's announced stake in German software company SAP,[27] Trian's approach of U.K.-based plumbing company Ferguson Plc calling for, among other things, a sale of its U.K. business,[28] and ValueAct's public letter to Merlin Entertainments, the U.K.-based owner of Madame Tussauds and Legoland, urging the company to go private.[29]

E. SUCCESSION VACUUMS AS A LEADING INDICATOR

In last year's memo, we identified 'succession vacuums' as a trending indicator of activism. Different from activist campaigns to remove a sitting CEO (*e.g.*, Carl Icahn's demand that Xerox CEO, Jeff Jacobson, be removed), activists frequently initiate campaigns against companies that lack a permanent CEO or that have an impending CEO retirement. Succession vacuums continue to be a key factor correlating to an activist challenge. There were a number of campaigns in 2019 that appeared to coincide with so-called 'succession vacuums,' including video game retailer GameStop's approach by a pair of activists in March in the midst of its search for a permanent CEO[30] and Carl Icahn increasing his position in business process services company Conduent upon the announcement of its CEO's retirement in May.[31]

Activists may see succession vacuums as an opportunity to have an outsized influence in a company's strategic direction (either by selecting the management team or pushing for change when there is no permanent leader to defend him or herself). Moreover, activist involvement at this stage may also make it more difficult for a board to attract a new CEO.

All companies should proactively plan for CEO succession, both in the ordinary course and in the "hit by a bus" situation. In particular, any company expecting to undergo a CEO transition in the next couple of years should devote the time and resources to ensure that the board's preferred candidate is identified well in advance of any public announcements (or significant speculation) regarding a transition, if possible, and that investors have a clear picture of the board's focus and priorities with regard to succession planning. Companies should also take care to ensure they have proper controls in place to manage an emergency situation with limited interruption. In either case, expected or unexpected, a company's explanation of the CEO transition must be thoughtfully structured to instill investor confidence in the timing and outcome of the board's decision.

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26 *See* Barron's, *Dan Loeb's Third Point Has a New Plan to Break Up Sony* (June 14, 2019).

27 *See* Wall Street Journal, *Why Elliott's Latest Target Is a Tech Giant* (May 2, 2019).

28 *See* Reuters, *Activist Peltz's Trian Urges Ferguson to Sell UK Business* (July 28, 2019).

29 *See* Financial Times, *ValueAct Urges Merlin Entertainments to Be Taken Private* (May 22, 2019).

30 *See* MSN, *GameStop Investors Threaten Proxy Battle Over 'Stale Board'* (March 14, 2019).

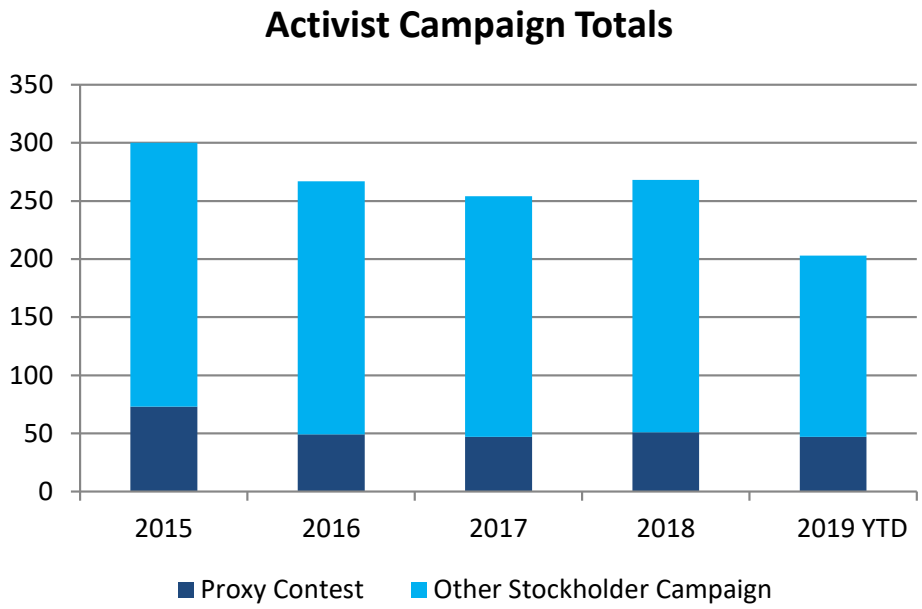
31 *See* MarketWatch, *Icahn Buys More Conduent Stock After CEO's Exit* (May 13, 2019).

2 ACTIVISM CAMPAIGN DATA[32]

Each year, we review the data underlying U.S. activism activity to elucidate trends. As activism matures, the data has become largely consistent and this has been the case thus far in 2019 as well. This consistency suggests that activism will continue to be an important consideration for companies going forward.

A. ACTIVIST CAMPAIGNS

Through August, activists announced 203 campaigns against U.S. issuers, as activism activity levels remain strong. The total number of campaigns has been remarkably consistent over the past five years with an average of approximately 272 campaigns announced per year. However, the total number of public campaigns in a given year does not paint a full picture; based on anecdotal information, a significant number of activist situations also are being resolved without publicity.



Proxy contests have made up a slightly larger percentage of announced activist campaigns so far this year (23%) compared to levels during the prior three years (19%). This year's percentage is more in line with 2014 and 2015, where full-scale proxy contests developed, on average,

32 This data is based on the database maintained by FactSet Research Systems, Inc. on SharkRepellent.net, using a dataset run on August 31, 2019; as such, this data does not paint a full picture of activism campaigns announced in 2019. For more information on the scope of this data, see "Notes on the Scope and Sources of Data Used in This Publication."

in slightly less than one-quarter of all activist campaigns announced in 2014 and 2015. 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. Further, the proxy 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
2019 YTD	47	156	203
2018	51	217	268
2017	47	207	254
2016	49	218	267
2015	73	227	300
2014	62	210	272

Activists have experienced higher success rates in obtaining board seats in recent years. So far this year, activists have averaged 0.7 board seats per campaign, in line with 2018 and almost double the 2016 average. As summarized in the table below, activists on average have received more than one board seat for every two campaigns announced in a particular year in each of the last three years and four of the last five years.[33]

Board Seats Obtained by Activists at U.S. Issuers

	2015	2016	2017	2018	2019 YTD
Total Board Seats Obtained	173	96	114	116	76
Number of Total Completed Campaigns	300	243	221	143	109
Average Board Seats Per Campaign	0.57	0.40	0.52	0.81	.70

