



# Review and Analysis of 2021 U.S. Shareholder Activism and Activist Settlement Agreements

December 20, 2021

*www.sullcrom.com*

New York • Washington, D.C.  
Los Angeles • Palo Alto  
London • Paris  
Frankfurt • Brussels  
Tokyo • Hong Kong • Beijing  
Melbourne • Sydney

- Public activism levels increased during the 2021 proxy season compared to the 2020 proxy season, with the number of U.S. activism campaigns up approximately 28% through August
- Engine No. 1's high-profile campaign against ExxonMobil cements ESG (environmental, social and governance) as a primary activism campaign objective, but the extent to which Engine No. 1's success may be replicated by other activists or in other industries remains to be seen
- Activism campaigns during the 2021 proxy season concluded in settlement agreements more frequently and more quickly compared to prior years, with 32% of settlement agreements through August being reached within one month of the activist publicly initiating its campaign
- Recent regulatory developments, including those focused on antitrust oversight, shareholder voting practices and disclosure, will likely have a meaningful impact on future activism campaigns

## INTRODUCTION

As the U.S. economy continues to adjust to the ongoing COVID-19 pandemic, shareholder activism campaigns against U.S. public companies have generally returned to pre-pandemic levels — activism activity through August increased 28% this year from 2020 and is comparable to 2019 levels. The most high-profile campaign this year, Engine No. 1's successful proxy contest at ExxonMobil, introduced what is likely a new wave of shareholder activism campaigns focused on ESG (environmental, social and governance) theses. The extent to which Engine No. 1's success can be replicated by other activists or in other industries is still to be determined, but ESG-focused activism is expected to gain further traction as a by-product of increasing public institutional investor emphasis on ESG issues.

Although this year's list of most prolific activists in terms of announced campaigns was dominated by activists focused on short-selling strategies (notably Spruce Point Capital, Hindenburg Research and Culper Research), familiar names such as Land and Buildings and Elliott remained active as well, with four and three announced U.S. campaigns, respectively, as of August 31, 2021. Elliott was also active this year in its pursuit of strategies not typically associated with activism, such as its acquisitions of Cubic Corp. and Paper Source, embodying the increasing trend of activists engaging in private equity and SPAC transactions. This year marked the first year in our data set since 2016 in which the majority of campaigns have been targeted at issuers with market caps above \$1 billion (with the heaviest concentration in the \$1-10 billion range, representing a sizeable increase compared to prior years).

Among others aspects of activism, the pandemic appears to have shaped the speed and manner in which settlements between target companies and activists occur. Although the trend toward quick settlements we observed in 2020 appears to have continued this year through August 31, 2021, we also observed that target companies were less likely to surrender board seats to dissidents than they were for the same time period in 2020. In addition, we have continued to see a trend that insiders placed on boards by prominent activists tend to stay on after the settlement expires, with such insiders staying on average 32 months beyond their initial term (the longest period since we began to track this data).

Going forward, we expect activism activity to remain strong during the 2022 proxy season and beyond as activism has proven to be a durable asset class despite the uncertainty and market volatility resulting from the continuing impact of the COVID-19 pandemic, including inflationary pressure, supply chain challenges and COVID-19 variants. As the M&A boom continues and de-SPAC transactions result in a number of newly public companies, we expect to see a corresponding increase in activism campaigns centered on M&A theses and de-SPAC-ed companies. Continued portfolio simplification pressure will apply to large conglomerates and has already resulted in a number of significant spin-off and Reverse Morris Trust transactions. Meanwhile, the regulatory focus on increased corporate reporting disclosure related to ESG

## SULLIVAN & CROMWELL LLP

issues, particularly climate- and diversity- related disclosure, and performance metrics for SPACs may present new opportunities for activists to identify and target underperformers.

This publication expands on these trends in shareholder activism from the past year in greater detail. This is followed by: (1) an overview of activism campaign data through August 31, 2021; (2) an analysis of key provisions in publicly filed settlement agreements this year as compared to prior years; and (3) an overview of other recent developments impacting shareholder activism.

---

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

The information in this publication in the sections titled “Activism Campaign Data Overview” and “Settlement Agreements” is based on SharkRepellent, the corporate governance database maintained by FactSet Research Systems, Inc., using a data set run on August 31, 2021 and supplemented by our review of public information and other third-party sources. This data set includes only campaigns against U.S.-incorporated companies with market capitalizations greater than \$100 million, although other sections of the publication include global data. References in charts to 2020 or 2021 “YTD\*” are to data from January 1 through August 31 of the relevant year. Due to rounding, percentage data in some charts may not add up to 100%. Other data sources relied on in this publication are identified as they arise.

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 (1) the submission of Rule 14a-8 proposals, without more, as “campaigns” (for more information on Rule 14a-8 proposals, please see the Sullivan & Cromwell 2021 Proxy Season Review and related webcast available [here](#)) and (2) strategic acquisition attempts involving unsolicited offers from one business entity to acquire another from the “other stockholder campaigns” category, although we have included takeover attempts involving unsolicited offers by activist hedge funds. In addition, in our review of settlement agreements, where one activist launched campaigns against several affiliates, we limited our discussion to one settlement agreement. Further, we have categorized activism campaigns based on the calendar year in which the campaign was launched, even if the campaign was completed (e.g., an activist gained a board seat) during the following calendar year.

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

# Table of Contents

---

<b>TRENDS IN SHAREHOLDER ACTIVISM</b> .....	5
A.    ESG ACTIVISM COMES TO THE FOREFRONT .....	5
B.    DIVERSITY IN THE BOARD ROOM .....	6
C.    “SHORT” STRATEGIES AND SPACTIVISM.....	7
D.    M&A-RELATED ACTIVISM .....	8
E.    VOTING IN PROXY CONTESTS AND THE CONTINUED IMPORTANCE OF SHAREHOLDER ENGAGEMENT .....	9
F.    INDUSTRY SPOTLIGHT: REGULATED UTILITIES .....	10
<b>ACTIVISM CAMPAIGN DATA OVERVIEW</b> .....	11
<b>SETTLEMENT AGREEMENTS</b> .....	12
A.    FREQUENCY AND SPEED OF SETTLEMENT AGREEMENTS .....	13
B.    NOMINATION PROVISIONS AND MINIMUM SHAREHOLDING PROVISIONS .....	14
C.    COMMITTEE MEMBERSHIP .....	14
D.    INFORMATION SHARING .....	15
E.    STANDSTILL PROVISIONS.....	15
F.    VOTING AGREEMENTS .....	18
G.    EXPENSE REIMBURSEMENT .....	19
H.    FUND INSIDERS APPOINTED BY SELECT ACTIVISTS.....	20
<b>OTHER DEVELOPMENTS IMPACTING ACTIVISM</b> .....	21
A.    RIGHTS PLANS AND THE WILLIAMS COMPANIES LAWSUIT.....	21
B.    LAWSUITS OVER “WHITE SQUIRE” INVESTMENTS DURING AN ACTIVISM CAMPAIGN .....	22
C.    ADVANCE NOTICE BYLAWS AND RETRIBUTIVE ACTIVISM .....	23
D.    ANTITRUST UPDATES .....	24
E.    SEC RULEMAKING .....	25

## TRENDS IN SHAREHOLDER ACTIVISM

### A. ESG ACTIVISM COMES TO THE FOREFRONT

Activism focused on ESG—environmental, social and governance criteria, with special emphasis on “E”—has gained significant prominence and momentum this past year. Engine No. 1’s successful proxy fight against ExxonMobil, arguably the most prominent campaign of the season, marked the first proxy contest to center on ESG theses as a primary campaign objective.

