SULLIVAN & CROMWELL LLP

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Review and Analysis of 2017 U.S. Shareholder Activism

Small Group of "Frequent" Activists Leading High-Profile Campaigns at Large-Cap Companies

Concentration of Equity Ownership Among Three Largest Index Fund Providers Continues to Influence Outcomes in Activism Situations

Activists Continue to Find Success Despite Institutional Investor Criticism of Rapid Settlements

Institutional Investors Increasingly Focused on ESG and "Long-Termism" May Lead Activists to Focus on Governance Topics

Activism Is Increasingly Shaping the M&A Landscape

INTRODUCTION

Shareholder activist hedge funds grew modestly in 2017, not yet restoring global activist fund assets under management ("AUM") to 2015 highs. Moreover, the rate of formation of new activist funds continued to decline, and the "winners" in this environment – those activists attracting the most new capital – seemed to be the well-established activists with strong brand names and track records of outperforming the market. Mirroring this development in fundraising, 2017 also saw a resurgence of campaign activity by frequent activists. Notably, these frequent activists appeared to focus on the largest companies, with activists targeting large-cap companies in over 21% of all campaigns (up from 19% in 2016).. Large-caps like P&G, GE, General Motors, Nestle and ADP became notable targets. Despite this increased activity by frequent activists, the overall number of proxy contests and the number of board seats sought by activists both declined during 2017, continuing similar declines observed during 2016.

Meanwhile, the concentration of ownership among the largest passive institutional investors continues to grow. The three largest index fund providers (BlackRock, State Street and Vanguard) now own about 18.5% of the S&P 500 (compared to 14.7% in 2013), and the top ten institutional holders own over 30% of the S&P 500. In contrast, retail holders now hold less than 30% of the S&P 500. Although retail share ownership at smaller market cap companies remains slightly higher than at the largest companies (e.g., 38% at companies with market capitalizations between $300 million to $2 billion), it also continues to decline, consistent with the overall trend.

With the growing size of the index fund providers' stakes, an activist now only needs to convince a handful of holders (as opposed to hundreds) of its attack thesis. For example, if an activist can accumulate a significant stake of an issuer in which Vanguard, State Street and BlackRock each own a large percentage, then the top four holders would control such a large portion of the outstanding shares that the top 10-12 investors alone could determine the outcome of a shareholder vote. This is particularly the case if the matter to be voted on, such as the election of directors, requires approval of only a majority or plurality of the shares voted rather than a majority of the shares outstanding, because the average percentage of shares voted (even in a contested election) is below 85%. Retail holders, who suffer from a collective action problem, historically have been less likely to vote and may become even less inclined if they perceive their votes as irrelevant to the outcome.

Well-known activists often develop relationships with significant institutional holders because they have communicated with these investors in prior activist campaigns and maintain a regular dialogue. In comparison, issuer management teams and directors may have fewer or more limited relationships with institutional investors, especially passive asset managers and voting teams at active managers. While many issuers have engaged in significantly more outreach to the largest institutions as part of an increasingly proactive and routinized shareholder engagement calendar, they are not always successful in reaching their audience. This is especially the case at smaller-cap issuers who, despite at times hiring sophisticated advisors to assist with investor relations, may struggle to secure meetings with the portfolio managers and governance teams at the largest funds who have limited resources to engage in routine update meetings with the thousands of issuers in their portfolios.

This potential asymmetry of access by issuers and activists to institutional investors is supported by observations from the 2017 activism landscape. First, index funds showed an increased willingness to support dissidents in complex and consequential proxy contests, perhaps because with better access to the index funds, the activists were able to convince the funds of the merits of the dissident slate (e.g., BlackRock supported Pershing Square at ADP). Second, the resurgence of the most prolific activist investors in 2017 may not be solely related to their brand names and fund raising efforts. It also may be partly attributable to the fact that they may have deeper relationships with certain institutional investors, thereby increasing the likelihood of success in any particular campaign.

There is a further hidden cost in the growth of passive investing in that index funds by definition do not make judgments about the businesses or operations of the issuers whose shares they hold. Moreover, expense management in the index fund industry, where margins are already very thin, requires that they focus on voting principles that are scalable and more likely to be "one-size-fits-all" or at least easily and objectively comparable across peers. The result has been index funds and other large asset managers using relative share price performance (such as total shareholder return statistics) and relative executive compensation metrics issues as the key parameters for guiding their voting behavior. Additionally, index funds, public pension funds and large activists alike place a strong emphasis on environmental, social and governance ("ESG") parameters.

Indeed, these institutions have given activists and issuers alike clear guidance about their ESG engagement priorities. In 2017, ESG issues played a prominent role in the passive investors' public discourse, with the index funds' CEOs making public statements on investment stewardship principles and the index funds publishing annual reports articulating more aggressive stances on issues like gender diversity on boards and climate risk. At times, the index funds have even openly targeted specific issuers on these issues. For example, BlackRock has urged oil giant ExxonMobil to be more open about the effects of climate change on its business and criticized its directors' lack of engagement with shareholders. When combined with the parallel focus of pension funds and other large activists, the index funds' focus on ESG has influenced the discourse in corporate governance circles to a large extent, even catalyzing explicit updated voting policies from the proxy advisory firms Institutional Shareholder Services ("ISS") and Glass Lewis.

Unsurprisingly, the index funds' focus on ESG has caused some activists to start to tack toward ESG topics. Activists now not only have additional avenues to launch ESG-based attacks on companies but also a potential path to distinguish their fundraising efforts and appeal to pension funds and other asset managers. Jana Partners, for example, announced that it is raising funds for a new sustainability fund – an announcement that gave emphasis to Jana's and CalSTERs' joint campaign at Apple to institute more parental controls on iPhones.

Not to be overlooked was the clear message that BlackRock's Larry Fink delivered in his 2018 annual letter to CEOs (the "BlackRock CEO Letter") in which he admonished issuers to be focused on and prepared to speak to investors about long-term strategy.[1] It still remains to be seen whether institutional investors will reward issuers who comply or hold activists to the same standard of having to articulate a viable long-term strategy for the targets of their campaigns. Recent index fund criticism of "short termism" – i.e. institutional investor criticism of issuers' swift settlements with activists – did not have a significant impact on the outcome of activism contests in 2017. More than a third of activist campaigns in 2017

[1] *See* Larry Fink's Annual Letter to CEOs – A Sense of Purpose (available at: https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter)

resulted in settlements, which is on par with the rate of settlements in 2016, and the speed with which issuers and activists reached settlements in 2017 was, on average, comparable with 2015 and 2016.

In this environment, ISS has continued to maintain its "what's the harm" approach to voting recommendations in activists' short-slate proxy contests, whether or not the activist presents shareholders with a viable long-term alternative to the issuer's strategic plan. The results of ISS's approach are predictable. Activists are now obtaining board seats at a record rate as a percentage of the overall number of proxy contests – activists won an additional 76 board seats in 2017 alone, raising their five-year total to 642. These directors are also staying on the boards for long periods of time. Since 2010, prominent activist fund insiders who became directors following a settlement agreement stayed on the relevant board for an average of approximately two years longer than the minimum provided for in the settlement agreement, and many insiders in this subset were still on the relevant board at the time of review.

Finally, an important and growing consequence of activism is its nexus with M&A. Activists both catalyze deals (in some cases, by creating a welcoming environment for unsolicited acquisitions) and hold up deals by engaging in so-called "bumpitrage."

Activist agitation has been the genesis for numerous strategic and sale processes, with the activists promoting the M&A alternative, whether a divestiture or a whole company sale, as a "fix" for underperforming businesses. In this environment, 2017 saw a dramatic uptick in unsolicited M&A, with 80% of "friendly" M&A being initiated by bidders rather than targets conducting planned sale processes. Acquirers are able to leverage the disruption engendered by activists, a phenomenon observed at Buffalo Wild Wings, BroadSoft, Parexel, SeaWorld and Whole Foods. In some cases, activists also pressure companies to consider unsolicited takeover bids, as was the case with PPG's ultimately unsuccessful bid for AkzoNobel, which was supported by Elliott Management, and Land & Buildings' pressure on Hudson's Bay to consider Signa's bid for its German retail business.

For any announced M&A transaction, there is the threat of having shareholder approval of the transaction held up by an activist seeking a higher price. Activist pressure resulted in the scuttling or sweetening of multiple M&A deals that were poorly received by investors in 2017, including SandRidge/Bonanza, Huntsman/Clariant, Qualcomm/NXP, Bain-Cinven/STADA, Safran/Zodiac, KKR/Hitachi Kokusai and GE/Arcam. For example, in EQT/Rice Energy, Jana Partners sought to terminate the deal outright, arguing that the dealmaking was motivated by a desire to maximize production growth, the key metric that formed the basis of EQT's executive compensation plans, rather than a desire to secure earnings growth.

Trends and developments in shareholder activism in 2017 portend another busy year for activists and issuers alike in 2018.

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

The information in this publication on proxy contests and other activist campaigns is based on the database maintained by FactSet Research Systems, Inc. on SharkRepellent.net, using a data run on January 5, 2018, supplemented as necessary by our own review of public information and other third-party sources. In order to provide an analysis relevant to our U.S. public company clients, we have not included campaigns at companies with a market cap of under $100 million and have not included campaigns at non-U.S. companies. We have followed the SharkRepellent categorization of campaigns as “proxy fights” or “other stockholder campaigns,” but have not included those categorized merely as exempt solicitations or Schedule 13D filings with no public activism. We have not included the mere submission of Rule 14a-8 proposals as “campaigns,” although the section “Types and Objectives of Activist Campaigns” discusses the use of shareholder proposals that were brought in conjunction with the activist campaigns covered in this publication. We have also 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.

Data in this publication regarding hedge fund AUM, performance and formation is based on the most recent Hedge Fund Industry Report issued by Hedge Fund Research (HFR), unless otherwise indicated. Other data sources, including Proxy Pulse (a Broadridge and PricewaterhouseCoopers initiative) and Preqin, are identified as they arise.