B. PROMINENT ACTIVISTS

The most frequent activists in terms of announced campaigns against U.S. public companies so far in 2019 have been Starboard, Ancora Advisors and Icahn.[34] This is the first year out of the past five years that Elliott has not appeared in the top-three of announced campaigns, although Elliott has remained active this year, falling just outside the top-three with three campaigns against U.S. issuers

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

34 This data does not include short sale activists (*e.g.*, Spruce Point Capital Management LLC), whose campaigns and tactics fall outside of the focus of our review.

through August and winning two board seats.[35] Ancora Advisors is a new addition to the top-three; the Cleveland-based fund, which founded its activist arm in 2014, was notably part of an investor group that settled with Bed Bath and Beyond in May.[36]

Announced U.S. Campaigns by Most Frequent Activists

2019 YTD	
Starboard Value LP	10
Ancora Advisors LLC	4
Icahn Associates Corp.	4
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

In addition to the public campaigns discussed above, activists engage in "behind the scenes" campaigns that often prove successful. Further, it is important then to consider the full picture in gauging the most successful activists in a given year, including board seats obtained.

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. In particular, Icahn has been remarkably successful, obtaining, on average, 1.63 board seats in each announced campaign over the last five years. Many board seats are also obtained through

35 According to Lazard, Elliott, Icahn and Third Point led all funds with $3.4 billion, $2.8 billion and $1.5 billion in capital deployed in activist campaigns globally in the first half of 2019, respectively. *See* Lazard's Shareholder Advisory Group, *Review of Shareholder Activism – H1 2019*.

36 *See* Wall Street Journal, *Bed Bath and Beyond Settles with Activist Investors, Appoints Four New Board Directors* (May 29, 2019).

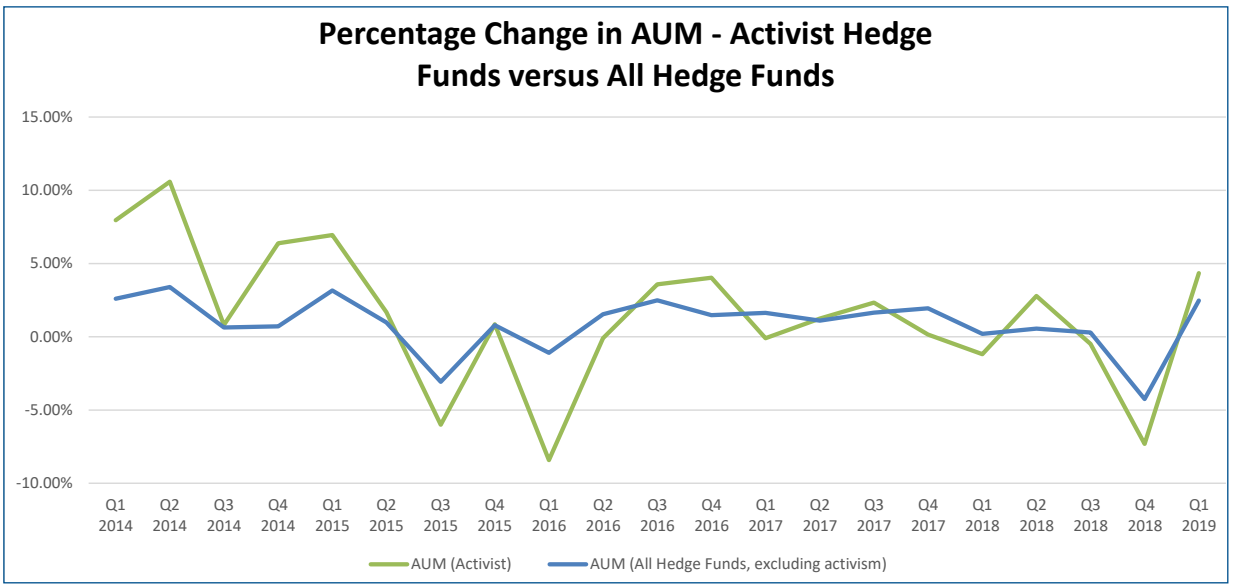
"quiet" campaigns where an activist engages with the issuer "behind the scenes." As noted in "Notes on the Scope and Sources of Data Used in This Publication," this data is limited to U.S. companies, and does not reflect the success of activist funds, like Elliott, in Europe and Asia over the past five years.

Number of Board Seats Obtained by Most Successful Activists at U.S. Issuers

	2015	2016	2017	2018	2019 YTD
Starboard Value LP	13	5	7	12	10
Icahn Associates Corporation	9	3	0	14	5
Elliott Management Corporation	6	9	6	5	2

C. ACTIVIST HEDGE FUND PERFORMANCE

In the first quarter of 2019, activist hedge fund AUM increased by roughly 4.3%, rising at levels slightly higher than hedge funds overall (2.5%). This follows moderate decreases in 2018 driven by second half declines.

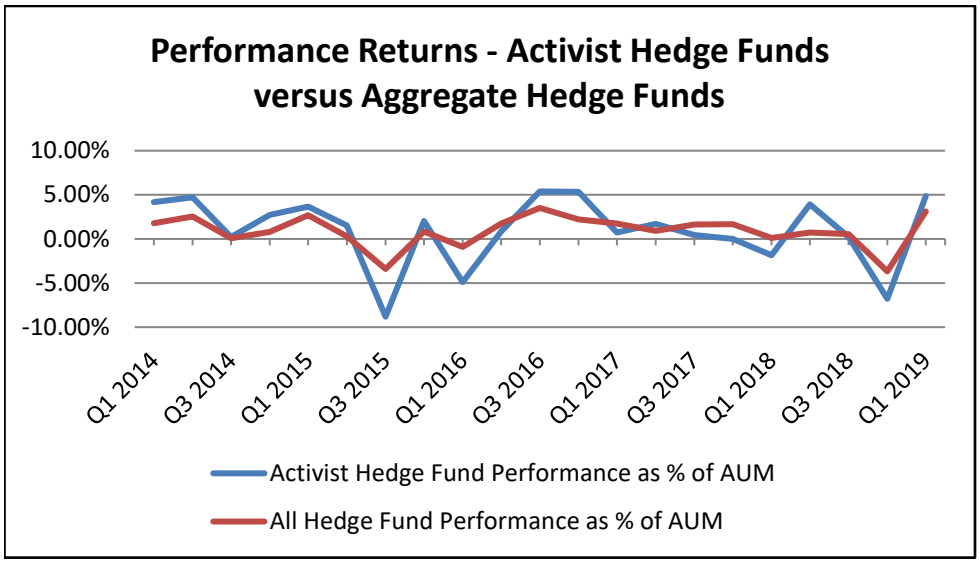


Activist hedge funds experienced positive net asset flows in the first quarter of 2019, following three consecutive quarters of negative net asset flows in 2018, which resulted in a total negative net asset flow of approximately $2.18 billion in 2018. Inflows as a percentage of AUM at activist hedge funds was higher than in the hedge fund industry in the first quarter of 2019. This comes after a three-year period where net outflows at activist hedge funds represented approximately 2% of

average AUM during this period, whereas outflows at all hedge funds represented just over 1% of average AUM.