The emphasis that institutional investors place on ESG has clearly been an accelerant for activism. A small and newly formed investment firm, Engine No. 1, launched its campaign seeking four board seats in order to push ExxonMobil to reduce its carbon footprint and improve its climate-related disclosures—while holding only .02% of the company’s shares. Importantly, Engine No. 1 did not campaign for ESG solely for the sake of ESG. Engine No. 1 argued that ExxonMobil was underperforming and that its underperformance was due in large part to its inability to develop long-term strategies regarding renewable energy. To further ground its ESG strategies in economic analysis, Engine No. 1 recently created a “Total Value Framework” in conjunction with The Wharton School, which quantifies sustainability initiatives in tangible dollars and, in turn, long-term financial value.

Engine No. 1 won three board seats at ExxonMobil, and a fourth board seat turned over during the pendency of the campaign. Engine No. 1’s partnership with CalSTERS, the second largest pension fund in the United States, and support from the largest passive institutional investors, BlackRock, Vanguard and State Street (who collectively owned approximately 20% of ExxonMobil’s shares), proved critical to the success of the activist’s campaign.

The growing potential for ESG activism also is partly attributable to the current regulatory landscape in which policymakers have engaged in an unprecedented amount of ESG rulemaking. For example, the U.S. Department of Labor proposed a rule that would facilitate retirement plan fiduciaries’ ability to consider climate change and other ESG factors when they select investments and exercise shareholder rights.<sup>1</sup> In addition, new SEC rules on climate disclosure expected in early 2022 will likely require more specific, prescribed quantitative and qualitative information about climate risks and opportunities.<sup>2</sup> Meanwhile, BlackRock’s announcement that it intends to pass-through voting rights to certain of its underlying investors (see “Voting in Proxy Contests and the Continued Importance of Shareholder Engagement” below) may make it more likely that shares managed by BlackRock will be voted in favor of ESG-oriented campaigns.

---

<sup>1</sup> See U.S. Department of Labor, *US Department of Labor Proposes Rule to Remove Barriers to Considering Environmental, Social, Governance Factors in Plan Management* (Oct. 13, 2021).

<sup>2</sup> See SEC Chair Gary Gensler, *Prepared Remarks Before the Principles for Responsible Investment ‘Climate and Global Financial Markets’ Webinar* (Jul. 28, 2021).

## SULLIVAN & CROMWELL LLP

Still, whether Engine No. 1's success can be replicated by other activists is yet to be seen. Engine No. 1 spent 5% of its \$250 million under management on the ExxonMobil campaign, and its campaign objectives require ExxonMobil to make significant changes over a long period of time, which is in sharp contrast to an activism thesis like M&A that has a shorter time horizon. However, the market may be willing to give issuers credit in the shorter-term for their longer-term ESG goals, which would provide ESG activists an opportunity to capture gains upon exit from their investments.

The “show of support” model is another approach activists and other investors with respected track records may use, subject to compliance with securities laws, to generate enthusiasm in their investments and align with a company on their views of the company's future. For example, the day before General Motor's investor day in October 2021, Engine No. 1 revealed its stake in GM alongside its white paper detailing the role that manufacturers such as GM will play in the automotive industry's transformation towards sustainability. In contrast with its tense relations with ExxonMobil, Engine No. 1 touted its two-way conversations with GM as “very constructive and collaborative,” explaining that it revealed its stake in GM as a show of support for the company's goals to go 100% electric by 2035. Having a healthy dialogue with a wide range of investors, including activists, may allow a company to avoid a future activist challenge.

Activists have not yet articulated a clear blueprint for the successful expansion of ESG activism into other industries. Oil, gas and energy companies are the most obvious targets of environmentally-focused activism campaigns. For example, Shell was attacked by an activist investor, Third Point, which argued the company should be split into multiple standalone companies, including separate oil and gas and renewables divisions. After oil and gas, the question becomes whether, how and on what time frame environmentally-focused activist strategies can be extended successfully. One potential target may be the banking industry in respect of banks' financing of oil, gas and energy companies. For example, a new commission-free trading app called Iconik launched recently with the goal of crowdsourcing shareholder activism by allowing users to collectively vote their shares. One of Iconik's first campaigns is directed at JPMorgan Chase, which has been the subject of calls to stop lending to fossil-fuel companies.<sup>3</sup>

### **B. DIVERSITY IN THE BOARD ROOM**

Diversity in the board room is another ESG theme that has come into sharper focus in shareholder discourse this past year. Prominent institutional investors such as BlackRock and State Street have reaffirmed this theme by continuing to adopt voting guidelines indicating that they will vote against companies that do not live up to their respective diversity standards.<sup>4</sup> U.S. governmental and self-regulatory bodies have also announced their own diversity initiatives. California's AB 979, signed into law

---

<sup>3</sup> See The New York Times Dealbook, *Crowdsourcing Shareholder Activism* (Dec. 15, 2021).

<sup>4</sup> See *BlackRock Investment Stewardship: Proxy Voting Guidelines for U.S. Securities* (published Dec. 2021 and effective Jan. 2022); State Street Global Advisors, *Proxy Voting and Engagement Guidelines* (Mar. 2021).

## SULLIVAN & CROMWELL LLP

by Governor Newsom in September 2020 and effective as of January 1, 2022, requires publicly held companies headquartered in California to have board members that are female and/or from underrepresented communities. Similarly, Rule 5605(f) of the Nasdaq Stock Market, approved by the SEC this August, will phase in “comply or explain” diversity requirements for Nasdaq listed companies. The SEC has also indicated plans to publish proposed rules regarding human capital management disclosures and corporate board diversity.

Despite this focus on diversity by institutional investors and regulators, we have not yet seen significant evidence of activist focus on candidate diversity in their campaigns. Notably, the failed Legion Partners campaign against Genesco Inc. is one of the only 2021 campaigns that expressly underscored an activist nominee’s diversity and experience in ESG initiatives as part of its campaign.<sup>5</sup> In the absence of disclosure from the activists regarding the diversity characteristics of their candidates, it is difficult to assess whether activists’ board slates are becoming more diverse (and likewise difficult to assess the diversity characteristic of activists themselves).

Although lack of board room diversity may not likely be the sole basis for an activism campaign, in the future activists may nominate more diverse candidates and attempt to contrast the diversity of their candidates with the diversity characteristics (or lack thereof) of the issuer’s incumbent directors. In addition, we may observe activists preemptively criticizing boards that fall short of achieving various diversity targets.

### C. “SHORT” STRATEGIES AND SPACTIVISM

We continue to observe investors deploying short selling strategies targeted at individual issuers. This strategy has been used heavily against SPACs: the aggregate short position in SPACs was at \$2.7 billion as of March 2021, more than triple the \$765 million at the end of 2020.<sup>6</sup> Given sustained SPAC activity and the need for the significant number of SPACs that have IPO’d in the last year to find acquisition targets in the near term (as of September 2021, more than 400 SPACs in the U.S. were reported to be looking to de-SPAC<sup>7</sup>), we expect companies that went public via a de-SPAC transaction to become attractive targets for activists in a few years, particularly if the company’s actual performance does not meet the projections disclosed during the de-SPAC process. We may see activists targeting such companies use rhetoric similar to that used by short-sellers to challenge de-SPAC-ed companies, which largely focus on allegations that a company exaggerated its financial performance or prospects.

---

<sup>5</sup> See Schedule 14A for Genesco Inc. filed by Legion Partner Holdings, LLC on June 7, 2021 with the SEC.

<sup>6</sup> See CNBC, *Short sellers are betting more against SPACs* (Mar. 16, 2021).

<sup>7</sup> See Bloomberg Law, *Analysis: 400+ Trading U.S. SPACs Still Seeking Merger Targets* (Sept. 15, 2021).