Our analysis throughout this publication is heavily dependent upon these data, statistics, our anecdotal experience and various assumptions. If our assumptions prove to be incorrect or if the data is incomplete or contains errors, our analysis and conclusions could change. Moreover, 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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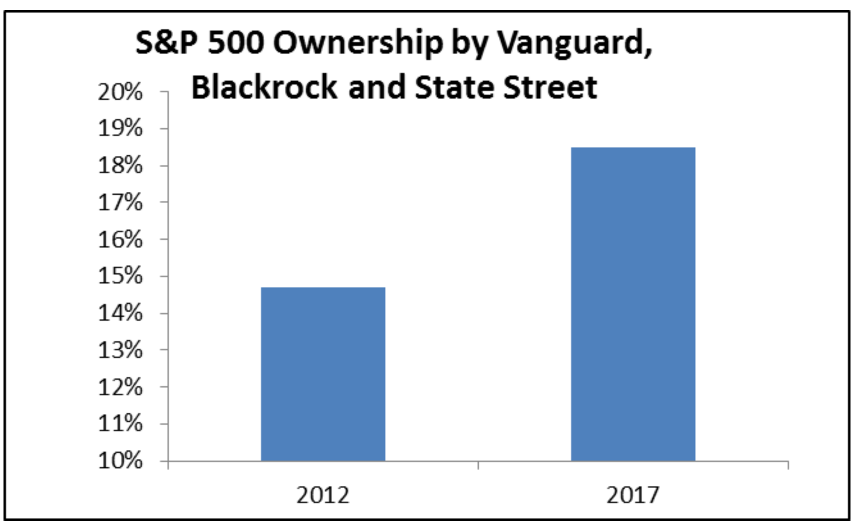
INSTITUTIONAL INVESTORS

The influence of large index and other institutional investors has been 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 to play a determinative role in vote outcomes. For campaigns launched in 2017, the median percentage ownership of the dissident group was about 8% and was less than 2% at companies with a market cap of over $20 billion.

To succeed in proxy contests or other campaigns, activists depend on the support of the large institutional investors. These large investors, particularly index fund managers, are well aware of their critical role. Accordingly, before turning to a detailed discussion of activist campaigns, it is worth highlighting trends at the large institutional investors decisive to the activism playing field.

A. CONCENTRATION AMONG LARGEST INSTITUTIONAL INVESTORS

Concentration of equity ownership, particularly among the largest three index providers, continues to be a key component in the activism landscape. As of June 2017, one of BlackRock, Vanguard or State Street was the largest single shareholder in 438 companies out of the S&P 500, or roughly 88 percent of the firms in the index.[2] Fidelity is the fourth largest institutional investor and its ownership also signicantly contributes to the equity concentration of the S&P 500. The following chart shows the growth in ownership stakes held in S&P 500 companies by Vanguard, BlackRock and State Street, which were the three largest U.S. institutional investors in each year:[3]



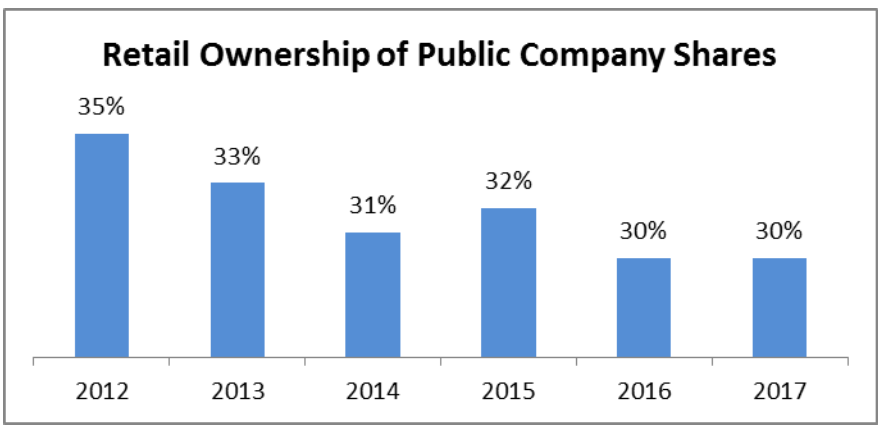
[2] Fichtner, Heemskerk, and Bernardo-Garcia, *Hidden power of the Big Three? Passive index funds, re-concentration of corporate ownership, and new financial risk.*

[3] *See* Wall Street Journal, *At BlackRock, Vanguard and State Street, 'Engagement' Has Different Meanings* (January 20, 2018).

In last year's Memorandum, we noted that the SEC's proposal to provide dissident shareholders with the ability to list company nominees on the dissident proxy card could make this concentration of share ownership even 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 to run a proxy contest. The universal proxy proposal is not on the SEC's near-term agenda but remains active. Moreover, as a counterpoint to our observation, some proxy solicitors suggest that the current system of strictly separating the management and dissident candidates onto separate proxy cards in a plurality-based election system may be backfiring on incumbents in instances in which institutions would prefer to split their vote among management and dissident candidates.

B. SHIFT FROM RETAIL TO INSTITUTIONAL OWNERSHIP

More shares of public companies are in the hands of institutions than in the hands of retail investors. Over the past two years, retail ownership has hovered around 30%, while the top ten institutional holders alone now own more than 30% of the equity ownership of the S&P 500.[4] Retail ownership is even lower at the largest companies – as of December 31, 2016 (the latest data publicly available), companies with market capitalizations in excess of $2 billion were less than 26% owned by retail investors.[5]



The decline in retail ownership understates the actual increase in voting power held by institutional investors. A critical difference between retail and institutional investors is their voting participation level. In 2017, only 29% of retail-held shares were voted, compared to 91% of shares held by institutions.[6] The difference in voting participation is the result of several factors. First, in many cases, institutional investors are required to vote their shares because of fiduciary duties, while there is no requirement for retail investors to vote their shares. Second, the use of notice-and-access for delivery of proxy materials

4 ProxyPulse, 2017 Proxy Season Review, 2016 Proxy Season Review and 2015 Proxy Season Wrap-up.

5 ProxyPulse, 2017 Proxy Season Preview.

6 ProxyPulse, 2017 Proxy Season Review. This relates to overall votes; not merely contested matters.

to shareholders has contributed to the declining voter participation of retail investors.[7] Third, the diminishing voting participation of retail shareholders has been amplified by the elimination of broker discretionary voting on uninstructed "street name" shares.

Lower levels of retail ownership and voting participation could potentially play a more significant role in the context of future ESG campaigns. A recent analysis of more than 3,000 annual shareholder meetings suggested that retail investors were significantly more likely than institutional investors to support the existing management team on environmental matters, executive compensation practices, and board diversity initiatives.[8] Assuring a high level of retail voting participation will be an important focus for companies that are targets of activist campaigns in these areas. This is particularly true in light of the fact that overall voting participation in contested elections is below 85% and that voting power at many companies is concentrated in the hands of only a few institutional investors. Even a small percentage increase in the voting participation of retail investors could change the outcome of a vote.

The multi-tiered system of beneficial ownership of U.S. equity securities also complicates efforts to verify the legitimacy of retail participation in proxy contests. Trian's campaign at P&G, where it took the inspector of elections 66 days to finalize the vote count after a reportedly intense period of counting proxies in the "snake pit," highlighted the shortcomings of this system. Although a number of proposals to simplify the system or facilitate a different approach to proxy tabulation, such as blockchain initiatives and universal ballots, have been floated, none of them has gained sufficient popularity or, in the case of blockchain, has sufficiently proven technological capability to change the landscape.

C. SHIFT TO INDEX INVESTING AND THE RISE OF SHAREHOLDER ENGAGEMENT

In 2017, investment dollars continued to move away from institutions with active investment philosophies toward index funds and other passive investors. The growth of passive funds has accelerated in recent years, and the percentage of fund assets held in passive strategies has nearly doubled since 2008.[9] According to Morningstar's annual net asset flows report, nearly $692 billion flowed into passive funds during 2017, while $7 billion flowed out of active funds.

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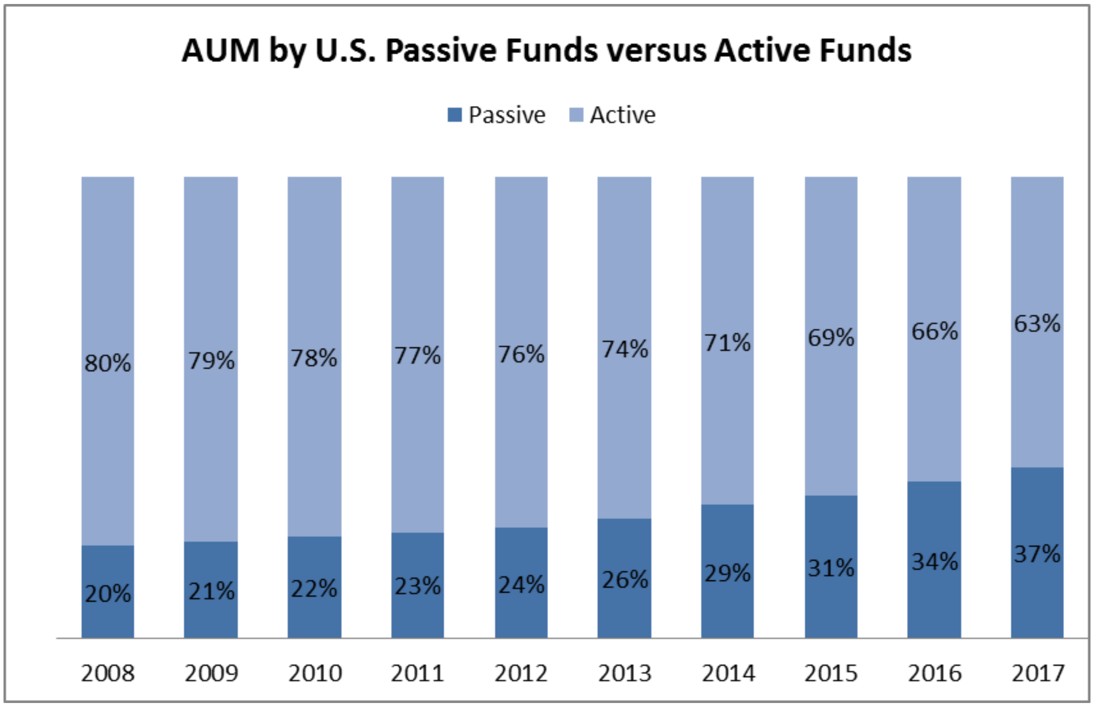
7 The concerns over reduced retail participation when notice-and-access is used are discussed in SEC Release No. 33-9108 (Feb. 22, 2010).

8 *See* Wall Street Journal, *Small Investors Support the Boards. But Few of Them Vote.* (Oct. 6, 2017).

9 Based on Morningstar net assets as of November 30, 2017. Includes U.S. domiciled funds and ETFs, excludes money market funds and funds of funds.