Although the data from the first quarter of 2019 is positive, the disproportionate amounts of outflows from activist hedge funds over the last three years suggest that these funds may face fundraising and fund-retention challenges when seeking to identify and capitalize on activism opportunities in the near-term.

In the first quarter of 2019, the hedge fund industry earned its highest returns since the third quarter of 2016 (3.1%) and activists slightly outperformed the hedge fund industry by posting returns of 4.9%. In contrast, in 2018, the hedge fund industry as a whole earned low returns—an average of negative 0.54% per quarter—and activists underperformed the hedge fund industry by posting average returns of negative 1.12% per quarter. In general, activist hedge funds have been more volatile than hedge funds overall, and this volatility has continued through recent years. Hedge funds significantly outperformed the S&P 500 and the Dow Jones Industrial Average in 2018, which had returns of negative 6.2% and negative 5.6%, respectively.[37]



D. TARGET COMPANIES

In general, the frequency of campaigns in each band of market capitalization has remained relatively steady since 2014. The following table sets forth by market capitalization the percentage of companies targeted by activist campaigns announced since the beginning of 2014, with the first row indicating the allocation of companies in the Russell 3000 Index in each range.

37 MarketWatch, *Here's How Ugly 2018 Was For Stocks and Other Assets* (Jan. 1, 2019).

ACTIVISM CAMPAIGN DATA *continued*

Target Company Market Capitalization

	$100m–$500m	$500m–$1b	$1b–$10b	$10b–$50b	>$50b
Percentage of total companies	*21%*	*14%*	*40%*	*12%*	*3%*
2019 YTD campaigns	43%	11%	34%	7%	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 more frequently, with companies whose market cap is between $100 million and $500 million representing 43% of campaigns thus far in 2019, while representing only 21% of Russell 3000 companies. In contrast, companies with market caps between $1 billion and $10 billion are less likely to be targeted than their representation as a percentage of Russell 3000 companies suggests, as these companies represent 34% of campaigns, while making up 40% of Russell 3000 companies. On average, approximately 10% of the 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.

Activists have targeted a wide variety of industries since 2014. 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.

Most Targeted Industries 2014 to 2019 YTD[38]

Industry	Total Campaigns
Real Estate Investment Trusts	88
Investment Trusts / Mutual Funds	87
Packaged Software	78
Integrated Oil	66
Miscellaneous Commercial Services	50
Pharmaceuticals: Major	50

One particular industry that has been targeted in the past two years more than in prior years is integrated oil, which includes businesses engaging in the production, exploration, refinement and distribution of oil and gas. There have been 38 campaigns announced against integrated oil companies since the start of 2018 compared to an average of just over seven per year from 2014 through 2017.

38 Industry classifications based on data from SharkRepellent.net. *See* "Notes on the Scope and Sources of Data Used in This Publication".

3 DEVELOPMENTS IMPACTING VOTING IN PROXY CONTESTS

There has been speculation in recent years about SEC involvement in a number of areas that could bear on voting in activism contests, including: (1) institutional investors; (2) universal proxy ballots; (3) proxy advisors; and (4) blockchain technology. This section provides an overview of recent developments with respect to each topic.

A. INSTITUTIONAL INVESTORS

The influence of large index funds and other institutional investors is central to outcomes of shareholder activism contests. Despite the growth of activist investing in recent years, 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 those 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.[39]

Concentration of equity ownership, particularly among the largest three index fund providers, continues to be a key component in the activism landscape. As of December 2018, one of BlackRock, Vanguard or State Street was the largest shareholder in 438 of the S&P 500 companies, roughly 88%, and collectively the three firms owned 18.7% of all shares in the S&P 500.[40] Fidelity is the fourth-largest institutional investor and its ownership also significantly contributes to the equity concentration of the S&P 500.

Meanwhile, institutional investors have become increasingly more likely to support activist nominees. From 2013 through 2018, the 10 largest institutional investors increased their support for activist nominees by approximately 21% (from 33% to 40%). This was more pronounced among the top three institutional investors, where support rose approximately 94% during the same period (from 17% to 33%). Within this group, support rose from 6% to 41% at Vanguard and from 18% to 37% at State Street. At BlackRock, however there was a decrease in support from 29% to 22%.[41]

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39 On the other hand, BlackRock recently released a report 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).

40 *See* Russell Reynolds Associates, *2019 Global & Regional Corporate Governance Trends* (Dec. 11, 2018). As of 2017, Vanguard alone owned more than five percent of 491 companies in the S&P 500. Leslie P. Norton, Barron's, *Jack Bogle's Battle – Correction Appended* (Jan. 17, 2019).

41 *See* Harkins Kovler, *Recent Institutional Investor Voting Trends in Contested Board Elections* (March 11, 2019) for the data included in this paragraph.

B. UNIVERSAL BALLOTS

We have discussed previously the possibility that universal proxy cards, in which management and shareholder nominees are included on a single ballot rather than two separate ballots, could make the concentration of institutional share ownership more impactful. We observed that, if a dissident shareholder could trigger the use of a universal proxy card by reaching out to a small number of large shareholders, it would be much less costly for activists to run a proxy contest. Last year, SandRidge Energy became the first U.S.-listed company to use a universal proxy card in its proxy contest with Carl Icahn.[42] This year, we saw the first successful use of a universal proxy for a control slate in the U.S. when the Rice brothers prevailed in their proxy contest at EQT Corporation.[43] In August, the SEC Investor Advisory Committee urged the SEC to adopt its universal proxy rule for contested elections.[44] Proxy advisor Glass Lewis voiced its support for the universal ballot after the SEC Investor Advisory Committee's proposal was announced, stating that it would enhance shareholder rights and simplify the mechanics of proxy voting.[45] It still remains to be seen whether the SEC will take action on these recommendations.