## SULLIVAN & CROMWELL LLP

In addition, many de-SPAC-ed companies have gone public with corporate governance features that are not aligned with the governance policies of ISS, Glass Lewis and institutional investors. Data shows that the governance practices of these de-SPAC-ed companies are often less shareholder friendly as compared to those of other public companies.<sup>8</sup> For example, 69% maintain a classified board, 66% maintain director removals for cause only, 19% allow shareholders to call special meetings, and 80% require supermajority shareholder voting on certain issues (including over 60% requiring supermajority voting to amend bylaws). These practices, already criticized by ISS, Glass Lewis and institutional investors, may provide a line of criticism for activists as well.

### D. M&A-RELATED ACTIVISM

Despite global M&A deal volume setting record highs in 2021,<sup>9</sup> public M&A activism has been lower on an absolute basis in 2021, with fewer companies in both the U.S. and abroad publicly receiving M&A-related demands than in 2020.<sup>10</sup> At the same time, such M&A activism has risen as a percentage of economic demands made by activists.<sup>11</sup> In large part, the activists' public M&A objectives were targeted at opposing deals (although in some cases activists used "bumptrage" tactics to improve price terms for targets).<sup>12</sup> As of August 2021, 16 companies have publicly faced opposition to M&A deals in the U.S., versus nine during the same period last year.<sup>13</sup> Meanwhile, activists advocating for U.S.-based issuers to engage in M&A in the same period fell from 49 in 2019, and 30 in 2020, to 19 in 2021.<sup>14</sup>

One recent example of M&A activism is Carl Icahn's opposition to Southwest Gas Holdings Inc.'s \$1.97 billion acquisition of Questar Pipelines.<sup>15</sup> In its letter to shareholders and the board, Icahn Enterprises argued Southwest Gas was overpaying for Questar Pipelines and asserted numerous governance related critiques of the board.<sup>16</sup> Southwest Gas adopted a short-term shareholder rights plan in response to Icahn's intent to launch a proxy contest to replace the entire board, after which Icahn Enterprises launched an unsolicited tender offer for the company's outstanding shares.<sup>17</sup> In response, Southwest Gas's board of

---

<sup>8</sup> Dealpointdata, generated as of December 2, 2021.

<sup>9</sup> See Reuters, *Pandemic Recovery Fuels Deal Craze as Third-Quarter M&A Breaks All Records* (Sept. 30, 2021).

<sup>10</sup> See Insightia, *M&A Activism 2021* (Oct. 2021) at 4.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 19.

<sup>14</sup> *Id.*

<sup>15</sup> See Dominion Energy, *Dominion Energy Announces Agreement to Sell Questar Pipelines to Southwest Gas* (Oct. 5, 2021).

<sup>16</sup> See Carl Icahn, *Open Letter to Southwest Gas Board of Directors* (Oct. 5, 2021).

<sup>17</sup> See Schedule to Tender Offer Statement for Southwest Gas Holdings, Inc. filed by Carl C. Icahn on October 27, 2021 with the SEC; Carl Icahn, *Open Letter to Southwest Gas Board of Directors* (Oct. 25, 2021).



## SULLIVAN & CROMWELL LLP

directors asked shareholders to reject the tender offer and named two new directors unrelated to Icahn.<sup>18</sup> On December 2, 2021, Icahn filed suit in the Delaware Chancery Court seeking a temporary restraining order to prevent Southwest Gas from selling stock below Icahn's tender offer price and/or to investors friendly to Southwest Gas to purportedly prevent the company from interfering with Icahn's proxy campaign.<sup>19</sup> At the time of this publication, the campaign remains ongoing.

As reported last year, we also continue to observe a convergence of private equity and activism strategies. Activist investors continue to pursue traditional private equity strategies — as of August 2021, 10 companies have become targets of attempted takeovers by funds managed by activists, and activists continue to form their own SPACs. Elliott continues to be an example of an activist hedge fund embracing private equity strategies. The fund launched two SPACs in 2021 (Elliott Opportunity I and Elliott Opportunity II), completed a buyout of public company Cubic Corp. in partnership with private equity firm Veritas Capital in March 2021, and acquired Paper Source Inc. in May 2021 as part of Paper Source's Chapter 11 process. Other activists have also engaged in M&A in 2021, including 40 North Management's \$4.6 billion takeover of W.R. Grace & Co. completed in September 2021<sup>20</sup> and Carl Icahn's tender offer for Southwest Gas discussed in the prior paragraph.<sup>21</sup> Some activists such as Elliott and Icahn have the resources, and in some cases the appetite, to acquire public companies. However, it is also possible that in some cases an activist may make a public, unsolicited takeover approach solely as a “stalking horse” tactic — which may be combined with a proxy contest — to put a company “in play” for other potential buyers as part of a broader M&A campaign objective.

### **E. VOTING IN PROXY CONTESTS AND THE CONTINUED IMPORTANCE OF SHAREHOLDER ENGAGEMENT**

As previously noted, Engine No. 1's campaign served as a reminder that institutional investor support is critical to winning or losing a shareholder vote. Engine No. 1's success can be contrasted with Starboard's pursuit of three board seats at Box, Inc.'s 2021 annual meeting, which ended in defeat for Starboard — with Box receiving support from both KKR (which had recently invested \$500 million in the company) and the company's institutional investors such as Vanguard. Securing institutional investor support during an activism campaign can be significantly supported by building strong relationships through shareholder engagement on a clear day and potentially by bringing in “white squire” investors through private placement transactions.

---

<sup>18</sup> See Reuters, *Southwest Gas Asks Shareholders to Reject Carl Icahn's Tender Offer* (Nov. 9, 2021).

<sup>19</sup> *Icahn Partners LP v. John P. Hester, et al.*, case number 2021-1031-KSJM (Del. Ch. Dec. 02, 2021).

<sup>20</sup> See Grace, *Standard Industries Complete Acquisition of Grace* (Sept. 22, 2021).

<sup>21</sup> See Schedule to Tender Offer Statement for Southwest Gas Holdings, Inc. filed by Carl C. Icahn on October 27, 2021 with the SEC.

## SULLIVAN & CROMWELL LLP

However, the landscape of institutional investor voting may shift in the coming years. BlackRock recently announced that investors in certain of its index strategies (accounting for approximately 40% of the \$4.8 trillion index equity assets managed by BlackRock) will be eligible to cast their own proxy votes starting in 2022. In 2019, Vanguard announced a similar, albeit more limited, decision to give back some of its voting power to the managers of Vanguard's externally managed active equity funds (about 9% of Vanguard assets). Although much of BlackRock's and Vanguard's voting power will still remain in the hands of their investment stewardship teams, these shifts in voting policy could meaningfully impact the outcome of activist proxy contests. Currently, BlackRock tends to side with management in proxy contests — during the 2020-21 proxy season, BlackRock voted for one or more directors on an activist slate in only 15% of U.S. proxy contests.<sup>22</sup> If a sizeable portion of the shares owned by BlackRock vote differently from BlackRock in proxy contests, this change is likely to benefit activist slates and may provide proxy advisory firms with increased influence over voting results. In light of these changes, combined with the move to universal proxy cards for proxy contests occurring after August 31, 2022 (discussed in more detail below under "Other Developments Impacting Activism"), issuers will be required to work with their advisors to navigate a new set of best practices for institutional investor engagement and proxy contest voting.

As investors from seemingly disparate ends of the playing field share their strategies and even partner together, companies would be wise to stay up to date on the makeup of their shareholder base, regardless of investment strategy or theses. Issuers can use a stock watch service to monitor movement in the company's stock, including potential broker dealer accumulations and increases in derivative activity, which can be signals of an impending campaign. Issuers can also monitor hits to the company's website and the creation of websites using derivations of the company's name, as activists sometimes create websites to host their campaign white papers, press releases and SEC filings.