Historically, passive funds have faced stiff price competition, and accordingly, as a means of controlling overhead costs, passive managers have dedicated a limited amount of resources and employees towards engaging with the companies in which they invest. For example, in 2016 the Wall Street Journal noted that State Street had less than 10 employees dedicated to monitoring and deciding positions on issues at over 9,000 companies and that the manager used automated filters to identify companies and issues on which to focus these employees' attention.[10]

This landscape, however, is changing somewhat in the face of the realization by some passive managers that, in addition to competing on price, they can compete on their support for policy initiatives that resonate with their constituents. For example, the BlackRock CEO Letter stated that BlackRock will be doubling the size of its investor stewardship team over the course of the next three years, reflecting increasing focus on a model of shareholder engagement that "deepens communications between shareholders and the companies they own." BlackRock's most recent report on its engagements with issuers states that it engaged with companies on more than 1,200 separate occasions during the 12-month period ended June 30, 2017.

BlackRock is not alone in increasing its engagement with issuers. For example, in its 2017 report, Vanguard indicated that it had engaged with company directors or management more than 800 times during the 12-month period ended June 30, 2017, an increase of 67% over three years. Further, Vanguard indicated that more than 15% of these engagements were discussions regarding activism or

[10] Wall Street Journal, *Passive Funds Embrace Their New Power* (Oct. 25, 2016).

contentious transactions. It is expected that these engagement figures will continue to rise as large institutional investors expand their engagement efforts and grow the size of their engagement teams.

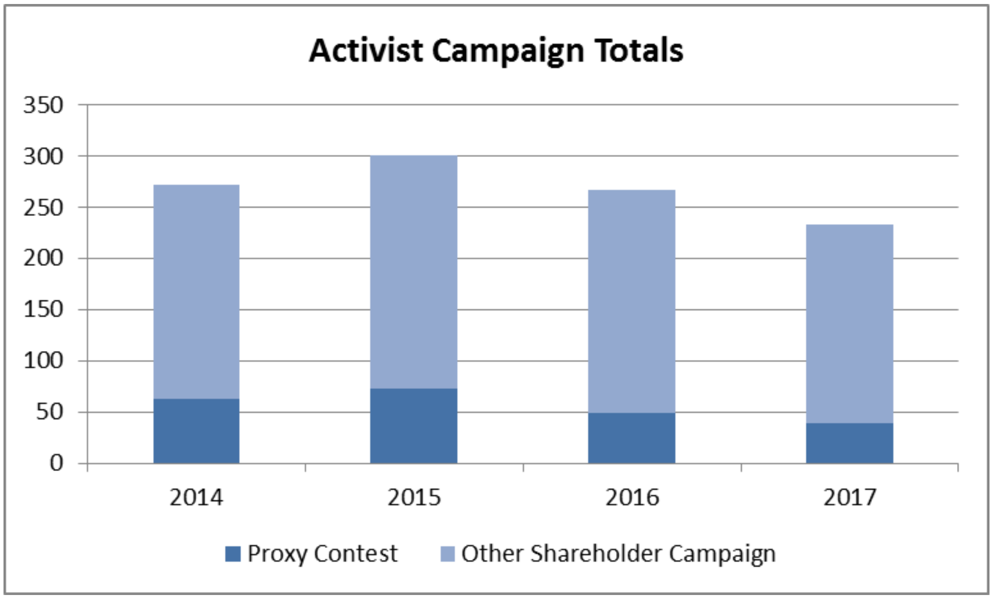
Much engagement in 2017 focused on social impact issues, such as board and employee diversity initiatives and environmental matters. In May 2017, a proposal requiring ExxonMobil to share more information about its climate-related plans and strategies passed with supporting votes from BlackRock, Vanguard and State Street. As detailed in the BlackRock CEO Letter, BlackRock intends to send letters to more than 300 companies seeking information about approach to boardroom and employee diversity. Vanguard also has indicated that its engagement efforts have deepened on climate change risks at some of the largest oil and gas companies and that it engaged in discussions with companies on labor and supply practices as well as the importance of gender diversity on boards. In August 2017, State Street announced that it will expand its asset stewardship program and will place increased efforts on its ESG initiatives.

ACTIVIST INVESTORS

A. TOTAL ACTIVIST CAMPAIGNS

2017 saw a slight decrease in the number of activist campaigns, with only 233 campaigns announced. However, as was also a trend in European markets, the year saw an increase in the number of campaigns at the largest companies, which resulted in more capital being deployed by activists year over year. The lower number of campaigns in 2017 reflects that activity is increasingly concentrated among the most frequent activists and that they, in turn, appear to be increasingly focused on campaigns at the largest companies. Based on anecdotal information, a significant number of activist situations also are being resolved without publicity (but confirmatory data on this trend is not available).

Proxy contests made up a smaller percentage of announced activist campaigns in 2017 and 2016 than has been observed in prior years, with 2017 including noticeably fewer contests than even 2016. During these two years, less than 20% of activist campaigns developed into proxy contests.



The trends across 2017 and 2016 in the overall number of campaigns and the proportion that developed into proxy contests marked a notable shift from prior years. In 2014 and 2015, activists recorded substantial increases in campaigns. In 2015, activists publicly announced a total of 300 campaigns, an increase of 10% over the 272 campaigns announced in 2014 and an increase of 36% over the 221 campaigns announced in 2013.[11] Full-scale proxy contests developed, on average, in slightly less than one quarter of all activist campaigns announced from 2013 through 2015. Importantly, this statistic does not take into account campaigns that settled prior to developing into a full proxy contest, but still resulted in board seats for the activists.

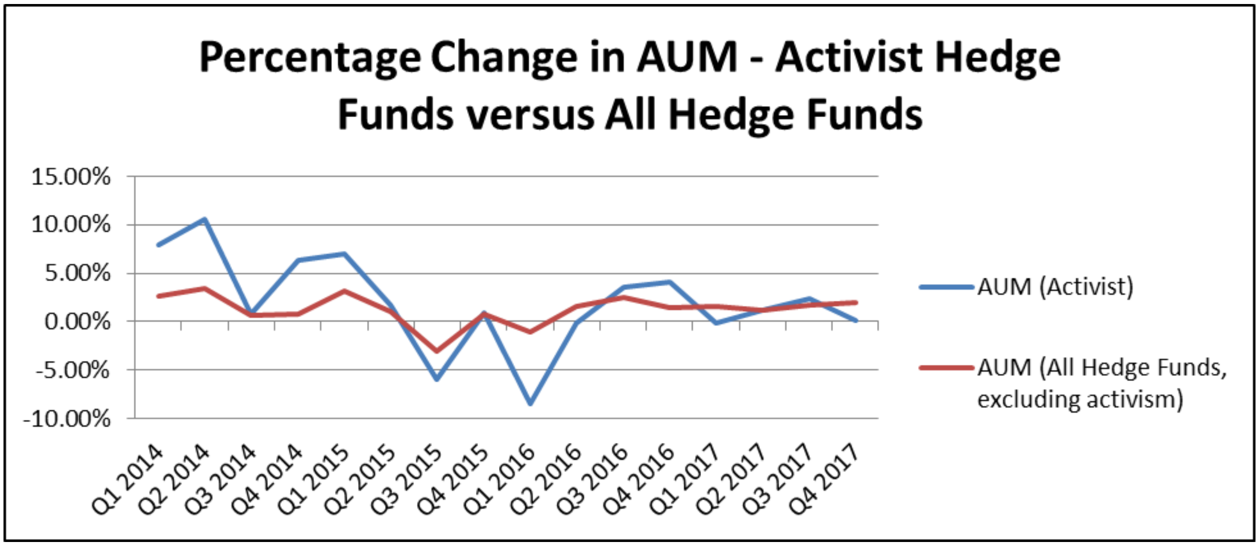
B. ASSETS UNDER MANAGEMENT BY ACTIVIST HEDGE FUNDS

In 2017, activist hedge fund AUM showed very modest increases, growing at a meaningfully lower rate than hedge funds overall. Despite continued growth since the second half of 2016, activist funds AUM remains slightly below the 2015-mid-year peak (while overall hedge fund AUM has more-or-less increased at a steady pace over this two-year period).

AUM (in billions) and Percentage Change Per Half Year										
	H1 2013	*H2 2013*	*H1 2014*	*H2 2014*	*H1 2015*	*H2 2015*	*H1 2016*	*H2 2016*	*H1 2017*	*H2 2017*
Activist Funds:										
AUM	$84	$93	$111	$119	$129	$122	$112	$121	$123	$126
% Change	29%	11%	19%	7%	9%	(5%)	(9%)	8%	1%	2%
Other Hedge Funds:										
AUM	$2,330	$2,535	$2,689	$2,725	$2,839	$2,773	$2,785	$2,897	$2,977	$3,085
% Change	7%	9%	6%	1%	4%	(2%)	0%	4%	3%	4%

11 Based on information from SharkRepellent.net for companies with market cap over $100 million. *See* "Notes on the Scope and Sources of Data Used in this Publication" on page 5.

The decline in AUM that activist hedge funds experienced from mid-2015 to mid-2016 was a reversal of a long-term trend of activist increases in AUM at a higher rate than hedge funds overall and was largely driven by poor activist hedge fund performance during the third quarter of 2015 and the first quarter of 2016. From the early 2000s until the economic downturn in 2008, AUM by activist hedge funds grew each year. After a short period of retrenchment, this growth resumed as the economy recovered. From 2013 to mid-2015, the growth rate of AUM by activist hedge funds was significantly higher than the growth rate experienced by the hedge fund industry as a whole. Activist AUM grew on average 7% per quarter over this time period, whereas all other hedge funds grew at an average rate of less than 3% per quarter.[12]



C. ACTIVIST HEDGE FUND WITHDRAWALS AND REDEMPTIONS

The modest improvement in activist AUM in 2017 (approaching the high point achieved in the first half of 2015) has been driven primarily by enhanced returns. Activist hedge funds experienced a positive net asset flow of only about $875 million in 2017, which was achieved entirely in the second half of the year. The development of positive net asset flow, however, did reverse a trend of negative net asset flows beginning in the fourth quarter of 2015. During this period, withdrawals and redemptions exceeded new investments by over $12 billion at activist hedge funds. Net outflows at activist hedge funds represented approximately 10% of average AUM during this period, whereas outflows at all other hedge funds represented just over 2% of average AUM.