C. PROXY ADVISORS

Proxy advisors, such as ISS and Glass Lewis, provide voting services to shareholders, including recommendations on how to vote at public company elections. Voting recommendations from proxy advisors continue to play a role in influencing institutional investors, although adherence to proxy advisor recommendations tends to be more rigid at smaller institutional investors, likely due to the large costs associated with investigating each individual voting decision.[46] In the two-year period from 2017 to 2018, institutional investors voted in line with ISS recommendations in proxy contests 54% of the time, compared to 49% in the prior two-year period.[47]

In 2019, the SEC issued important guidance on proxy advisors.[48] The

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42 *See* MacKenzie Partners, Inc., *The Universal Proxy Gains Traction: Lessons from the 2018 Proxy Season* (Sep. 19, 2018), *available at* https://corpgov.law.harvard.edu/2018/09/19/the-universal-proxy-gains-traction-lessons-from-the-2018-proxy-season/.

43 *See* The Corporate Counsel, *Universal Proxies: Dissidents Win Board Control for First Time!* (Jul. 11, 2019).

44 The SEC Investor Advisory Committee also suggested modest modifications to address raised objections. *See* SEC, *SEC Recommendation from the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee* (IAC) *Proposal for a Proxy Plumbing Recommendation* (Aug. 15, 2019).

45 *See* Glass Lewis, *SEC Proxy Recommendations Include Universal Ballot and Vote Confirmations* (Sep. 13, 2019).

46 *See* Brav et al., *Picking Friends Before Picking (Proxy) Fights: How Mutual Fund Voting Shapes Proxy Contests* (June 2018), *available at* http://w4.stern.nyu.edu/finance/docs/pdfs/Seminars/1901/1901w-jiang.pdf.

47 *See* Harkins Kovler, *Recent Institutional Investor Voting Trends in Contested Board Elections* (March 11, 2019).

48 *See* SEC, *Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice* (Aug. 21, 2019), *available at* https://www.sec.gov/rules/interp/2019/34-86721.pdf.

guidance affirms that voting recommendations from proxy advisors such as ISS and Glass Lewis constitute a "solicitation" under the SEC's proxy rules; the interpretation reiterates the SEC's previously stated view that a "solicitation" includes a communication by a person seeking to influence the voting of proxies by shareholders, regardless of whether that person is seeking authorization to act as a proxy. Notably, this means that proxy advisor voting recommendations will be subject to anti-fraud rules and are prohibited from containing any "false or misleading" statements and omitting any necessary material facts. In addition, the SEC offered guidelines for proxy advisors to consider disclosing when rendering voting recommendations or other advice in order to avoid a potential Rule 14a-9 violation, including explanations of the methodology used, disclosures about information sources and material conflicts of interest.[49] SEC Chairman Jay Clayton explained that the purpose of the guidance is to ensure that proxy advisors conduct reasonable due diligence, reasonably identify and address conflicts and provide full and fair disclosure.[50] Notably, the SEC's interpretation does not restrict the ability of proxy advisors to rely on any applicable exemptions from the information and filing requirements of the federal proxy rules set forth in Exchange Act Rule 14a-2(b).

In October, ISS filed a lawsuit against the SEC seeking injunctive and declaratory relief with respect to the SEC's proxy advisor guidance, contending that the guidance "has inappropriately altered the regulatory regime applicable to the voting advice provided by proxy advisory firms."[51] ISS's CEO, Gary Retelny, said in a statement announcing the litigation that ISS is concerned the guidance will be interpreted in a way that could impede ISS's ability to deliver data, research and analyses in an independent and timely manner.[52]

It remains to be seen how ISS's lawsuit will affect future rulemaking in this space, but proxy reform has been a continued area of focus for the SEC. The August proxy advisor guidance notes that the SEC staff is considering recommending that the SEC propose rule amendments to address proxy advisory firms' reliance on the proxy solicitation exceptions under Exchange Act Rule 12a-2(b).[53] For more information on the SEC's guidance, which also addressed the proxy voting responsibilities of investment advisors, you can refer to our prior publication on this topic (available here).

D. BLOCKCHAIN TECHNOLOGY

Another recent area of focus is the potential for blockchain technology to change proxy voting mechanics and, accordingly, activism contests. Proponents of blockchain technology argue that the technology

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49 *See* Id.

50 *See* Id.

51 *See* ISS, *ISS Files Suit Over August SEC Guidance* (Oct. 31, 2019).

52 *See* Id.

53 SEC Commissioner Elad Roisman also recently hinted there would be more SEC action with respect to proxy advisors, calling the SEC's August guidance an "important first step" at a hearing on September 24. *See* Council of Institutional Investors, Weekly Governance Alert, *Roisman Hints at Future SEC Action on Proxy Advisory Firms* (Sep. 26, 2019).

DEVELOPMENTS IMPACTING VOTING IN PROXY CONTESTS *continued*

presents an opportunity to streamline the proxy voting system.[54] Specifically, the multi-tiered system of beneficial ownership of U.S. equity securities has historically complicated efforts to verify the legitimacy of investor participation in proxy contests—shares are typically held in "street name" and settled through book entries, making it difficult to determine the beneficial owner. Proponents argue that blockchain technology would allow share ownership to be tracked through the complete settlement cycle, thereby increasing share ownership transparency and simplifying proxy voting mechanics.[55] In the activism context, increased share ownership transparency would allow issuers and activists alike to better target their messaging to shareholders.

Recently, corporate services companies and issuers have begun investing in and experimenting with blockchain technology in the proxy voting space. Last year, Broadridge, which has reportedly spent roughly $150 million looking into how blockchain technology can be used to innovate proxy voting and other applications,[56] was awarded a patent applying blockchain technology to proxy voting.[57] In March 2018, Broadridge teamed up with Santander to pilot a blockchain ballot at Santander's annual meeting for institutional investors.[58] This year, Santander expanded this offering to retail investors at its 2019 annual meeting.[59]

Meanwhile, the State of Delaware has indicated that it is open to introducing blockchain technology to the corporate governance space. In July 2017, Delaware announced amendments to the Delaware General Corporation Law to include several blockchain-related provisions, including the possibility of using blockchain technology to create and administer stock ledgers.[60] Some have called for the SEC to take action of its own to ease adoption of blockchain technology[61] and SEC Chairman Jay Clayton has expressed interest in potential initiatives to improve the "proxy plumbing" through the use of the technology,[62] but the SEC has not yet formally addressed this issue.

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54 *See, e.g.*, Panisi et al., Stanford Journal of Blockchain Law & Policy, *Blockchain and Public Companies: A Revolution in Share Ownership Transparency, Proxy Voting and Corporate Governance?* (June 28, 2019). *Contra* Park Bramhall, CLS Blue Sky Blog, *Blockchain Will Not Solve the Proxy Voting Problem* (Jul. 31, 2019).