### F. INDUSTRY SPOTLIGHT: REGULATED UTILITIES

During the last decade, publicly traded regulated utilities had been largely insulated from the scrutiny of activists. Although we have long said that no company is fully immune from activism, the combination of regulated returns and overlapping federal and state utility regulations (including regulations that require the approval of acquisitions of voting securities) have historically made activists more wary of targeting regulated utilities than companies in other industries. However, the rate of change in the utility industry has increased over the last several years, and more change is expected as a consequence of new technology and consumer driven demand for renewable energy and fuel choice, leading to additional activist interest in the industry. Elliott has been particularly active in this industry, most recently achieving a settlement with Duke Energy in November 2021. Icahn entered into a settlement with FirstEnergy Corp. in March 2021, for which Icahn sought approval from the Federal Energy Regulatory Commission before seating its two

---

<sup>22</sup> See Insightia, *The Proxy Voting Annual Review 2021* (Sept. 2021) at 20.

## SULLIVAN & CROMWELL LLP

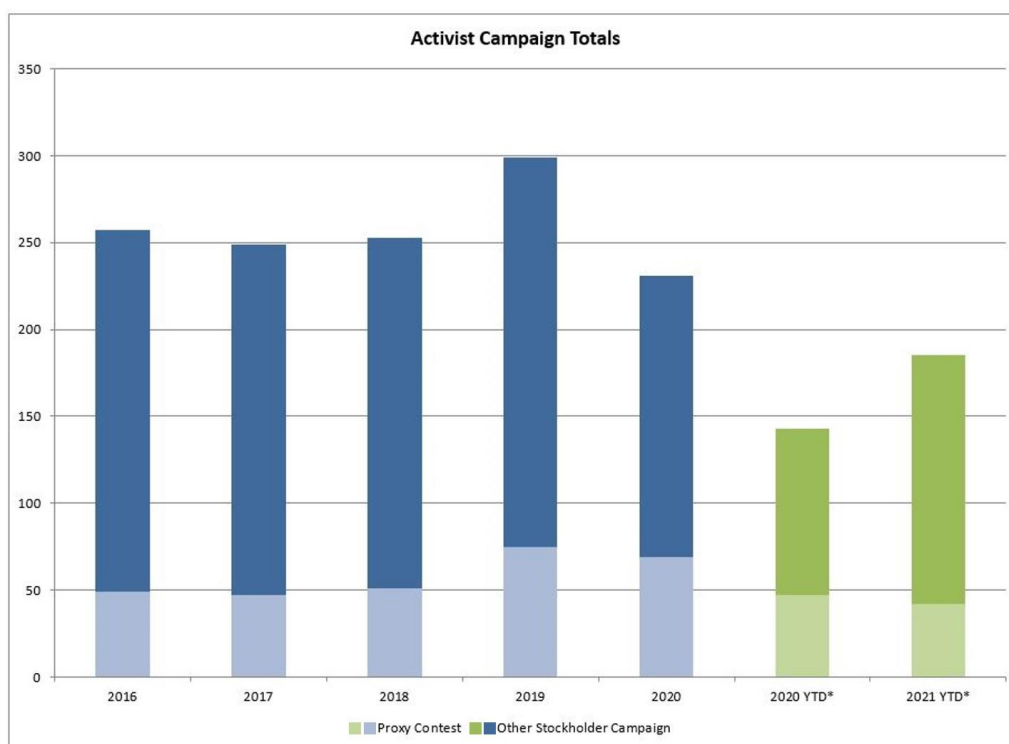
employee directors, and launched its campaign at Southwest Gas in October 2021. We will be discussing the unique considerations raised by activism activity in the regulated utility sector in a separate publication coming soon.

---

### ACTIVISM CAMPAIGN DATA OVERVIEW

As activism has matured, U.S. activism campaign data has become largely consistent from year to year. However, 2020 saw that consistency affected by the changing circumstances brought on by the COVID-19 pandemic, and 2021 marked a return to some of the trends of the preceding decade.

Paralleling the surge of market activity in 2021, shareholder activism levels also increased in 2021. As of August 31, 2021, activists have launched 185 campaigns against U.S. issuers, which is 28% (or 40 campaigns) more than those launched during the same time period in 2020 and more in line with the pre-pandemic level of 203 campaigns in 2019 for the same time period.



Reversing a trend observed over the past two years, proxy contests made up a smaller percentage of announced activism campaigns (23%) compared to proxy contest levels during the prior two years: 29% in 2020 and 25% in 2019. Importantly, this statistic does not take into account campaigns that were settled prior to developing into proxy contests but still resulted in board seats for the activists. The proxy contest total may continue to grow this year, as ongoing campaigns may develop into proxy fights.

## SULLIVAN & CROMWELL LLP

Despite an increase in activism levels, activists have obtained fewer board seats, on average, than they have in the past. Through August 2021, activism campaigns resulted in an average of 0.42 board seats per campaign, significantly lower than last year's average of one board seat per campaign and the average over the period from 2014 to 2020 of 0.62 seats per campaign.<sup>23</sup> This may be due in part to the types of activism campaign objectives and strategies that were more prevalent in 2021, including short-selling and M&A-focused campaigns. Activists focusing on short-selling investment strategies do not generally seek board seats.

Board Seats Obtained by Activists at U.S. Issuers						
	2016	2017	2018	2019	2020	2021 YTD*
<b>Total Board Seats Obtained</b>	96	114	116	145	112	43
<b>Number of Completed Campaigns</b>	233	215	135	223	137	92
<b>Avg. Board Seats per Campaign</b>	0.41	0.53	0.86	0.65	0.82	0.47

Icahn secured the most board seats this year through August 31, 2021, winning five board seats across two campaigns (at FirstEnergy and Xerox Holding Corporation, with one seat at Xerox going to an independent designee). Although Starboard had been one of the most prolific activists in recent years in terms of both number of campaigns and board seats won, this year it announced only two campaigns as of August 31, 2021. Its high-profile proxy contest at Box ended in defeat, and its eHealth, Inc. campaign resulted in one board seat via settlement.

---

## 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 (or cooperation agreements, as they are sometimes known) typically provide for the appointment of one or more persons selected by (or in consultation with) an activist to the company's board in exchange for a "standstill," which generally includes limitations on share ownership and prohibitions on proxy solicitation and other activist actions for a defined period of time. This section analyzes the publicly filed settlement agreements that have been reached in 2021 for activism campaigns announced as of August 31, 2021 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

---

<sup>23</sup> Campaign statistics referred to in this sentence and the below chart include both proxy contests for board representation and other shareholder campaigns (i.e., an activism campaign that did not involve a formal proxy contest).

## SULLIVAN & CROMWELL LLP

simple director appointment letters without any standstill provisions and confidentiality agreements that do not have customary settlement agreement provisions.

### A. FREQUENCY AND SPEED OF SETTLEMENT AGREEMENTS

The percentage of settlement agreements that have been filed with the SEC in 2021 as of August 31, 2021 as compared to the total number of completed campaigns<sup>24</sup> was lower than in 2020 and 2019. In addition, as of August 31, 2021, settlement agreements have been filed with the SEC for 28% of proxy contests, above the 24% in 2020 but down from 35% in 2019 and 41% in 2018.

Although 2021 saw both fewer settlements and board seats obtained by activists, those campaigns resulting in a settlement reached the settlement more quickly in 2021 than in past years. As of August 31, 2021, 32% of campaigns reached settlement in 2021 less than one month after the campaign was publicly announced, up from 19% in 2020 and 13% in 2019. On the whole, the speed at which activists and issuers entered into a settlement increased in 2020, and that pace has not since slowed despite the increase in activism levels in 2021 (as compared to 2020) and the evolution of the COVID-19 pandemic.