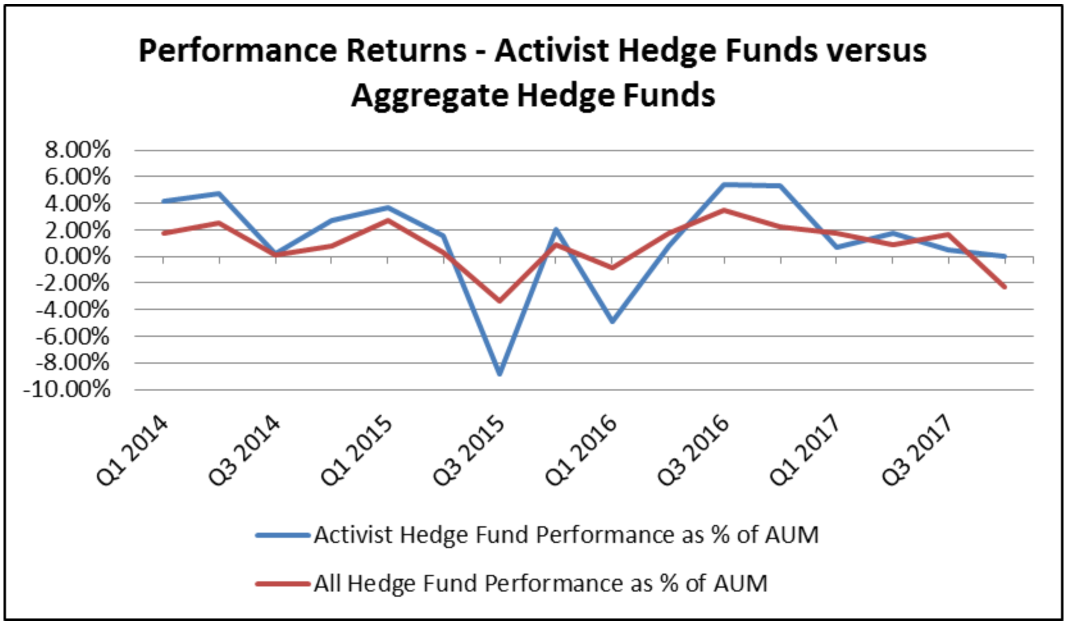
Although the outflows did reverse in the second half of 2017, it remains too early to predict whether investors view activist strategies as capital constrained. The disproportionate amount of outflows over the last two years suggest, at a minimum, that any headwinds encountered by these funds in identifying and

[12] Based on information from HFR. See "Notes on the Scope and Sources of Data Used in this Publication" on page 5.

capitalizing on activism opportunities can continue to raise significant fundraising and fund-retention challenges.

D. ACTIVIST HEDGE FUND PERFORMANCE

In 2017, the hedge fund industry as a whole earned low returns – an average of 0.48% per quarter – and activists only slightly outpaced the industry by posting average returns of 0.73% per quarter. In contrast, the Dow Jones Industrial Average return during 2017 was more than 24%.[13] If measured from mid-2016, activist hedge funds have earned superior average returns of 2.3% per quarter compared to 1.3% per quarter returns by the hedge fund industry as a whole. On the other hand, from mid-2015 to mid-2016, activist hedge funds on average experienced losses of 2.7% per quarter, whereas hedge funds as a whole experienced average losses of only 0.4% per quarter. In general, activist hedge funds have been more volatile than hedge funds in the aggregate, and this volatility has continued through recent years.

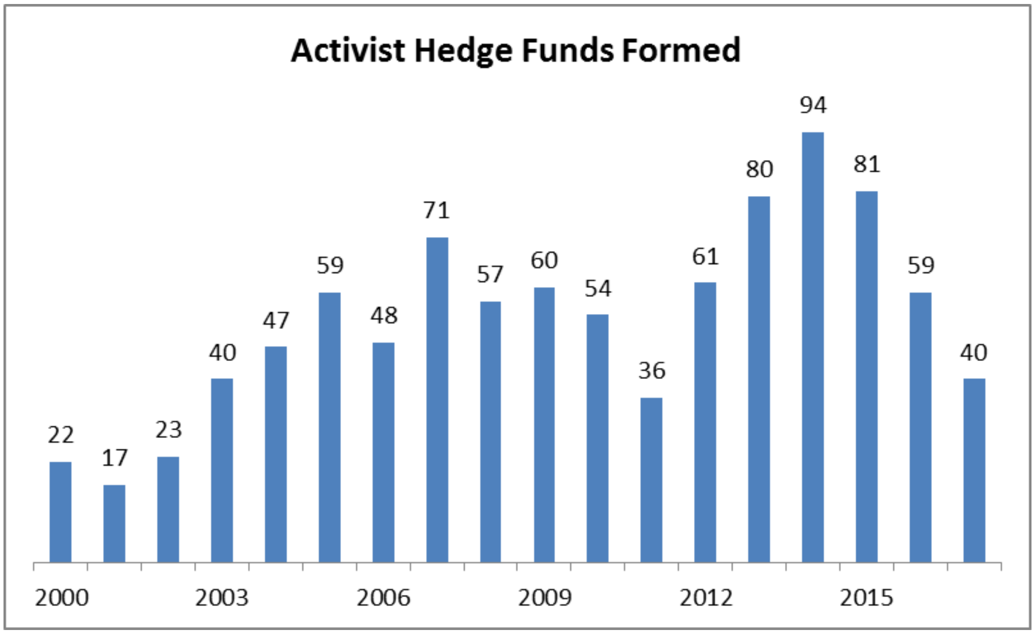


E. FORMATION OF ACTIVIST HEDGE FUNDS

The formation of activist hedge funds has been steadily declining since a peak in 2014. Excluding the effect of the financial crisis, formation numbers generally increased until 2014 and have declined by double digits in each year since.[14] This decrease reflects a shakeout in activist funds on the whole and an enhanced concentration of AUM (and activity) in brand-name activist funds.

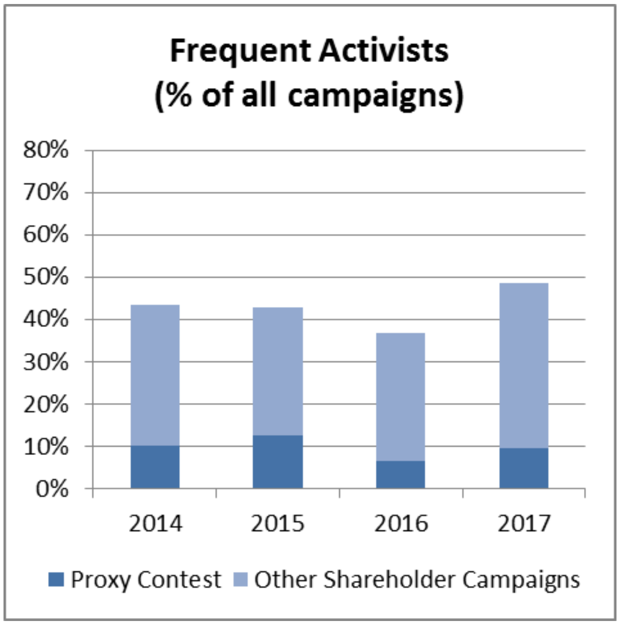
13 Seeking Alpha, *2017 Dow Jones Industrial Average Return* (Jan. 4, 2018).

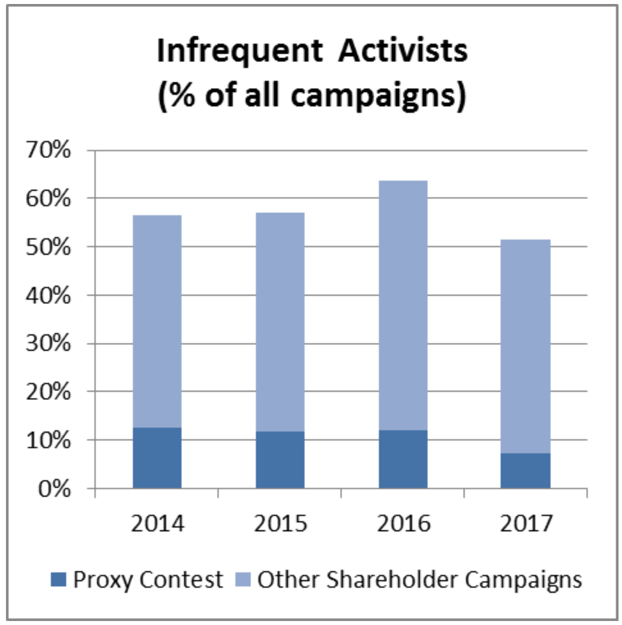
14 Based on 2018 Preqin Global Hedge Fund Report.



F. INCREASE IN ACTIVIST CAMPAIGNS BROUGHT BY FREQUENT ACTIVISTS

2017 saw a small number of activist investors dominate the activist space, making up a large portion of the total number of public activist campaigns. For purposes of this publication, we have defined frequent activists as those that have each brought more than five campaigns since the beginning of 2014. Frequent activists brought 9% of all proxy contests and 49% of all announced campaigns, marking a resurgence from 2016, in which frequent activists brought only 6% of all proxy contests and 37% of all announced campaigns, and representing activity levels more consistent with 2014 and 2015. Given that frequent activists more often target large companies, their activity levels in 2017 are consistent with the increase in large companies targeted by activists.





G. FREQUENT ACTIVIST INVESTORS

The most frequent activists in terms of announced campaigns in 2017 were Elliott Management, Saba Capital and GAMCO Asset Management. In addition to the public campaigns discussed below, these and other activists engage in "behind the scenes" campaigns that often prove successful. GAMCO and Elliott have appeared in the top-three four and three times, respectively, over the past five years, while this is Saba's first time in the top-three. During this time period, GAMCO has engaged in 41 announced campaigns, while Elliott is second with 36 announced campaigns. Starboard Value, which also has been in the top-three three times, announced three campaigns in 2017:

Announced Campaigns by Most Frequent Activists[15]	
2017	
Elliott Management Corporation	8
Saba Capital Management	8
GAMCO Asset Management, Inc.	7
2016	
Elliott Management Corporation	8
Bulldog Investors, LLC	7
Starboard Value LP	3
2015	
GAMCO Asset Management, Inc.	11
Bulldog Investors, LLC	9
Elliott Management Corporation	8
2014	
Starboard Value LP	10
GAMCO Asset Management, Inc.	9
Lone Star Value Management, LLC	8

15 Based on information from SharkRepellent.net for companies with market cap over $100 million. See "Notes on the Scope and Sources of Data Used in This Publication" on pages 4-5 of the *Introduction*.

Announced Campaigns by Most Frequent Activists[15]	
2013	
GAMCO Asset Management, Inc.	10
Starboard Value LP	10
Clinton Group, Inc.	8

H. PROMINENT ACTIVIST INVESTORS

As discussed further in the section "Target Companies by Market Capitalization" below, a large percentage of Fortune 100 companies have been the targets of activist campaigns. But, given the capital required to raise a significant stake in large-cap companies, only a small number of prominent activist investors have targeted Fortune 100 companies. Only five investors have announced more than one activist campaign against a Fortune 100 target company since 2014.