55 *See* Id.

56 *See* Barrons, *Blockchain Could Help Fix Proxy Voting Reforms* (Oct. 1, 2018).

57 *See* Newsday, *Broadridge Financial Awarded Patent for Blockchain Technology* (May 10, 2018). Broadridge continues to show interest in the space, agreeing to acquire a blockchain platform, Northern Trust, in June. *See* Newsday, *Broadridge Financial Buys Blockchain Platform* (June 27, 2019).

58 *See* Financial Times, *Santander Shows Potential of Blockchain in Company Votes* (May 17, 2018).

59 *See* Form 6-K filed by Banco Santander, S.A. on April 12, 2019.

60 *See* 8 Del. C. § 224 (2018). Delaware is generally a pioneer in adapting its corporation law to the latest technology; in its 2019 session, the Delaware legislature passed amendments to the Delaware General Corporation Law aimed at e-signatures and e-delivery of corporate documents. See 8 Del. C. § 116 (2019).

61 *See* Bertsch & Mahoney, Council of Institutional Investors, Letter to SEC (Jan. 31, 2019), *available at* https://www.sec.gov/comments/4-725/4725-4864575-177347.pdf.

62 *See* Park Bramhall, CLS Blue Sky Blog, *Blockchain Will Not Solve the Proxy Voting Problem* (Jul. 31, 2019) (citing Jay Clayton, *SEC Rulemaking Over the Past Year, the Road Ahead and Challenges Posed by Brexit, LIBOR Transition and Cybersecurity Risks* (Dec. 6, 2018), available at https://www.sec.gov/news/speech/speech-clayton-120618).

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 prohibitions and limitations on share ownership, proxy solicitation and other actions. This section analyzes the publicly filed settlement agreements that have been reached for activist campaigns announced in 2019 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 or 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 2019 campaigns to date as compared to the total number of completed activist campaigns was generally consistent with 2018 and 2017. Proxy contests, however, reached settlement at higher rates than in previous years, with settlement agreements being filed for 49% of proxy contests, up from 37% in 2018.

	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*
2019	47	19%	17	49%	30	14%
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 what appears to be an aberration of extended campaigns in 2017, for which one-third of campaigns lasted six months or longer and two-thirds of campaigns lasted three months or

SETTLEMENT AGREEMENTS *continued*

longer. While longer campaigns can prove costly and burdensome for the company, institutional investors continue to express that they are wary of campaigns that reach settlement too quickly. In its Q2 2018 Investment Stewardship Report, BlackRock described an account in which a company, targeted by two separate activists, reached a quick settlement with the first activist in what "appeared to be a defensive tactic" against the second activist. BlackRock raised its concerns with the company in that situation, indicating its preference that companies publicly targeted by activists engage with their institutional investors rather than unilaterally settling with activists, a process that could extend the duration of campaigns but may ultimately improve shareholder confidence in the resolution of activism campaigns.[63]

For the purposes of calculating the duration of activist 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 39% of the settlements we reviewed for 2019.[64]

Time Between the Initiation of Campaigns and the Date of the Settlement Agreements	*Less than 1 Month*	*1–2 Months*	*2–3 Months*	*3–6 Months*	*6 Months or More*
2019	22%	48%	19%	7%	4%[65]
2018	24%	24%	13%	26%	13%
2017	10%	10%	13%	33%	33%
2016	23%	19%	21%	25%	12%
2015	15%	23%	19%	21%	21%

63 *See* BlackRock, *Investment Stewardship Report: Americas – Q2 2018* (June 30, 2018).

64 This is up from 24% of such campaigns in 2018, 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.

65 2019 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 January 2019 analysis of settlement agreements where we reported that 6% of 2018 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 13%. We would expect a similar increase in the 2018 numbers, perhaps to an even greater extent given the earlier cut-off date used for this memo's analysis.

B. NOMINATION PROVISIONS AND MINIMUM SHAREHOLDING PROVISIONS

The majority of settlement agreements relating to 2019 activist campaigns provide for the appointment of a director to the board. The remaining agreements either provide for the mere nomination of a director candidate or some other arrangement, such as a change in committee composition. Generally consistent with 2018, 87% of settlement agreements provided for the nomination and/or appointment of at least one director to the board. However, 2019 settlement agreements were more likely to involve *only* one new director, with 36% of agreements providing for one director, up from 25% in 2018.

Directors in Settlement Agreement	*2019 Percentage*	*2018 Percentage*
4+ directors	9%	12%
3 directors	13%	13%
2 directors	29%	32%
1 director	36%	25%
No directors	13%	18%

The appointment of one or more new directors pursuant to a settlement agreement led to a board size change in 76% of 2019 settlement agreements reviewed, up from 72% in 2018. 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 directors would resign.

Board Size Change	*2019 Percentage*	*2018 Percentage*
Yes	76%	70%
None	24%	30%

Settlement agreements in 2019 have been more 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 73% of 2019 settlement agreements including such a provision, up from 55% in 2018. 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 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. For example, in August when software company Cloudera settled with Icahn, who held an 18.36% stake in the company at the time, the settlement agreement provided for the appointment of two Icahn nominees and required one nominee to resign if Icahn's aggregate net long position dropped below 15% and the other to resign if his position dropped below 5%.

C. COMMITTEE MEMBERSHIP

In 2019, we observed a notable increase in the percentage of settlement agreements providing for committee membership for the activist-nominated directors, with 73% of total agreements including such a provision, representing 85% of agreements that provided for the appointment or nomination of at least one director. This is a sizeable increase from only 52% of total 2018 agreements and 63% of 2018 agreements providing for the appointment or nomination of at least one director. 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, 16% of the agreements we reviewed require the formation of new board committees, compared to 10% for 2018, 14% for 2017 and 8% for 2015 and 2016, with names such as "Strategic Alternatives Committee," "Financial Operating Committee," "Risk & Compliance Committee" and "CEO Search Committee." Where the settlement agreements we reviewed do not provide for committee membership, the agreement either notes that the company must consider the nominee/appointee for committee membership along with other members of the board or is silent on committee membership.

Committee Membership	*2019 Percentage*	*2018 Percentage*	*2017 Percentage*
Nominee on committee	73%	52%	55%
Formation of new committee	16%	10%	12%

D. INFORMATION SHARING

71% of 2019 agreements specifically address the topic of information sharing by the new director with the activist, consistent with prior years: 16% of agreements expressly permitted such sharing of information, similar to 2017 levels after decreasing to 5% in 2018; 29% 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 in determining whether to permit directors to share information with the activist, especially if the activist holds positions in other companies in the same industry.