This approach to calculating the duration of activism campaigns is, however, limited, as an activist can be deemed to have initiated a campaign only when it makes the first public step towards achieving its goal, either by publicizing a letter sent to the company, sending a letter to other shareholders, filing a Schedule 13D or otherwise publicly announcing its intent to initiate a campaign. In many cases, the company and the activist will have had extensive private 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 37% of the settlements we reviewed as of August 31, 2021.

<i>Time Between the Initiation of Campaigns and the Date of the Settlement Agreements</i>	<i>Less than 1 Month</i>	<i>1–2 Months</i>	<i>2–3 Months</i>	<i>3–6 Months</i>	<i>6 Months or More</i>
2021 YTD*	32%	18%	23%	27%	0% <sup>25</sup>
2020	19%	20%	33%	26%	2%
2019	13%	28%	17%	30%	13%
2018	24%	24%	13%	26%	13%
2017	10%	10%	13%	33%	33%
2016	23%	19%	21%	25%	12%
2015	15%	23%	19%	21%	21%

<sup>24</sup> Completed campaigns refer to activism campaigns involving a proxy contest for board representation or other shareholder campaigns (i.e., an activism campaign that did not involve a formal proxy contest) that ended in (a) a vote (in the case of a proxy contest), (b) the activist disclosing it exited its position or (c) a settlement.

<sup>25</sup> 2021 data for longer-term periods may be artificially low, because the data includes only completed campaigns, and some long-running campaigns announced in 2020 had not yet been completed as of August 31, 2021.

# SULLIVAN & CROMWELL LLP

## B. NOMINATION PROVISIONS AND MINIMUM SHAREHOLDING PROVISIONS

The majority of settlement agreements relating to 2021 activism campaigns provide for the appointment of one or more directors. The remaining agreements provide either for the nomination of a director candidate or some other arrangement, such as a change in committee composition. Generally consistent with 2019 and 2020, 89% of settlement agreements provided for the nomination and/or appointment of at least one director. However, settlement agreements in 2021 were less likely to involve only one new director or more than four new directors, opting most often to compromise at two new directors.

<i>Directors in Settlement Agreement</i>	<i>2021 YTD* Percentage</i>	<i>2020 Percentage</i>	<i>2019 Percentages</i>
4+ directors	3%	11%	9%
3 directors	20%	21%	14%
2 directors	37%	16%	32%
1 director	29%	39%	34%
No directors	11%	14%	11%

The appointment of new directors led to a corresponding board size change in 66% of 2021 settlement agreements reviewed, up from 50% in 2020, returning to 2019 levels. Additionally, some agreements provide for an initial increase to the size of the board followed by an eventual decrease following the 2021 annual meeting. Other agreements provide for board discretion, prior to the 2022 annual meeting, to replace an expected retiree or reduce the size of the board in connection with an expected retirement.

Settlement agreements in 2021 have been more likely to include provisions requiring minimum shareholding of the activists in order to keep the directors nominated by those activists on the board: 66% of 2021 settlement agreements include such a provision, up from 53% in 2020, returning to 2019 levels. Failure to maintain the minimum ownership threshold typically results in the nominees being required to resign from the board, the activist losing the right to name replacement nominees if the initial nominees resign or are otherwise unable to serve, the termination of the agreement or all of the above. This year, only one agreement as of August 31, 2021 set multiple minimum ownership thresholds, with the activist incrementally losing rights after falling below the various thresholds, reflecting a decrease from last year.

## C. COMMITTEE MEMBERSHIP

In 2021, the percentage of settlement agreements providing for committee membership for activist-nominated directors was consistent with what we observed in 2019 and 2020, with 69% of agreements including such a provision. Many agreements provide for appointment to specific committees, while others mandate that any new committee formed in the future contain one or more of the activist's directors. Some agreements also require that committee membership be offered to the activist's directors if the board forms an "Executive Committee" or "Transaction Committee" in the future. Additionally, the frequency of agreements requiring formation of new board committees has reverted to the 2019 rate of 14%, down from 24% in 2020. Indicative of their purpose, these committees have been named "Capital Allocation

## SULLIVAN & CROMWELL LLP

Committee,” “Long Term Planning Committee,” “Finance and Strategy Committee” and “CEO Search Committee.” Although some settlement agreements did not provide for committee membership, those agreements often required the company to consider the activist nominee/appointee for committee membership along with other members of the board.

<i>Committee Membership</i>	<i>2021 YTD* Percentage</i>	<i>2020 Percentage</i>	<i>2019 Percentage</i>
Nominee on committee	69%	66%	71%
Formation of new committee	14%	24%	14%

### D. INFORMATION SHARING

63% of 2021 agreements specifically address the topic of information sharing by the new directors with the activist, largely consistent with prior years: 3% of agreements expressly permitted such sharing of information, less often than in recent years in which approximately 5% to 15% of agreements expressly permitted such information sharing; 46% of agreements subjected new directors to the board’s standard policies regarding confidential information (which implies that information sharing with an activist would not be permitted); and an additional 14% of agreements involved separate confidentiality agreements entered into with the activist fund itself. The agreements that contemplate information sharing usually arise when one or more activist insiders, as opposed to only independent directors, are appointed to the board of the issuer. Issuers and activists alike will also have to consider the impact of information sharing on the activists’ ability to trade.

### E. STANDSTILL PROVISIONS

Almost every settlement agreement includes a standstill provision, which prohibits activists from engaging in certain activities within a prescribed period of time. The main purpose of the standstill provision is to restrict the activist from initiating or participating in any further campaigns in the near term. The standstill period generally runs one annual meeting election cycle from the date of the settlement agreement. Often, the length of the standstill period is synced with the time when a 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 2021, 2020 and 2019 settlement agreements.

<i>% of 2021 YTD* Agreements</i>	<i>% of 2020 Agreements</i>	<i>% of 2019 Agreements</i>	<i>Activities Prohibited</i>
<b>97%</b>	<b>92%</b>	<b>95%</b>	<b><i>Soliciting proxies or consents.</i></b> Prohibits activists from making, engaging in or in any way participating in, directly or indirectly, any “solicitation” of proxies or consents to

SULLIVAN & CROMWELL LLP

<b>% of 2021 YTD* Agreements</b>	<b>% of 2020 Agreements</b>	<b>% of 2019 Agreements</b>	<b>Activities Prohibited</b>
			vote, or advising, encouraging or influencing any person with respect to the voting of any securities of the company.
<b>97%</b>	<b>87%</b>	<b>93%</b>	<b>Forming a group or a voting trust or entering into a voting agreement.</b> 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).
<b>91%</b>	<b>89%</b>	<b>89%</b>	<b>Seeking board additions or removals.</b> Prohibits activists from seeking to elect or remove any directors or otherwise seeking representation on the board.
<b>91%</b>	<b>82%</b>	<b>93%</b>	<b>Presenting a shareholder proposal.</b> Prohibits activists from making any proposal at any annual or special meeting of the shareholders.
<b>94%</b>	<b>92%</b>	<b>88%</b>	<b>Publicly disparaging the company or its directors or officers.</b> 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.
<b>77%</b>	<b>79%</b>	<b>77%</b>	<b>Calling shareholder meetings or referendums.</b> Prohibits activists from calling or seeking the company or any other person to call any meeting of shareholders, as well as act by written consent, or conducting a referendum of shareholders.
<b>94%</b>	<b>84%</b>	<b>70%</b>	<b>Seeking amendments or waivers from the standstill or challenging the validity of the standstill.</b> 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.
<b>74%</b>	<b>74%</b>	<b>70%</b>	<b>Requesting a shareholder list or books and records.</b> Prohibits activists from exercising their rights under state law to request a shareholder list or books and records of the corporation.