Fortune 100 Campaigns 2014–17	
Activist	**Campaigns**
Trian Fund Management, L.P.	4
Value Act Capital Management LP	3
Greenlight Capital, Inc.	3
Third Point LLC	3
Icahn Associates Corp.	2

I. MOST SUCCESSFUL ACTIVISTS BY BOARD SEATS OBTAINED

Activists have obtained board seats as a result of their efforts at a consistent rate in recent years, although the number of board seats sought and achieved has declined markedly since 2015. As summarized in the table below, activists on average have received just over one board seat for every two campaigns announced in a particular year.[16]

Board Seats Obtained by Activists					
	2013	**2014**	**2015**	**2016**	**2017**
Total Board Seats Obtained	128	169	173	96	76
Number of Total Completed Campaigns	221	272	300	243	115
Average Board Seats Per Campaign	0.57	0.62	0.57	0.40	0.66

Not surprisingly, 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. Icahn Associates is a notable exception, in that it has not been in the top three most frequent activists in any year during the period. Many board seats are also obtained through "quiet" campaigns where an activist engages with the issuer "behind the scenes."

Number of Board Seats Obtained by Most Successful Activists					
	2013	**2014**	**2015**	**2016**	**2017**
Starboard Value LP	7	24	13	5	7
Icahn Associates Corporation	5	5	9	3	0

16 Based on information from SharkRepellent.net for U.S. companies with market cap over $100 million. *See* "Notes on the Scope and Sources of Data Used in This Publication" on page 3. For purposes of this section, board seats are recorded as obtained during the year in which the activist campaign was initiated.

Number of Board Seats Obtained by Most Successful Activists					
	2013	***2014***	***2015***	***2016***	***2017***
Elliott Management Corporation	5	7	6	9	2

TARGET COMPANIES

A. TARGET COMPANIES BY MARKET CAPITALIZATION

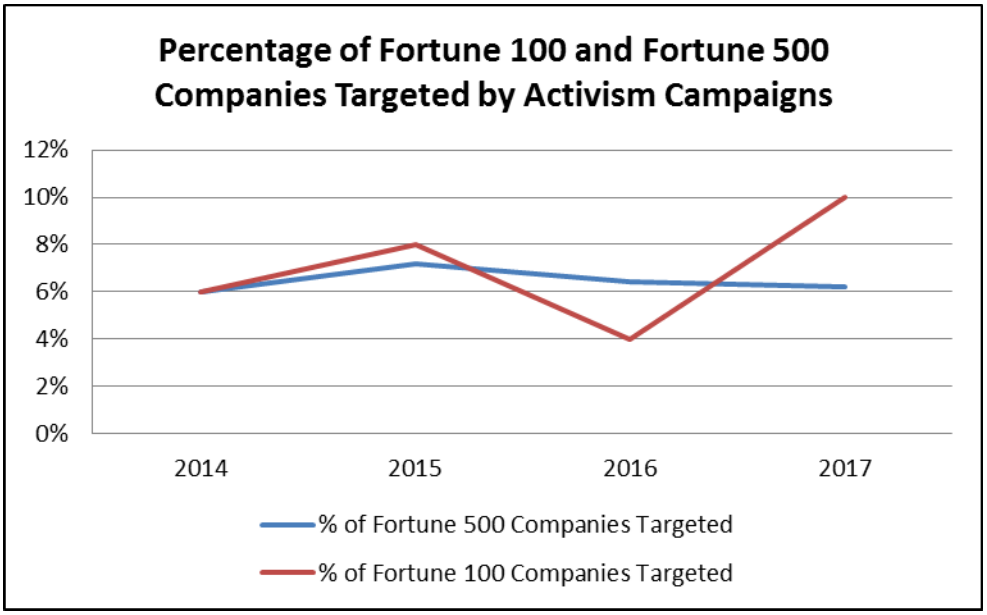
2017 saw a sharp increase in the percentage of campaigns at the largest companies, including highly public campaigns at household-name companies. It remains to be seen, however, whether 2017 signals a trend. The following sets forth the market cap of companies targeted by activist campaigns announced since the beginning of 2013, with the first row indicating the allocation of *all* U.S. public companies in each range.[17]

Target Company Market Capitalization					
	$100m–$500m	***$500m–$1b***	***$1b–$10b***	***$10b–$50b***	***>$50b***
Percentage of total companies	*26%*	*15%*	*44%*	*11%*	*3%*
2017 campaigns	42%	15%	28%	8%	6%
2016 campaigns	44%	19%	29%	6%	2%
2015 campaigns	45%	15%	29%	8%	3%
2014 campaigns	42%	14%	33%	6%	5%
2013 campaigns	38%	14%	35%	7%	3%
Five-year average	42%	15%	30%	7%	4%

Smaller companies tend to be targeted somewhat more frequently, with companies whose market cap is between $100 million and $500 million representing an average of 42% of campaigns, while representing only 26% of public companies. In contrast, companies with market caps between $1 billion and $10 billion are somewhat less likely to be targeted, as these companies represent an average of 30% of campaigns, while making up 44% of public companies.

On average, about 11% of the campaigns in each year targeted companies with market caps of greater than $10 billion, with companies of greater than $50 billion making up around 4% of total campaigns. In 2017, however, companies with market caps greater than $50 billion made up 6% of total campaigns, while representing only 3% of companies. It is not clear whether the increased targeting of larger cap companies is a trend, but at a minimum, 2017 has confirmed that the largest companies are in no way immune from activist campaigns. For the companies that are currently in the Fortune 100, 33% have been targeted by a public activism campaign since 2013 and untold others have dealt with activism situations privately. The following chart shows the percentage of Fortune 100 and Fortune 500 companies that have been targets of activist campaigns in each of the past five years.

17 As discussed further in "Notes on the Scope and Sources of Data Used in This Publication" on page 3, we have based this analysis on information from SharkRepellent.net, and limited our analysis to U.S. companies with a market capitalization of over $100 million.



B. INDUSTRIES OF TARGET COMPANIES

Activists have targeted a wide variety of industries since 2014. The most targeted industries, which have generally been consistent in each year, include investment vehicles (including investment trusts and mutual funds), pharmaceutical companies, software companies, other commercial service providers and regional/mid-sized banks.[18]

Most Targeted Industries 2014 to 2017	
Industry	***Total Campaigns***
Investment Trusts / Mutual Funds	77
Packaged Software	58
Miscellaneous Commercial Services	42
Major Pharmaceuticals	38
Regional/Mid-sized Banks	34

Particular industries that have been targeted in 2017 more than in prior years include real estate development, financial conglomerates, semiconductors, medical specialties and movies/entertainment.

TYPES AND OBJECTIVES OF ACTIVIST CAMPAIGNS

Initiating or threatening to initiate a proxy contest for representation on a company's board of directors is a common strategy used by activists to achieve their campaign objectives. A proxy contest occurs when an activist nominates one or more directors for election in opposition to a public company's slate of director nominees. Activists also conduct campaigns through other avenues and tactics, all of which we have included in the general category of "other shareholder campaigns"; this can include publicly

18 Industry classifications based on data from SharkRepellent.net. *See* "Notes on the Scope and Sources of Data Used in This Publication" on page 3.

disclosing letters to target companies, issuing press releases, proposing precatory or binding shareholder proposals, running "vote no" campaigns against incumbent directors, calling special meetings or taking actions by written consent.[19]

A. FREQUENCY OF DIFFERENT CAMPAIGN TYPES

2017 saw a moderate decrease in the number of activist campaigns, including both proxy contests and other shareholder campaigns, following a similar reduction in 2016 which was emphasized by a sharp decline in the number of proxy contests. For the prior three years, activist campaigns had been continuously growing.

Number of Campaigns Announced Per Year			
	Proxy Contests[20]	***Other Shareholder Campaigns***	***Total***
2017	39	194	233
2016	49	218	267
2015	73	227	300
2014	62	210	272
2013	65	156	221
Five-year average	58	201	259

On average, 22% of activist campaigns have taken the form of actual proxy contests. The actual percentages are lower for campaigns announced in 2016 and 2017, at 18% and 16%, respectively, which is due in part to the fact that the above numbers include only completed contests, not pending ones, and that some of the campaigns currently categorized as "Other" may yet evolve into actual proxy contests in 2018.

B. UNDERLYING OBJECTIVES OF ACTIVIST CAMPAIGNS

Although board representation remains the most common objective in activist campaigns, it is almost always sought to promote other underlying objectives. In past years, the most common underlying objectives of proxy contests related to business strategies, balance sheet actions (such as returning cash to shareholders through dividends or share repurchase, which are often related to capital allocation strategies) and divestitures or other M&A actions (such as encouraging a sale of the target company or opposing a merger). In 2017, proxy contests focused more on balance sheet issues (such as concerns about the capital structure of the company) and board-related governance issues, with business strategy issues and M&A actions less of a focus. However, much of the increase in focus on balance sheet issues in the 2017 campaigns related to a more-or-less generic concern for shareholder value rather than

19 These categories align with "Proxy Fights" and "Other Stockholder Campaigns" used by SharkRepellent.net. We have not included SharkRepellent.net's other categories of "Exempt Solicitations" and "13D Filings Without Public Activism" as activist campaigns in this publication, as they more often reflect ordinary course shareholder interaction rather than true activist situations. See "Notes on the Scope and Sources of Data Used in This Publication" on page 3 for a further discussion.

20 Throughout this section, to aid comparison of outcomes across years, we have included only proxy contests that have been completed, not those that remain pending. This results in a lower number of contests for 2017 in particular than would appear if the outcome of all pending contests was known.

specific proposals (which is perhaps a symptom of the fact that companies have become more proactive in taking concrete actions to improve shareholder value or have already made changes in response to a prior activist approach). In addition, over the past three years, an increasing number of proxy contests have included a focus on compensation-related issues.

Objectives of Proxy Contests[21]						
Issue	**2013**	**2014**	**2015**	**2016**	**2017**	**Five-year average**
Business Strategies	40%	44%	34%	21%	14%	31%
Balance Sheet	31%	35%	53%	21%	71%	44%
M&A	31%	27%	40%	21%	14%	27%
Board-Related Governance	18%	26%	26%	23%	57%	30%
Compensation	3%	5%	11%	10%	13%	8%
Other Governance	6%	19%	8%	2%	13%	10%

Over the last five years, the top three objectives of other shareholder campaigns relate to business strategies, balance sheet actions and M&A actions, with a push for divestitures and other M&A actions being the dominant objective in the past few years. 2017 as a whole was consistent with these trends, with noteworthy increases in campaigns relating to business strategies and board-related governance.