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 from the date of the settlement agreement until a date tied to 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 2019 vs. 2018.

% of 2019 Agreements	*% of 2018 Agreements*	*Activities Prohibited*
98%	***88%***	***Soliciting proxies or consents.*** 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.
98%	***85%***	***Forming a group or a voting trust or entering into a voting agreement.*** 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).
96%	***87%***	***Seeking board additions or removals.*** Prohibits activists from seeking to elect or remove any directors or otherwise seeking representation on the board.
96%	***82%***	***Presenting a shareholder proposal.*** Prohibits activists from making any proposal at any annual or special meeting of the shareholders.
89%	***83%***	***Publicly disparaging the company or its directors or officers.*** 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 settlement agreements we reviewed, 90% include a mutual non-disparagement clause that also prohibits the company from publicly disparaging the activists.

SETTLEMENT AGREEMENTS *continued*

% of 2019 Agreements	% of 2018 Agreements	Activities Prohibited
84%	80%	***Calling shareholder meetings or referendums.*** 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.
78%	70%	***Seeking amendments or waivers from the standstill or challenging validity of the standstill.*** 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.
76%	62%	***Requesting a shareholder list or books and records.*** Prohibits activists from exercising their rights under Delaware law to request a shareholder list or books and records of the corporation.
73%	65%	***Bringing litigation or other proceedings (other than to enforce the settlement agreement).*** 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.
73%	60%	***Seeking to control or influence the company or the management.*** 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.
69%	67%	***Entering into third-party agreements that go against the settlement agreement.*** 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 2019 Agreements	% of 2018 Agreements	Activities Prohibited
69%	***57%***	***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.
62%	***58%***	***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.
58%	***63%***	***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.
42%	***33%***	***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.
20%	***15%***	***Short selling.*** Prohibits activists from engaging in short selling of the company's securities.

SETTLEMENT AGREEMENTS *continued*

The restrictions imposed by standstill provisions tightened across the board from 2018 to 2019. Of the 16 restrictions we tracked, all but one increased in frequency from 2018 to 2019, with ten increasing by at least eight percentage points. Restrictions have also become more uniform, with four of the restrictions (soliciting proxies or consents, seeking board additions or removals, presenting a shareholder proposal and forming a group or voting trust/entering into a voting agreement) appearing in 96% or more of 2019 agreements, whereas 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.

Two restrictions in particular have experienced a consistent upward trend over the past two years, with 73% of 2019 agreements restricting the activist from bringing litigation (up from 65% in 2018 and 57% in 2017) and 73% of 2019 agreements prohibiting the activist from seeking to control or influence the company or management (up from 60% in 2018 and 43% in 2017).

The one restriction that decreased in frequency from 2018 to 2019 was the prohibition against seeking extraordinary transactions not recommended by the board. This marks a continued downward trend with respect to this metric, appearing in only 58% of 2019 agreements, down from 63% in 2018, 84% in 2017 and 96% across 2015 and 2016.

F. VOTING AGREEMENTS

87% of 2019 settlement agreements include a provision requiring the activists to vote their shares in a prescribed manner within the standstill period, up 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 20% of the settlement agreements require the activist to vote in accordance with all board recommendations. The remaining 58% 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, etc.) 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 increasingly popular over the past few years, appearing in 53% of settlement agreements reviewed for 2019, 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 to only 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. At least one settlement allowed the activist to vote in its discretion with respect to the securities held at the time of the agreement but required the activist to vote in accordance with the board's recommendations or in a manner proportionate to shares not owned by the activist with respect to any securities acquired following the date of the agreement.

Voting Provisions	*2019 Percentage*	*2018 Percentage*	*2017 Percentage*
All board recommendations	20%	12%	10%
Specific board recommendations or exceptions	58%	62%	68%
The board slate only	9%	7%	16%
No voting provision	13%	20%	6%
ISS/Glass Lewis exception to voting provision	53%	37%	26%

G. EXPENSE REIMBURSEMENT

One noteworthy trend witnessed in 2019 was the substantial increase in the proportion of settlement agreements pursuant to which the company was required to reimburse the activist for its expenses in connection with the campaign. 73% of 2019 settlement agreements included an expense reimbursement requirement, up from 52% in 2018 and 51% in 2017. Moreover, expense reimbursement obligations have become not only more frequent but also more costly. We have divided expense reimbursement obligations into three buckets based on the cap of the obligations—less than $100,000, $100,000 to $500,000, and $500,000 or greater. While each of the first two categories experienced five- to six-percentage point increases from 2018 to 2019, the share of agreements with an expense reimbursement cap exceeding $500,000 increased 13 percentage points to 20% in 2019 from 7% in 2018. The majority of this increase corresponded to companies with a market capitalization between $1 billion and $5 billion; of the 13 companies of this size that agreed to an expense reimbursement, 54% agreed to a cap of greater than $500,000, compared to only 11% in 2018 and 40% in 2017. Interestingly, larger market cap companies valued at $5 billion or greater were more likely to agree to more modest expense reimbursement terms, with only 25% of such agreements providing for reimbursements of $500,000 or greater, compared to 60% in 2017. The median market capitalization for the $500,000+ expense reimbursement bracket was $2.9 billion, compared to $1.5 billion for the $100,000 to $500,000 bracket and $296 million for the less than $100,000 bracket.

SETTLEMENT AGREEMENTS *continued*

Additionally, there was one settlement in 2019 that provided that the company reimburse expenses but did not disclose a cap, although this agreement, between Papa John's Pizza and founder and former CEO John Schnatter, is also an outlier due to the relationship between the parties.

Expense Reimbursement	*2019 Percentage*	*2018 Percentage*	*2017 Percentage*
Each party pays for its own expenses	27%	48%	45%
Cap of less than $100,000	24%	18%	26%
Cap of $100,000 to $500,000	27%	22%	13%
Cap of $500,000 or more	20%	7%	16%
Others (including no cap)	2%	5%	0%

In last year's memo, we discussed the increased use of special purpose websites and alternative media in activism campaigns. Most notably, Third Point produced a pointed YouTube video[66] 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—which could partially explain the increase in expense reimbursement amounts. While repeated use of some techniques may allow activists to streamline costs in future campaigns, the constant evolution of alternative media may lead to newer high-cost techniques.