SULLIVAN & CROMWELL LLP

<b>% of 2021 YTD* Agreements</b>	<b>% of 2020 Agreements</b>	<b>% of 2019 Agreements</b>	<b>Activities Prohibited</b>
<b>73%</b>	<b>74%</b>	<b>68%</b>	<b><i>Bringing litigation or other proceedings (other than to enforce the settlement agreement).</i></b> 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.
<b>54%</b>	<b>61%</b>	<b>63%</b>	<b><i>Seeking to control or influence the company or management.</i></b> 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.
<b>63%</b>	<b>58%</b>	<b>71%</b>	<b><i>Entering into third-party agreements that go against the settlement agreement.</i></b> 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.
<b>89%</b>	<b>63%</b>	<b>66%</b>	<b><i>Acquiring more shares.</i></b> 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.
<b>51%</b>	<b>74%</b>	<b>54%</b>	<b><i>Publicly announcing intent to go against the settlement agreement.</i></b> Prohibits activists from making any public disclosure, announcement or statement

## SULLIVAN & CROMWELL LLP

<b>% of 2021 YTD* Agreements</b>	<b>% of 2020 Agreements</b>	<b>% of 2019 Agreements</b>	<b>Activities Prohibited</b>
			regarding any intent, purpose, plan or proposal that is inconsistent with the standstill provisions.
<b>97%</b>	<b>74%</b>	<b>59%</b>	<b>Seeking extraordinary transactions not recommended by the board.</b> 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.
<b>54%</b>	<b>37%</b>	<b>38%</b>	<b>Transferring shares to a third party.</b> 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.
<b>34%</b>	<b>34%</b>	<b>20%</b>	<b>Short selling.</b> Prohibits activists from engaging in short selling of the company’s securities.

### F. VOTING AGREEMENTS

91% of 2021 settlement agreements include a provision requiring the activists to vote their shares in a prescribed manner within the standstill period, generally consistent with 2020 (92%) and 2019 (89%) levels. 6% of the settlement agreements simply require the activist to vote for all the director candidates nominated by the board, and 11% of the settlement agreements require the activist to vote in accordance with all board recommendations. The remaining 74% of the settlement agreements either specify proposals that the activists must vote for (such as ratification of the appointment of an auditor, “say-on-pay” and “say-on-frequency” proposals, proposals regarding equity incentive plans, change of control transactions and the board slate for the director election) or include exceptions permitting activists to vote in their own discretion

## SULLIVAN & CROMWELL LLP

on certain proposals (such as mergers or liquidations, amendments to the company's articles of incorporation or implementation of takeover defenses).

One of the most common exceptions to the voting agreement provision is when a board recommendation differs from that of the proxy advisors ISS and/or Glass Lewis. This exception has become popular over the past few years, appearing in 60% of settlement agreements reviewed for 2021, which is up from 37% in 2020, 50% in 2019 and 37% in 2018. Some agreements including this exception 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. Others require *both* ISS and Glass Lewis to make such a differing recommendation. Some agreements also limit the exception only to ISS recommendations, while others only limit to specified matters, requiring the investor to support most or all other board recommendations notwithstanding an ISS/Glass Lewis recommendation to the contrary.

<i>Voting Provisions</i>	<i>2021 YTD* Percentage</i>	<i>2020 Percentage</i>	<i>2019 Percentage</i>
All board recommendations	11%	16%	20%
Specific board recommendations or exceptions	74%	68%	54%
The board slate only	6%	8%	16%
No voting provision	9%	8%	11%
ISS/Glass Lewis exception to voting provision	60%	37%	50%

### G. EXPENSE REIMBURSEMENT

Another noteworthy trend in 2021 was the decrease in the percentage of settlement agreements pursuant to which the company was required to reimburse the activist for its expenses in connection with the campaign. 54% of 2021 settlement agreements included an expense reimbursement requirement, down from 66% in 2020 and 70% in 2019. We have divided expense reimbursement obligations into three buckets based on the dollar value cap of the obligations—less than \$100,000, \$100,000 to \$500,000, and \$500,000 or greater. Since 2019, we have observed a steady increase in the share of agreements in which each party pays for its own expenses or in which expense reimbursement is provided at a cap of \$100,000 to \$500,000. In contrast, we have seen corresponding decreases in agreements in which expense reimbursement is provided at a cap of less than \$100,000 or \$500,000 or more. There continues to be at least one settlement agreement that provides that the company must reimburse expenses but does not specify a cap. Notably, as was the case in 2020, the size of reimbursement caps in 2021 does not appear to correlate to issuers' market capitalizations.

## SULLIVAN & CROMWELL LLP

<i>Expense Reimbursement</i>	<i>2021 YTD* Percentage</i>	<i>2020 Percentage</i>	<i>2019 Percentage</i>
Each party pays for its own expenses	46%	34%	30%
Cap of less than \$100,000	11%	18%	23%
Cap of \$100,000 to \$500,000	31%	29%	21%
Cap of \$500,000 or more	6%	13%	20%
Others (including no cap)	6%	5%	5%

### H. FUND INSIDERS APPOINTED BY SELECT ACTIVISTS

We also reviewed settlements with certain prominent activist funds, for which we now have data from 2010 to September 2021, to assess the frequency with which the activist appointed fund insiders to the board (as opposed to unaffiliated directors) and the length of time that the longest serving fund insider remained on the board. For this purpose, we limited our analysis to settlement agreements granting the activist the right to at least one director.

Although institutional investors may prefer independent designees to fund insiders, as shown in the chart below (and as BlackRock has expressly stated), in 49% of the agreements we reviewed at least one of the appointed directors was an insider of the activist fund. Icahn and ValueAct appointed an activist insider in over 85% of their settlements reviewed, whereas Elliott, JANA and Land & Buildings chose an insider in 20% or fewer of their settlements. Starboard and Third Point were the most split between insiders and independents, with at least one insider in 38% and 60% of the settlements reviewed, respectively. In 64% of the agreements for which the duration of the settlement agreement has expired, at least one insider stayed on the board longer than the length of time that the target company was required to appoint and nominate the director pursuant to the settlement agreement. This is up from 55% based on settlement agreements that had expired by September 2020. For agreements in which at least one insider remained on the board beyond the duration provided for by the settlement agreement, the longest-serving insider for each such agreement has served an average of approximately 32 months longer than the period provided for in the agreement, up from 28 months as of September 2020.<sup>26</sup>

The group of seven prominent activists referenced in the previous paragraph entered into eight settlement agreements in 2021 through August. Of those agreements, only two (Icahn's settlements with FirstEnergy and Xerox) involved the appointment of an activist insider as opposed to an independent designee. Among the settlement agreements reached by this group of activists this year as of August 31, 2021, 49% included at least one insider director.

<sup>26</sup> 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 33% 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 2021. Furthermore, as of September 2021, 8% of the settlement agreements we reviewed were still in effect, which means that the insider nominees appointed pursuant to those agreements may eventually stay on the target boards beyond the settlement duration.

## SULLIVAN & CROMWELL LLP

<i>Fund</i>	<i>Settlements Reviewed from 2010-21</i>	<i>% with Insider</i>	<i>% of Agreements with Insider Appointees on Board Beyond Duration of Settlement Agreement</i>	<i>Average Months Insider Appointees Are on Board Beyond Settlement</i>
Elliott	22	18%	100%	21
Icahn	19	89%	80%	36
JANA	11	18%	0%	N/A
Land & Buildings	5	20%	100%	2
Starboard Value	24	38%	50%	23
Third Point	5	60%	67%	34
ValueAct	12	100%	55%	38
TOTAL	98	49%	64%	32

---

### OTHER DEVELOPMENTS IMPACTING ACTIVISM

Some of the more notable litigation involving activists this year included: (A) the Delaware Chancery Court's decision to strike the Williams Companies' 5% rights plan; (B) shareholder derivative lawsuits over "white squire" investments during an activism campaign; and (C) the Cytodyn, Inc. board of directors' win against an activist group regarding the nomination notice requirements under the company's bylaws.