Objectives of Other Shareholder Campaigns[21]						
Issue	**2013**	**2014**	**2015**	**2016**	**2017**	**Five-year average**
Business Strategies	29%	23%	24%	24%	47%	29%
Balance Sheet	29%	26%	21%	17%	17%	22%
M&A	24%	31%	37%	34%	32%	32%
Board-Related Governance	6%	7%	11%	13%	24%	12%
Compensation	1%	4%	7%	5%	5%	4%
Other Governance	3%	0%	2%	1%	4%	2%

C. TACTICS USED BY ACTIVISTS

The most common tactics in the activists' playbook (aside from nominating a director slate) are publicity campaigns (including publicly disclosing letters to the company and issuing press releases) and, less commonly, putting forth shareholder proposals. The following sets forth how frequently each of these tactics was used in activist campaigns announced in each year.

Tactics Used in Activist Campaigns		
	Public Disclosure by Activist	**Shareholder Proposals**
2017	31%	10%
2016	41%	6%
2015	46%	6%
2014	42%	5%

[21] The percentages in these tables often add up to over 100% because single campaigns often have multiple objectives.

Tactics Used in Activist Campaigns		
	Public Disclosure by Activist	Shareholder Proposals
2013	53%	9%
Five-year average	43%	7%

The decline during 2017 of the public airing of concerns may be due to an increased focus by companies on engagement with an activist, and often even settlement with an activist, before the demands are made public. Other tactics that are used from time to time, including initiation of litigation and the calling of a special meeting, happen relatively rarely—in less than 5% of campaigns over this period.

D. STRUCTURAL AND BEHAVIORAL ACTIONS USED BY COMPANIES IN RESPONSE TO ACTIVISM

Target companies respond to activist campaigns with a variety of structural and behavioral actions, some designed to create obstacles for activists and some designed to address shareholder concerns at least nominally. Actions taken by target companies in response to campaigns include substantive business steps (such as hiring advisors to evaluate strategic alternatives, and returning cash to investors through dividends or buybacks), governance changes (including those viewed as governance enhancements by shareholders) and tactical actions (such as adoption or revision of poison pills, calling of a special meeting, adjourning or postponing meetings, initiation of litigation or changing board size).[22] The most frequently taken action during a campaign is to return cash to shareholders, though this was less common in 2017 than in recent years. More aggressive tactical steps, such as adoption of poison pills and initiation of litigation, remain relatively uncommon during a campaign.

Actions Taken by Target Companies in Response to Activism						
	2013	2014	2015	2016	2017	Five-year average
Substantive Actions						
Act to Increase Shareholder Value (e.g., buybacks or dividends)	17%	8%	21%	12%	10%	14%
Hire Advisors to Evaluate Strategic Alternatives	6%	3%	8%	7%	5%	6%
Governance Changes						
Amend Advance Notice Requirements	8%	2%	4%	3%	1%	4%
Other Charter/Bylaw Changes	9%	5%	10%	3%	7%	7%
Corporate Governance Enhancement	8%	1%	3%	4%	1%	3%
Tactical Actions						
Increase Size of Board	8%	5%	17%	10%	5%	9%
Adopt Poison Pill	6%	7%	1%	2%	2%	4%
Adjourn Meeting	4%	0%	1%	2%	1%	2%
Postpone Meeting Date	2%	1%	3%	2%	1%	2%
Amend Poison Pill	1%	0%	1%	1%	0%	1%
Decrease Size of Board	1%	2%	3%	2%	3%	2%
Call Special Meeting	1%	1%	1%	1%	0%	1%

22 The categorizations of defensive actions taken are derived from those used by SharkRepellent.net.

Actions Taken by Target Companies in Response to Activism						
	2013	2014	2015	2016	2017	Five-year average
Initiate Litigation	<.5%	<.5%	1%	0%	1%	1%

PROXY CONTESTS

As noted, initiating a proxy contest for representation on a company's board of directors is one of the primary strategies used by activists to achieve their campaign objectives. Defending against a proxy contest requires a public company to expend considerable time and resources as it undertakes to demonstrate to its shareholders that its director candidates are better positioned to lead the company. As a result, a company may choose to settle with an activist for minority board representation, and accept the risk of prolonged controversy or even disruption in the boardroom, rather than taking the risk of engaging in a public proxy contest. This section analyzes key statistics and trends regarding proxy contests, which may help inform strategies for approaching a potential proxy contest.

However, these overall statistics tell only part of the story, as the decision whether or not to settle in individual cases will depend on the particular facts and circumstances. Moreover, as other statistics provided below demonstrate, the consequences of accepting dissident directors can be profound.

A. HOW OFTEN ARE PROXY CONTESTS SETTLED?

Proxy Contests: Frequency of Votes, Settlements and Withdrawals							
	Total Number	Went to Vote	Percentage	Settled/Concessions Made	Percentage	Withdrawn	Percentage
2017	39[23]	11	28%	15	38%	7	18%
2016	49	14	26%	22	41%	12	22%
2015	73	26	36%	35	48%	12	16%
2014	62	14	23%	32	52%	16	26%
2013	65	26	40%	26	40%	13	20%

Following an 18% rise in the total number of proxy contests in 2015 as compared to 2014, both 2016 and 2017 saw a significant drop-off in the number of reported proxy contests. This decline is almost certainly not be due to lower activist interest in obtaining board representation but rather reflects a trend toward engaging in private discussions with activist investors to resolve the shareholder's concerns before a potential proxy contest is made public.

Proxy Contests Settled After the Date of the Definitive Proxy Statement				
	Proxy Contests That Went Definitive	As a Percentage of Total Proxy Contests	Proxy Contests Settled After Definitive Date	As a Percentage of Proxy Contests That Went Definitive
2017	21	54%	8	38%
2016	25	51%	7	28%
2015	36	49%	5	14%

23 The total number of proxy contests in 2017 includes campaigns which are still pending.

Proxy Contests Settled After the Date of the Definitive Proxy Statement				
	Proxy Contests That Went Definitive	*As a Percentage of Total Proxy Contests*	*Proxy Contests Settled After Definitive Date*	*As a Percentage of Proxy Contests That Went Definitive*
2014	23	37%	5	22%
2013	38	59%	9	24%

Each year since 2013, around half of the proxy contests extended beyond the date that the proxy statements for both sides go "definitive" – in other words, closer in time to the date of the shareholders' meeting at which directors are elected. Of these, issuers and activists generally settled, on average, one in four, although the settlement rate in 2017 jumped to more than one in three.

B. RESULTS OF RECENT PROXY CONTESTS

Proxy Contests – Short vs. Control Slate							
	Number of Proxy Contests With Short Slate	*Percentage of Proxy Contests With Short Slate*	*Activist Wins at Least One Board Seat (Short Slate)*	*Number of Proxy Contests With Control Slate*	*Percentage of Proxy Contests With Control Slate*	*Activist Wins at Least One Board Seat (Control Slate)*	*Activist Wins Majority of Board Seats (Control Slate)*
2017	16	41%	50%	23	59%	25%	4%
2016	13	27%	39%	36	74%	36%	8%
2015	24	33%	42%	49	67%	39%	8%
2014	18	29%	67%	44	71%	52%	14%
2013	24	37%	58%	41	63%	46%	15%

Activist investors historically have been aggressive with the level of control they seek through their proxy contests, with the percentage of proxy contests involving a control slate, or a slate for more than a majority of the board seats, ranging from 59% to 74%. This suggests that, once activists invest in formally commencing a proxy contest, many are not content to merely gain a seat at the table to influence the direction of the company but rather are seeking the ability to control the direction of the company, or at a minimum are willing to threaten a control attempt in order to gain negotiating leverage.[24] It remains to be seen, however, whether the sharp decline in the last year of these contests (as a percentage of total contests) represents a trend or an anomaly.

Over the last five years, about 45% of all proxy contests, control slates or short slates (a slate for a minority of the board seats), resulted in the activist investor obtaining one or more seats on the board. However, for each year in our study, short slate contests are more successful than control slate contests by this measure and control slate contests have become steadily less successful over this period. It is notable that 2017 represents the lowest proportion of control slate contests and control slate successes in our study.

[24] In addition, the ability of an activist to launch a campaign for a control slate may be limited by regulatory restrictions in certain industries, such as the financial services industry.

Short Slate Contests – Percentage of the Board Sought				
	Number of Short Slate Contests	Dissident nominees for < 15% of Board	Dissident nominees for 15% ≤ x < 30% of Board	Dissident nominees for 30% ≤ x ≤ 50% of Board
2017	16	19%	38%	44%
2016	13	31%	38%	31%
2015	24	8%	50%	42%
2014	18	0%	44%	56%
2013	24	21%	29%	50%

When an activist investor puts forward a short slate of directors, it is often for more than 15% of the available board seats. After the 15% threshold, which typically equates to one or two nominees, the data shows a fairly even split between the percentage of times that activist investors seek up to 30% of the board seats, which typically equates to three or four nominees, and the percentage of times they seek up to 50% of the board seats.

Proxy Contest Settlement Frequency – Short vs. Control Slate				
	Number of Short Slate Contests	Percentage of Short Slate Contests Settled/Concessions Made	Number of Control Slate Contests	Percentage of Control Slate Contests Settled/Concessions Made
2017	16	50%	23	30%
2016	13	31%	36	58%
2015	24	25%	49	60%
2014	18	44%	44	54%
2013	24	29%	41	46%

For the four years before 2017, when an activist investor put forward a short slate of directors, the issuer and activist investor ended up agreeing to settle the contest before a vote about 32% of the time on average. In 2017, the percentage that ended up settled jumped to 50%, the highest percentage in our study. In the context of control slates, for the four years before 2017, the issuer and activist investor agreed to settle the contest before a vote about 55% of the time on average. In 2017, however, that percentage dropped to 30%.

The reversal in the frequency of the pre-vote resolution of proxy contests in the short versus control slate contexts may have a number of explanations. One explanation revolves around the factors described in the introduction that combine to tip the balance in favor of activists in a short slate contest. A second is that management may be predisposed to settling in the context of a short slate contest because it is more difficult to justify the monetary and reputational cost of publicly fighting an activist that is seeking only one or two board seats. In contrast, in the control slate context, an issuer may be less likely to be able to settle with the activist on acceptable terms and may be increasingly willing to defend the company's incumbent directors and strategic direction in a public forum. Issuers' decisions in these cases have been bolstered by data showing that an issuer is more likely to prevail in a control slate contest than the activist.