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 2019. 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 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 such), as shown in the chart below, in 54% of the agreements we reviewed, at least one of the appointed directors in our dataset 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 25% or fewer of the settlements; Starboard and Third Point were almost evenly split between insiders and independents, with at least one insider in 10 out of 20 agreements and three out of five agreements, respectively. In 59% of the agreements for which the duration of the settlement agreement has expired, at

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

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. 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 41% 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 2019. Furthermore, as of September 2019, in 16% 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.

Fund	*Settlements Reviewed*	*% with Insider*	*% of Agreements with Insider Appointees on Board Beyond Duration of Settlement Agreement*	*Average Months Insider Appointees Are on Board Beyond Settlement*
Elliott	15	13%	100%	25
Icahn	17	88%	77%	27
Jana	10	20%	0%	N/A
Land & Buildings	4	25%	100%	2
Starboard Value	20	50%	33%	22
Third Point	5	60%	67%	39
ValueAct	11	100%	55%	32
TOTAL	85	55%	60%	28

5 LITIGATION STRATEGIES

One important tool in the activist's toolbox is the initiation or threat of litigation. Activists have initiated litigation in roughly two to four percent of campaigns each year for the past five years and litigation strategies have continued thus far in 2019. Some of the more notable campaigns involving litigation initiated by activists this year include: (1) Icahn's opposition to Occidental Petroleum's Anadarko acquisition; (2) FrontFour's successful efforts to enjoin the three-way merger of Medley Capital and its affiliates; (3) Saba Capital's successful challenge to two BlackRock Funds' use of director questionnaires; and (4) Bay Capital's unsuccessful challenge to Barnes and Noble's advance notice bylaw provision.

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. Litigation can serve several purposes for the activist—in addition to attempting to achieve success on the merits of the claim, activists can use litigation for the purposes of frustration and delay, as an additional platform for airing grievances and as an additional source of pressure (and expense) on targeted companies and boards. Activists can also leverage interim orders and judgments to bolster their causes (for instance, success on a motion for discovery or similar preliminary pleading can be spun in the press as an indication that the underlying claim or agenda has merit) and use discovery as a tool for ferreting out damaging or embarrassing e-mails and other documents (whether or not ultimately relevant to the matter being litigated).

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 often serve as launching pads for a broader activism campaign or further litigation action against the company. Carl Icahn's opposition to Occidental Petroleum's Anadarko acquisition is illustrative of this point. In May, Icahn sued Occidental Petroleum demanding books and records related to the acquisition.[67] Icahn's complaint 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

67 *See* Bloomberg, *Icahn Sues Occidental and Threatens Fight for Board, Sale* (May 30, 2019).

lawsuit.[68] Icahn later initiated a proxy fight against the company citing similar concerns.[69]

FrontFour's effort to block the three-way merger of Medley Capital and its affiliates is also illustrative of how Section 220 demands can be starting points for a broader activist approach. Following a Section 220 books and records demand in January, FrontFour sued to enjoin a three-way merger between Medley Capital and two of its affiliates. FrontFour alleged that the transaction undervalued Medley Capital and that the directors of Medley Capital breached their fiduciary duties in approving the transaction. In March, the Delaware Chancery Court ruled that Medley Capital's directors violated their fiduciary duties, since a majority of the transaction-approving special committee failed to act independently, and enjoined the transaction pending corrective disclosures to shareholders.[70]

Activists may also use litigation defensively to challenge company tactics to limit activists' abilities to nominate board members. In June, Saba Capital sued two BlackRock investment funds after they invalidated Saba Capital's director nominations on the basis that the nominees failed to return a 47-page questionnaire in five business days.[71] The Delaware Chancery Court ultimately held for Saba, finding that the questionnaire was overbroad and exceeded the inquiry permitted by the funds' bylaws, and required votes in favor of Saba's director candidates to be counted at the annual meeting.[72] In contrast, in August, the Chancery Court sided with Barnes and Noble Education in enforcing its advance notice bylaws to exclude director nominees submitted by Bay Capital in connection with the company's annual meeting.[73] Contrary to the bylaw requirements, Bay Capital's director nomination notice was not received by the prescribed deadline and Bay Capital held its shares in street name instead of being a shareholder of record. In its decision, the Chancery Court noted that there was "no evidence suggest[ing] that the company [was] in any way at fault for [Bay Capital's] mistake."[74] Companies should review their advance notice bylaw provisions in light of these decisions.

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68 *See* Matt Levine, Bloomberg, *Carl Icahn Wants an Oxydarko 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").

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

70 *See FrontFour Capital Group LLC* v. *Taube, C.A.* (Del. Ch. 2019).

71 *See* Bloomberg, *Boaz Weinstein's Hedge Fund Sues BlackRock Funds Over Board Elections* (June 6, 2019) and Wall Street Journal, *Saba Can Nominate Slate to BlackRock Fund Boards, Delaware Court Says* (June 28, 2019).

72 *See Saba Capital Master Fund, Ltd.* v. *Blackrock Credit Allocation Income Trust, C.A.* (Del. Ch. 2019).

73 *See Bay Capital Finance, LLC* v. *Barnes and Noble Education Inc.* (Del. Ch. 2019).

74 *See* Id.

6 DEBT "ACTIVIST" STRATEGIES

In addition to the trends discussed above, the past few years have seen an increase in the profile of activist activity targeting non-equity portions of the capital structure. Although loan-to-own and similar strategies that involve using an issuer's debt as a means to obtain control have long been part of distressed investing, the market's more recent focus has been on the use of debt to profit from an issuer's default.

There are a variety of investment strategies available to "debt default activists." One fairly simple strategy involves taking a naked short position in an issuer's debt (for example through a credit default swap, or CDS) and then taking action to change the market's perception of the issuer's credit quality, such as by publicly criticizing the issuer, in order to increase the value of the investor's CDS. Another relatively straightforward strategy involves buying an issuer's debt at a discount and then alleging a default (even a default that occurred many years previously) with the goal of making a profit by forcing the issuer to pay off the debt for more than the investor's purchase price.[75] This strategy has potentially become more lucrative since the *Cash America* decision, which held that a prepayment premium was recoverable upon acceleration of debt on the theory that a "voluntary" default was equivalent to an optional redemption.[76] However, the two strategies that have been the subject of the most recent attention (perhaps to an extent greater than their actual prevalence deserves) are "manufactured defaults" and "net short activism," both of which are hybrid strategies that involve taking long and short positions at the same time.