There have also been a number of new legislative and regulatory developments expected to have an impact on proxy contests and activism strategies more broadly, including proposed changes in antitrust laws, in particular, the New York State Senate Bill S.933A, and SEC rulemaking, including its final rule with respect to the universal proxy card and updates to required disclosures under Form N-PX.

#### A. RIGHTS PLANS AND THE WILLIAMS COMPANIES LAWSUIT

As discussed in our 2020 memo, shareholder rights plans, commonly known as poison pills, were briefly back in vogue during the first half of 2020 as a number of issuers felt more susceptible to takeovers and activism due to pandemic-related stock price drops and volatility. Although this burst of activity was short lived, it resulted in some interesting litigation, and there continue to be some instances in which issuers adopt rights plans in response to an actual or perceived activism threat. Most recently, and as discussed above, Southwest Gas instituted a temporary rights plan in response to Icahn's proxy fight.

On November 4, 2021, the Delaware Supreme Court upheld the Delaware Chancery Court's ruling from February 2021 to strike down the rights plan adopted by the Williams Companies in March 2020. Applying the intermediate enhanced scrutiny standard established in *Unocal*, the Delaware Chancery Court held that the Williams board conducted a good faith, reasonable investigation in adopting the rights plan, but cast doubt on some of the threats underpinning the rights plan and found that Williams' response was not proportional to the stated threats. Vice Chancellor McCormick expressed discomfort with the rights plan's 5% trigger threshold (which is lower than the norm for non-NOL (net operating loss) rights plans), and its broad definitions of "beneficial ownership" and "acting in concert" (which included a daisy chain concept that two investors would be deemed to be "acting in concert" if each of those investors was separately

## SULLIVAN & CROMWELL LLP

“acting in concert” with the same third party). The Chancery Court’s views of the rights plan’s specific provisions were not surprising in light of prior guidance, but *Williams* was the first decision to consider whether “short-termism” and “disruption” constitute cognizable threats under *Unocal* and clarified that such threats cannot be “hypothetical.”<sup>27</sup> *Williams* is a reminder that it is incumbent upon a board seeking to adopt a rights plan to define specific and viable threats, narrowly tailor the provisions of the pill to those threats, and memorialize its decisions in a clear and thorough record. For more detail on the Chancery Court’s decision in *Williams*, refer to our publication available [here](#).

### B. LAWSUITS OVER “WHITE SQUIRE” INVESTMENTS DURING AN ACTIVISM CAMPAIGN

The Delaware Chancery Court recently denied Twitter’s motion to dismiss a shareholder derivative suit. In the suit, the Orlando Police Pension Fund alleged that after Elliott’s threat to remove Jack Dorsey as CEO and launch a proxy campaign to turn over the board, the directors of Twitter breached their fiduciary duties by agreeing to a transaction with Silver Lake.<sup>28</sup> The complaint alleged that the transaction, pursuant to which Twitter sold \$1 billion in low-interest convertible notes to Silver Lake (with a conversion price which the plaintiff alleged was far below current stock value), provided Silver Lake with a board seat, and coincided with Twitter settling with Elliott and announcing a \$2 billion stock buyback, “served no business purpose and was financially unreasonable” and “bought protection for their incumbency with the [c]ompany’s money.”<sup>29</sup>

In denying Twitter’s motion to dismiss, the Delaware Chancery Court accepted that, at the pleadings stage, the Silver Lake capital infusion was an “off-market deal” for the company, including capital “that [the company] had no use for” and that the company would not have taken “but for the threatened proxy fight and the implications [thereof].”<sup>30</sup> Nevertheless, Vice Chancellor Laster emphasized this was a “unicorn case [with] exceptional facts,” and that his order denying Twitter’s motion should not be regarded as a new or different approach to activist situations. He expressed wariness over setting precedent for litigation over activist settlements that settle for only additional disclosures and plaintiffs’ attorneys fees, mirroring the M&A litigation market in Delaware before *Trulia*.<sup>31</sup> Although the *Twitter* case may be likely to settle following the Delaware Chancery Court’s ruling on the motion to dismiss, it will be interesting to monitor the case, including in light of Jack Dorsey’s recently announced resignation as CEO of Twitter.

---

<sup>27</sup> Williams Companies Stockholder Litigation, case number 2020-0707-KSJM, at 73 (Del. Ch. Feb. 26, 2021).

<sup>28</sup> Orlando Police Pension Fund, derivatively on behalf of Twitter, Inc. v. Dorsey, Lane, Fox et. al. and Twitter Inc., case number 2021-0041, at 7 (Del. Ch. Jan. 21, 2021).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 79.

<sup>31</sup> See In re Trulia, Inc. Stockholder Litigation, case number 10020-CB (Del. Ch. Jan. 22, 2016).

## SULLIVAN & CROMWELL LLP

It is not unique for companies to accept “white squire” capital infusions from private equity firms or other investors in exchange for minority stakes. However, it is also not unheard of, particularly this year, for such companies to then face litigation or public criticism as a result of an investment (or even potential investment). Notably, KKR’s initial agreement with Box required KKR to vote its newly issued preferred stock with Box’s board of directors in connection with its investment in Box, but the parties amended their agreement to remove this contractual commitment after Starboard initiated its public activism campaign.<sup>32</sup> Similarly, Comtech Telecommunications Corp. faced a derivative suit in the Delaware Chancery Court similar to the *Twitter* case, which alleged that, in an attempt to block activist investor Outerbridge Capital’s proposed slate of directors, Comtech’s board accepted a \$100 million investment from White Hat Capital Partners LP and Magnetar Capital LLC, added two board seats (with one seat going to White Hat Capital) and secured a voting agreement from White Hat and Magnetar. The complaint alleged the board made these changes just before the nomination deadline expired to “ensure that the incumbents will remain in control.”<sup>33</sup> The case was dismissed without prejudice on November 12, 2021 after the parties reached a settlement pursuant to which Comtech agreed that, among other things, the voting agreements with White Hat and Magnetar would not apply to director elections.<sup>34</sup> As discussed above, Icahn recently filed for a temporary restraining order against Southwest Gas in an attempt to prevent Southwest Gas from issuing stock to purportedly prevent the company from interfering with Icahn’s proxy campaign.<sup>35</sup> These recent situations serve as a reminder for boards of directors to consider carefully decisions made within the zone of an activism campaign (including entering into transactions or agreements with other investors).

### C. ADVANCE NOTICE BYLAWS AND RETRIBUTIVE ACTIVISM

On October 13, 2021, the Delaware Chancery Court denied an activist plaintiff’s request for injunctive relief against biotechnology company CytoDyn, Inc. The Chancery Court held that CytoDyn acted lawfully when it rejected a nomination notice by an activist group owning 7.67% of CytoDyn’s shares led by Paul Rosenbaum and Bruce Patterson, which submitted a five-nominee slate one day before the notice deadline for the company’s upcoming six-member board election, without providing the activists with an opportunity to cure.<sup>36</sup> CytoDyn invalidated the director slate, stating numerous deficiencies in the notice that failed to satisfy the advance notice requirements set forth in the company’s bylaws, including the group’s failure to disclose supporters of the activist group and a conflict of interest between a nominee and a member of the activist group. Vice Chancellor Slight agreed, noting that these omissions rendered the nomination notice

---

<sup>32</sup> See Schedule 14A for Box, Inc. filed by Starboard LP on July 20, 2021 with the SEC.

<sup>33</sup> *Franchi v. Kornberg*, case number 2021-0919-JRS (Del. Ch. Oct. 26, 2021).