Outcome of Proxy Contests That Went to a Vote			
	Won by Issuer	Won by Activist	Vote Split
2017	55%	36%	9%

Outcome of Proxy Contests That Went to a Vote			
	Won by Issuer	Won by Activist	Vote Split
2016	79%	21%	0%
2015	65%	27%	8%
2014	43%	57%	0%
2013	39%	42%	19%

Of the proxy contests that go all the way to a vote, incumbent board candidates had been increasingly successful in defeating activist investors' slates of directors up until 2017. The margin declined in 2017, but still favored incumbents. The reasons for companies' success against the activists vary from campaign to campaign.

Outcome of Proxy Contests That Went to a Vote – Short vs. Control Slate						
	Short Slate Contests			Control Slate Contests		
	Won by Issuer	Won by Activist	Vote Split	Won by Issuer	Won by Activist	Vote Split
2017	60%	20%	20%	50%	50%	0%
2016	60%	40%	0%	89%	11%	0%
2015	67%	27%	7%	64%	27%	9%
2014	33%	67%	0%	50%	50%	0%
2013	53%	33%	13%	18%	55%	27%

In the last three years, issuers' success in winning short slate contests that go to a vote has been fairly consistent at rates between 60% to 67%. In contrast, from 2013 to 2016, incumbent slates of directors had seen a fairly rapid year-over-year increase in their success rate with respect to winning control slate votes. In 2017, issuer success in control slate contests returned to the 2014 rate of 50%. One possible explanation for the 2017 rate is that activist investors have become more selective when pursuing control slate contests. Given the limited success of control slate campaigns in the past few years, activists may be less willing to expend resources for control slate campaigns, and to see those campaigns through to the finish line, unless they are confident in their chances of success.

C. HOW DO PROXY ADVISORY FIRM RECOMMENDATIONS IMPACT A PROXY CONTEST?

Although their impact may have waned somewhat in recent years, ISS and Glass Lewis continue to have a notable, if not always determinative, effect on the outcome of a proxy contest.

ISS has been inclined to recommend in favor of at least one activist director candidate in a proxy contest for minority representation on the board of directors if the activist presents a credible case that change is warranted at the company. In 2017, ISS recommended in support of issuers only 33% of the time, recommended in favor of the activist 45% of the time and spit its recommendation 9% of the time. From 2013 to 2016, in the proxy contests in which ISS issued a recommendation, ISS recommended for activist investors in about 45% of contests and for issuers in about 38% of contests. In the remaining 17% of the contests, ISS either split its support or recommended "withhold" votes. Over time, the trend has favored activists, as discussed in the introduction.

From 2013 to 2016, ISS's influence appeared to have decreased in proxy contests. In 2013, ISS recommendations matched the outcome of the vote in 77% of proxy contests. That figure dropped to 73%, 62% and 50% in the years 2014, 2015 and 2016, respectively. This decline was likely due at least in part to the internal proxy advisory functions that many of the larger investment funds have developed, as noted above, and may also be due in part to ISS's increased support for activists. Nevertheless, ISS's recommendations have remained consistent with the ultimate outcome of a proxy contest a majority of the time, and in 2017, ISS recommendations matched the outcome of the vote in 73% of the proxy contests. The reversal is likely due to ISS's continued efforts to improve its proxy voting guidelines in accordance with shareholders' needs and views, which may have narrowed the gaps between the voting practices of ISS and influential institutional shareholders.

D. WHAT OCCURS IN THE AFTERMATH OF A PROXY CONTEST?

Company Changes in the Aftermath of a Proxy Contest				
	CEO Change	***Merger or Spin-off***	***Additional Proxy Contests***	***Board of Directors Change***
2017	9%	9%	9%	55%
2016	7%	14%	7%	57%
2015	11%	14%	11%	45%
2014	44%	31%	0%	31%
2013	23%	19%	31%	29%

The conclusion of a proxy contest, regardless of the outcome, is often a precursor to a number of different types of changes for the company. In the year or so after a proxy contest, it is not uncommon to see changes to senior management or the board of directors, strategic initiatives such as mergers or spin-offs, or the continuation of activist efforts through additional future proxy contests (whether waged by the same or another activist). The table above presents how often certain changes or events occur in the aftermath of all proxy contests that go to a vote. Note that because these changes can take time, the 2016 and 2017 data should be considered in light of the fact that there may not have elapsed enough time since each proxy contest concluded for some of these changes to take place.

There have been fewer CEO changes and mergers or spin-offs from 2015 to 2017, and the likelihood of additional proxy contests remained low after 2013. However, changes to the board have increased notably since 2013 and have impacted a majority of the target companies after a proxy contest that went to a vote in 2016 and 2017. Activist funds are now holding investments longer, regularly up to five years, and focusing initially on operational turnarounds. It is possible that activists have had no choice but to adapt to a longer time frame as companies susceptible to quick fixes have largely disappeared due to preemptive actions by boards. We expect that if operational and share price targets are not achieved, the push for another solution will become more urgent and be reflected in CEO change or merger/spin-off activity at the same rates as appeared in our data for 2013 to 2015.

Interestingly, the frequency of these types of changes does not seem to depend heavily on the outcome of the contest—that is, whether management or the activist won or the vote was split. This may indicate that the issues raised during the course of the contest, including those raised by the activist and those arising in shareholder outreach discussions, can in some cases lead the board and management to conclude that responsive steps should be taken, even if the management slate wins. Moreover, activists do not simply withdraw following a contest. They often continue campaigns after a lost vote, many times successfully.

SETTLEMENT AGREEMENTS

This section analyzes the publicly filed settlement agreements that have been reached for activist campaigns announced in 2017 as compared to 2015 and 2016, including the frequency of settlements, the timing of reaching a settlement and the key provisions of settlement agreements.

A. FREQUENCY AND SPEED OF SETTLEMENT AGREEMENTS

The percentage of settlement agreements that have been filed with the SEC for 2017 campaigns to date as compared to the total number of completed activist campaigns has decreased significantly from 2016 and returned closer to 2015 levels. This decline may be because companies are more carefully considering activist demands before settling in light of prior institutional investor concerns regarding the "short-termism" of activist objectives.

	Settlement Agreements Filed with the SEC		*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***
2017	38	15%	11	27%	27	12%
2016	66	41%	15	43%	33	40%
2015	81	25%	22	28%	59	24%

The speed with which settlement agreements have been reached in 2017 is generally in line with each of the prior two years. While there is more variation in individual categories, 65% of settlement agreements were reached within three months in 2017, as compared to 63% in 2016 and 57% in 2014. For the purposes of these calculations, the time when an activist initiates a campaign is deemed as the time 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 there being any public knowledge of the campaign, and the first public announcement may come in the form of a finalized settlement agreement between the parties.

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*
2017	18%	35%	12%	35%	0%[25]
2016	23%	19%	21%	25%	12%
2015	15%	23%	19%	21%	21%

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. In addition, this year, where multiple settlement agreements were filed for the same campaign, either because there were multiple activists or because one activist launched campaigns against several affiliates, we limited our review to one settlement agreement. Therefore, for the 185 publicly filed settlement agreements for completed campaigns that were announced in 2015, 2016 and 2017, this section examines 152 of those settlement agreements.

B. NOMINATION PROVISIONS AND MINIMUM SHAREHOLDING PROVISIONS

The majority of settlement agreements relating to 2017 activist campaigns provided for the appointment of a director to the board. The remaining agreements either provided for the mere nomination of a director candidate or some other arrangement, such as the appointment of an activist as a board observer. Where settlement agreements provided for the appointment or nomination of a director candidate, the vast majority covered one or two candidates. 73% of settlement agreements covered one or two director candidates.

Directors in Settlement Agreement	*Percentage*
4+ directors	16%
3 directors	10%
2 directors	33%
1 director	40%

The appointment of one or more new directors pursuant to a settlement agreement led to a board size change in 49% of 2017 settlement agreements reviewed. The change in board size was generally an increase to make room for new nominees, but in some cases there were removals from the board in conjunction with the agreements that led to a decrease in board size.

Board Size Change	*Percentage*
Yes, by 3 members	10%
Yes, by 2 members	10%
Yes, by 1 member	29%
None	52%

[25] 2017 data for longer-term periods is likely artificially low, because the data includes only completed campaigns, and long-running campaigns announced in mid-2017 will not yet have been completed. This played out in our November 2016 analysis of settlement agreements where we reported that only 4% of 2016 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 12%. We would expect a similar increase in the 2017 numbers.

52% of 2017 settlement agreements have 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. This represents a slight decrease from the 59% of settlement agreements in 2015 and 2016 with the same provision. The minimum shareholding threshold is generally set based on the percentage owned by the activist at the execution of the settlement agreement (and can be quite low).

C. BOARD SEATS PURSUANT TO SETTLEMENT AGREEMENTS

We further analyzed data from select campaigns by certain prominent activist funds from 2010 to January 2018 that resulted in settlements granting the fund the right to appoint at least one director to the board of the target company to assess the frequency with which these activists chose to have a fund insider appointed to the board, as well as the length of time that insider remained on the board. As shown in the chart below, 58% of the appointed directors in our data set were insiders of the activist fund. Corvex, Icahn, Pershing Square, Third Point, Trian and ValueAct appointed an activist insider in 75-100% of the settlements reviewed, whereas Elliott, Jana and Land & Buildings chose an insider in 25% or less of the settlements; Starboard was almost evenly split between insiders and independents, with a slant toward independents. Of the insiders, 62% 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. Those who remained on the board for longer than the duration provided for by the settlement agreement served an average of approximately 20 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 about half of the insider appointees in our data set were still serving on their respective boards and three were still serving within the period provided for by their settlement agreements as of January 2018.

Fund	*Settlements Reviewed*	*% Insider*	*% Independent*	*% of Insider Appointees Who Remained on Board Beyond Duration of Settlement Agreement*	*Average Months Insider Appointees Are on Board Beyond Settlement*
Corvex	4	100%	0%	N/A	N/A
Elliott	14	7%	93%	7%	9
Icahn	14	86%	14%	64%	19
Jana	13	23%	77%	8%	7
Land & Buildings	4	25%	75%	25%	2
Pershing Square	6	83%	17%	17%	36
Starboard Value	13	46%	54%	N/A	N/A
Third Point	4	75%	25%	50%	21
Trian Partners	5	80%	20%	N/A	N/A
ValueAct Capital	13	100%	0%	46%	27
TOTAL	**90**	**58%**	**42%**	**62%**	**20**

D. COMMITTEE MEMBERSHIP OF NOMINEES

68% of the settlement agreements reviewed include provisions providing for committee membership of the directors appointed or nominated under the agreement. Of these agreements that provide for committee membership, most of them place the director onto a key committee. A smaller percentage of agreements place the director on the executive committee as well, if the board in question has such a 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	***Percentage***
Prohibit information sharing with activist	55%
Key committees & executive committee	13%
No committee	32%

In 2017, there was a slight increase in the number of settlement agreements that provided for the formation of a new committee. 19% of agreements reviewed for 2017 provide for the formation of a new committee. The committees to be formed differed in name and purpose, but were generally strategic committees with titles such as “Strategic Alternatives Committee” and “Cost Savings Committee.”