In a manufactured default, an investor takes a large short position in an issuer's debt (by buying CDS) and then encourages the issuer to affirmatively take action to default on a small piece of its debt in a manner that causes a payout on the CDS but is not significant enough to result in cross defaults to the issuer's other debt. To sweeten the deal for the issuer, the investor offers financing to the issuer to replace the defaulted debt (and more) at a price that is cheaper than the issuer is currently paying. This new financing is the investor's long position and the reason why manufactured default strategies are not necessarily adversarial, since they can generally only be successful with cooperation from the issuer. The most prominent example of this strategy was Blackstone's 2017 attention-grabbing effort to profit from providing financing to homebuilder Hovnanian Enterprises,[77] although

75 *See* Bloomberg, *Albertsons' Safeway Buys Back Notes to End Default Claim* (November 29, 2018).

76 *See Wilmington Savings Fund Society, FSB* v. *Cash America International, Inc.* (S.D.N.Y. 2016).

77 *See* Economist, *A Bondholder Finds a Sneaky Way to Trigger Insurance Against Default* (May 3, 2018).

that transaction resulted in litigation[78] and significant scrutiny from regulators[79] and industry groups,[80] which has discouraged other investors and issuers from pursuing manufactured defaults.

Net short activists similarly seek to take both long and short positions in an issuer's debt. Their long position is sized to be large enough to control the delivery of a default notice under the relevant debt instrument, while their short position is sized to be much larger. The key is to find an issuer that has already taken action in violation of the relevant debt instruments, such that once the investor takes its long position, it can formally declare the default and receive a payout under its CDS. The most commonly cited example of this type of transaction is Aurelius Capital Management's entanglement with the communications company Windstream, which ultimately resulted in Windstream's bankruptcy[81] and garnered significant attention in the financial and mainstream press.[82]

In addition to encouraging regulatory scrutiny of their behavior, market reaction to these "activists" has included attempts to make these strategies more difficult to effect contractually, with some issuers introducing terms into debt instruments that seek to disenfranchise those with a net short position and limit the time period for alleging a default.[83] However, it remains to be seen whether these provisions will be effective at discouraging future "debt default activist" activity.

78 *See* Bloomberg, *Blackstone, Solus Settle Fight Over Hovnanian CDS Trade* (May 30, 2018).

79 *See* Wall Street Journal, *Blackstone-Inspired Defaults Under U.S., U.K. Spotlight* (June 24, 2019); Financial Times, *Global Regulators Vow to Address 'Manufactured Defaults'* (June 24, 2019); and CFTC, *Statement on Manufactured Credit Events by CFTC Divisions of Clearing and Risk, Market Oversight, and Swap Dealer and Intermediary Oversight* (April 24, 2018).

80 *See* Loan Syndications & Trading Association, *Manufactured Defaults: Is The End Near?* (March 13, 2019).

81 *See* Wall Street Journal, *Windstream Files for Bankruptcy After Legal Loss* (Feb. 25, 2019).

82 *See* Matt Levine, Bloomberg, *Maybe Companies Will Get Rid of CDS* (May 23, 2019) (noting that Aurelius never publicly admitted to owning any Windstream CDS); and William D. Cohan, New York Times, *What Hedge Funds Consider a Win Is a Disaster for Everyone Else* (May 12, 2019).

83 *See e.g.*, Reuters, *Sirius Computer Moves to Block Derivatives Holders from Speculation* (May 22, 2019).

* * *

The 2019 activism landscape, which has been highlighted by an increased focus on M&A, the emergence of active managers as players in the activism space and high-profile campaigns against large cap issuers domestically and abroad, suggests that activism will continue to be an important consideration for companies in 2020. Meanwhile, a broader debate has begun in earnest over the "purpose" of a corporation and the role of stakeholders (other than shareholders) in corporate decisionmaking. As this debate continues into 2020, it remains to be seen how, and the extent to which, "purpose" will impact future activism campaigns, which have become increasingly dependent on institutional investor support.

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Contacts

New York

Francis J. Aquila
+1-212-558-4048
aquilaf@sullcrom.com

Robert E. Buckholz
+1-212-558-3876
buckholzr@sullcrom.com

Catherine M. Clarkin
+1-212-558-4175
clarkinc@sullcrom.com

Audra D. Cohen
+1-212-558-3275
cohena@sullcrom.com

H. Rodgin Cohen
+1-212-558-3534
cohenhr@sullcrom.com

Heather L. Coleman
+1-212-558-4600
colemanh@sullcrom.com

Robert W. Downes
+1-212-558-4312
downesr@sullcrom.com

Mitchell S. Eitel
+1-212-558-4960
eitelm@sullcrom.com

Matthew M. Friestedt
+1-212-558-3370
friestedtm@sullcrom.com

Joseph B. Frumkin
+1-212-558-4101
frumkinj@sullcrom.com

Scott D. Miller
+1-212-558-3109
millersc@sullcrom.com

Robert W. Reeder III
+1-212-558-3755
reederr@sullcrom.com

Melissa Sawyer
+1-212-558-4243
sawyerm@sullcrom.com

William D. Torchiana
+1-212-558-4056
torchianaw@sullcrom.com

Marc Treviño
+1-212-558-4239
trevinom@sullcrom.com

Los Angeles

Eric M. Krautheimer
+1-310-712-6678
krautheimere@sullcrom.com

Alison S. Ressler
+1-310-712-6630
resslera@sullcrom.com

Contacts

Palo Alto

Scott D. Miller
+1-650-461-5620
millersc@sullcrom.com

Sarah P. Payne
+1-650-461-5669
paynesa@sullcrom.com

Frankfurt

Carsten Berrar
+49-69-4272-5506
berrarc@sullcrom.com

Krystian Czerniecki
+49-69-4272-5525
czernieckik@sullcrom.com

London

John Horsfield-Bradbury
+44-20-7959-8491
horsfieldbradburyj@sullcrom.com

Jeremy Kutner
+44-20-7959-8484
kutnerj@sullcrom.com

Evan S. Simpson
+44-20-7959-8426
simpsone@sullcrom.com

Paris

Olivier de Vilmorin
+33-1-7304-5895
devilmorino@sullcrom.com

William D. Torchiana
+33-1-7304-5890
torchianaw@sullcrom.com

Melbourne & Sydney

Waldo D. Jones Jr.
Melbourne
+61-3-9635-1508
Sydney
+61-2-8227-6702
jonesw@sullcrom.com

Tokyo

Keiji Hatano
+81-3-3213-6171
hatanok@sullcrom.com

Hong Kong

Garth W. Bray
+852-2826-8691
brayg@sullcrom.com

Michael G. DeSombre
+852-2826-8696
desombrem@sullcrom.com

Chun Wei
+852-2826-8666
weic@sullcrom.com

Beijing

Gwen Wong
+86-10-5923-5967
wonggw@sullcrom.com

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