<sup>34</sup> *Franchi v. Kornberg*, case number 2021-0919-JRS (Del. Ch. Nov. 12, 2021).

<sup>35</sup> *Icahn Partners LP. v. John P. Hester, et al.*, case number 2021-1031-KSJM (Del. Ch. Dec. 02, 2021).

<sup>36</sup> See Business Wire, *CytoDyn Announces Resolution of Federal Litigation with Rosenbaum/Patterson Activist Group* (Sept. 20, 2021).

## SULLIVAN & CROMWELL LLP

“fatally incomplete.”<sup>37</sup> Helpful to the court’s decision in favor of CytoDyn was the fact that the board had adopted the advance notice bylaw on a clear day, rather than as a response to the Rosenbaum/Patterson activists. The Chancery Court also refused to delay the company’s annual meeting pending an appeal. The decision reinforces the importance of well-crafted advance notice bylaws, and highlights that a company and its board are within their rights to invalidate an activist nomination if the notice fails to include substantive information required by the bylaws by the deadline set forth in the bylaws.

However, the CytoDyn situation also highlights that activists are able to engage in other forms of activism campaigns without a director nomination on the table in the near term. Following the Chancery Court’s decision, CytoDyn adjourned its annual meeting scheduled to be held in October, citing lack of quorum after an insufficient number of shareholders (including the Rosenbaum/Patterson group members) failed to submit proxies. On November 24, 2021, the company’s shareholders ultimately approved all proposals up for consideration at the annual meeting.

### D. ANTITRUST UPDATES

In the past, we have highlighted how antitrust laws — for example, the notice requirements imposed by the Hart-Scott-Rodino Act on an activist acquiring a stake in a public company or the Clayton Act restrictions on overlapping directorships in the same industry — can serve as a tool to detect potential activist approaches and may have an impact on the outcome of activism campaigns. Recently renewed interest in revamping U.S. antitrust law to target large businesses, especially “Big Tech,” could increase antitrust law’s role in shareholder activism. Consistent with academic and non-governmental calls for reform, the Biden Administration, the Federal Trade Commission<sup>38</sup> and certain members of Congress<sup>39</sup> have expressed interest in reorienting federal antitrust law to, among other things, target large companies. Depending on the form, this reorientation, if implemented, could have a secondary impact on activism.

Individual states may also enter the fray. For example, the New York State Senate passed a bill on June 7, 2021 that proposes a stricter antitrust regime requiring, among other things, premerger notifications and waiting periods.<sup>40</sup> If passed into law, the proposal would require persons with a set dollar value of assets in New York to observe a 60-day waiting period to pre-clear acquisitions of voting securities or assets of any other person (including any company) which has assets or annual net sales in excess of \$9.2 million within New York — which is 10 times lower than roughly comparable metrics under the HSR Act notification threshold. Because many activists have significant presences in New York, those activists would be subject

---

<sup>37</sup> *Rosenbaum v. CytoDyn Inc.*, case number 2021-0728-JRS, at 4 (Del. Ch. Oct. 13, 2021).

<sup>38</sup> See Federal Trade Commission, *FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competition After String of Failed Attempts to Innovate* (Aug. 19, 2021).

<sup>39</sup> See Competition and Antitrust Law Enforcement Reform Act of 2021, 117th Cong. S. 225 (2021) (*available at*: <https://www.congress.gov/bill/117th-congress/senate-bill/225/text?r=164&s=1>).

<sup>40</sup> See N.Y. Senate S.933A (2021) (*available at*: <https://www.nysenate.gov/legislation/bills/2021/s933/amendment/a>).



## SULLIVAN & CROMWELL LLP

to the requirement unless expressly exempted by the New York Attorney General. This would, in effect, be expected to require activists to seek antitrust clearance prior to amassing voting power in a public company target. Such a regime, although likely to complicate negotiated transactions by issuers and be the subject of constitutional and other legal challenges if adopted, would serve as a significant early detection tool for issuers that may be faced with activism campaigns. For more information on the New York legislation, refer to our publication available [here](#).

### E. SEC RULEMAKING

The SEC in 2021 has adopted or proposed a number of rules impacting shareholder voting and disclosure. Of particular note in the activism context are the adoption of mandatory universal proxy cards for contested elections and the proposed enhanced proxy voting disclosure requirements for investment funds. The SEC is also evaluating other rulemaking that could impact activism campaigns, including its recently proposed rules weakening the requirements imposed on proxy voting advice businesses adopted in 2020 and its review of Schedule 13D filing requirements (including the 10-day filing window and the treatment of derivative securities).

#### 1. Mandatory Universal Proxy Cards for Contested Director Elections

On November 17, 2021, the SEC adopted rules mandating the use of a universal proxy card in contested director elections (other than solicitations exempt under the proxy rules) that take place after August 31, 2022. The new rules, initially proposed in October 2016, will require issuers and activists to use proxy cards that list the names of both the issuer's and dissident's nominees, allowing shareholders to select among all nominees in a manner designed to more closely mirror in-person voting practices. In addition, the rules require activists to solicit holders of a minimum of 67% of the voting power of shares entitled to vote in the election. The new rules also establish notice, filing and presentation requirements when using a universal proxy card. For more information on the new rules, see our publication available [here](#).

It is difficult to predict the likely extent or impact that the universal proxy rules will have on proxy contests, including whether they will result in more or fewer proxy contests or impact the outcome of proxy contests. On the one hand, by enabling split-ticket voting universal proxy cards could lead to a greater number of boards that are composed of a mix of issuer-nominated and activist-nominated directors. On the other hand, the minimum solicitation requirement and other procedural requirements could increase the costs associated with launching a proxy contest, which may encourage activists to utilize other forms of activism. Issuers may want to consider reviewing their governing documents to understand the various options available to shareholders and consider the need for any additional defenses (such as stricter advance notice bylaws or the adoption of, or enhanced, director qualification provisions).

# SULLIVAN & CROMWELL LLP

## 2. Proposed Rules to Enhance Investor Proxy Voting Disclosure

On September 29, 2021, the SEC proposed rules to enhance the information that investment funds (which include mutual funds, exchange-traded funds and other registered management investment companies) report annually about their proxy votes. Currently, every registered management investment company, other than a small business investment company registered on Form N-5, must file its proxy voting record annually on Form N-PX.<sup>41</sup> The proposal aims to expand the scope of voting decisions that the funds must report on, such as director elections and stock lending activities. For example, the proposal would require such funds and managers to include portfolio securities on loan in the potential votes able to be cast, because the fund could recall these securities and vote on them. These proposed rules, if adopted, could potentially impact voting outcomes and engagement strategies in contested elections, as they may lead to some institutions being more likely to recall their shares prior to a significant vote. For more information on the proposed rules, see our publication available [here](#).

\* \* \*

Activist activity has made a comeback from its sharp decline in the early days of the COVID-19 pandemic. Activists are now approaching targets with newfound lines of critique (such as ESG) and tactics (such as SPACtivism), as well as a more developed traditional activist playbook. Therefore, it is more important than ever for companies to maintain consistent and strong relationships with their shareholders — particularly holders of large stakes—and perhaps even dissidents. Going forward, we expect the activism landscape in the United States to continue in full force as the world economy adjusts to a pandemic-affected environment, against the backdrop of increasing U.S. regulatory oversight.

\* \* \*

---

<sup>41</sup> See Securities Exchange Commission, Enhanced Reporting of Proxy Votes by Registered Management Investment Companies (Sept. 29, 2021) (*available at*: <https://www.sec.gov/rules/proposed/2021/34-93169.pdf>).

## SULLIVAN & CROMWELL LLP

### ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

### CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers or to any Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to [SCPublications@sullcrom.com](mailto:SCPublications@sullcrom.com).