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 2017.

% of 2017 Agreements	***Activities Prohibited***
94%	***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.
94%	***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.

% of 2017 Agreements	Activities Prohibited
94%	***Seeking board additions or removals.*** Prohibits activists from seeking to elect or remove any directors or otherwise seeking representation on the board.
94%	***Presenting a shareholder proposal.*** Prohibits activists from making any proposal at any annual or special meeting of the shareholders.
94%	***Seeking amendments or waivers from the standstill or challenging validity of the standstill.*** Prohibits activists from 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.
90%	***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).
84%	***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.
81%	***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.
71%	***Requesting a shareholder list or books and records.***
68%	***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%	***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.

% of 2017 Agreements	Activities Prohibited
55%	***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.
55%	***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.
55%	***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.
32%	***Short selling.*** Prohibits activists from engaging in short selling of the company's securities.
29%	***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.

The frequency of activities prohibited in standstill prohibitions remained relatively stable in 2017 as compared to data collected for the previous two years, with certain exceptions. Notably, there was a 15% increase in prohibitions on short selling, from 17% to 32%. This coincided with a 15% drop in prohibitions on acquisitions of more company shares and transfer of shares to third parties. This is in line with the growing trend in activist short selling as an investment strategy, whereby an activist investor sells company stock short, often while publicly criticizing the company and its current stock price.

Additionally, in 2017 there was a 25% increase in provisions prohibiting the activist from publicly announcing an intent to breach the settlement agreement and a 17% increase in prohibiting the activist from seeking amendments or waivers from the standstill.

Settlement agreements generally include exceptions that the standstill provisions will not prohibit the activists from communicating privately with the company's directors or officers so long as such communications are not intended to, and would not reasonably be expected to, trigger any public disclosure obligations or restrict any director nominated by the activists in the exercise of his or her fiduciary duties to the company and all of its shareholders.

F. VOTING AGREEMENTS

94% of the 2017 settlement agreements reviewed include a provision requiring the activists to vote their shares in a prescribed manner within the standstill period compared to 88% of settlement agreements in the prior two years. 16% of the settlement agreements simply require the activist to vote for all the director candidates nominated by the board, and 10% of the settlement agreements require the activists to vote in accordance with all board recommendations. The remaining 68% of settlement agreements either specify proposals that the activists must vote for in addition to voting for the board slate (such as ratification of the appointment of an auditor, "say-on-pay" proposals, proposals regarding equity incentive plans, 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 ISS and/or Glass Lewis. This exception appeared in 26% of settlement agreements reviewed for 2017 compared to 22% of agreements reviewed in the prior two years. Other customary exceptions include extraordinary transactions that would influence the control of the company and amendments to the company's articles of incorporation.

Voting Provisions	*2017 Percentage*	*2015/2016 Percentage*
All board recommendations	10%	14%
Specific board recommendations or exceptions	68%	56%
The board slate only	16%	16%
No voting provision	6%	6%

G. EXPENSE REIMBURSEMENT

71% of the settlement agreements reviewed for 2017 set forth how expenses should be split between the company and the activists. In 2017, the most common practice remained for each party to pay its own expenses. Some companies agree to reimburse reasonable, documented out-of-pocket fees and expenses (including legal expenses) incurred in connection with the negotiation and execution of the settlement agreements, the nomination of directors and/or the annual meeting, capped at a certain amount. In 2017, the amounts of the caps appear to increase as 10% more settlement agreements included caps for reasonable expenses of $500,000 or more (while there was a marked decline in caps ranging between $100,000 to $500,000). Companies did not agree to reimburse expenses incurred by activists without a cap in any of the agreements we reviewed.

Expense Reimbursement	*2017 Percentage*	*2015/2016 Percentage*
Each party pays for its own expenses	45%	40%
Cap of less than $100,000	26%	24%
Cap of $100,000 to $500,000	13%	22%
Cap of $500,000 or more	16%	6%
Others (including no cap)	0%	3%

OTHER ACTIVISM DEVELOPMENTS

A. 13D / HSR ENFORCEMENT ACTIVITY

SEC rules require an acquiror of more than 5% of a public company's shares to file a Schedule 13D, disclosing the identity of the acquiror and its intent with respect to the investment, within 10 days of accumulating a 5% or greater stake. When two or more persons act as a group, their shares are aggregated for purposes of the 5% threshold. A Schedule 13G, which requires less comprehensive disclosure, may be filed instead of a Schedule 13D if the filer acquires the securities in the ordinary course and not with the purpose of exerting influence over the issuer. However, a Schedule 13D must be filed within 10 days if a Schedule 13G filer subsequently holds the securities for the purpose of exerting influence.

It is unclear whether the SEC will scrutinize the increasing frequency of institutional investor engagement with issuers and activists alike to assess whether the institutional investors continue to satisfy the "passive intent" requirement to qualify for Schedule 13G (as opposed to Schedule 13D). Certainly the SEC has shown some appetite to police Schedule 13D filings by activists in the past.

On February 14, 2017, two activist investors, Jeffrey E. Eberwein and Charles M. Gillman, were charged with failing to properly disclose material information under Schedule 13D in a series of campaigns to influence or take control of microcap companies. In its administrative action, the SEC said that Eberwein and Gillman began collaborating on activism efforts in early 2012, collaborating on three of the campaigns with mutual fund adviser Heartland Advisor. Eberwein, Gillman and Heartland consented to the issuance of an administrative cease-and-desist order, in final settlement of the SEC's investigation into their alleged disclosure violations. Without admitting or denying the SEC's findings, Eberwein and Gillman agreed to pay civil penalties of $90,000 and $30,000, respectively, and Heartland agreed to pay $180,000. This recent enforcement activity suggests that the SEC may in the future be more actively engaged in monitoring the filings of investors or groups of investors with control or activist intent who fail to properly file a Schedule 13D, particularly where control or activist intent is very apparent, as in this enforcement example.

Relatedly, the DOJ has also shown an appetite for enforcing the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) against activist investors. Subject to certain exemptions which are usually not applicable to activists, the HSR Act also requires investors to make certain filings and subjects investors to a waiting period if their investment in a company exceeds $84.4 million, unless they are passive investors in which case they can accumulate a stake as high as 10% prior to having to make an HSR filing. The FTC and the DOJ have previously brought charges against activists, specifically Third Point and ValueAct Capital, who were not passive investors and did not comply with the HSR Act requirements, and these charges have resulted in significant settlements. Unlike the Schedule 13D rules, however, under the HSR Act, investors who initially take the position that their investment is passive do not have to file an HSR filing upon changing to an active intent unless they accumulate additional shares.

B. POISON PILLS – "ACTING IN CONCERT"

Although not commonly deployed in response to activists, the adoption of a poison pill is one of the strongest defenses to a share accumulation. Poison pills provide that if a shareholder exceeds a stated ownership (or "trigger") threshold (often 10% or 25%), then all the company's other shareholders (but not the 10%/25% acquirer) may have the right to buy more shares at a steep discount. Poison pills deter unsolicited share accumulations because no shareholder is likely to risk triggering the poison pill and being significantly diluted. ISS and Glass Lewis have adopted policies recommending withhold vote campaigns against companies that adopt long-term, non-shareholder-approved poison pills, so most companies now keep a poison pill "on the shelf" and ready to implement on short notice if a hostile acquiror or activist is quickly accumulating a position in a company's stock. In certain circumstances, ISS and Glass Lewis have shown hostility towards short-term, non-shareholder-approved poison pills as well, even though their policies do not nominally suggest such hostility. Additionally, obtaining shareholder approval of poison pills is often difficult.

Traditionally, poison pills have aggregated the stock of all shareholders that have an "agreement, arrangement or understanding" for the purpose of holding, voting, acquiring or disposing of stock in determining whether the trigger threshold had been met. Some more recent poison pills have gone a step further than the traditional approach and regulated shareholders "acting in concert." These "acting in concert" provisions seek to prevent shareholders (particularly activist hedge funds) from cooperating with or acting in parallel to each other in ways that do not rise to the level of an "agreement, arrangement or understanding," but still allow the shareholders to act in a large block to force a course of action on a company.

In November 2017, "acting in concert" provisions were put into the spotlight by Carl Icahn, who sharply criticized SandRidge Energy after the company adopted a poison pill with an "acting in concert" provision amid strong opposition to SandRidge's bid to acquire Bonanza Creek Energy from Icahn and another major shareholder. In a public letter to the SandRidge board on November 30, 2017, Icahn called the poison pill "a complete travesty and … a new low in corporate governance." Icahn argued that the "acting in concert" provision is "patently absurd and we believe unenforceable because it is a transparent attempt to preclude large shareholders from communicating with one another and exercising their rights as shareholders." On December 8, 2017, SandRidge issued a response letter to Icahn defending its poison pill as "straightforward and unremarkable" and confirming that Icahn would not trigger the pill merely by discussing his opposition to the proposed transaction with other shareholders, among other actions.

C. ENFORCEMENT OF ORAL SETTLEMENT AGREEMENTS

The Court of Chancery of Delaware recently issued a decision that specifically enforced an oral settlement agreement between a public company and an insurgent activist investor. In February 2017, Sarissa Capital Domestic Fund LP launched a proxy contest to elect three director nominees to the board of Innoviva, Inc. at its annual shareholder meeting in April 2017. After ISS, Glass Lewis and Egan-Jones each recommended a vote in favor of Sarissa's slate, Innoviva's board attempted to negotiate a settlement with Sarissa. At first, the parties discussed increasing the board size from seven to nine and appointing two Sarissa nominees to the board, but they could not reach a deal because Sarissa refused to sign a standstill. Later, when Innoviva's board learned that one of its major institutional shareholders had decided to vote in favor of Sarissa, the board agreed to settle with Sarissa without receiving a standstill. Sarissa promptly accepted the board's offer over the phone, and both parties confirmed that they "had a deal." While a written definitive settlement agreement was being prepared, the Innoviva board learned that another major institutional shareholder had voted in favor of the board's slate of nominees, which secured the board nominees' election, and determined not to proceed with the settlement agreement. Sarissa filed suit in Delaware to specifically enforce the terms of the oral agreement, including expanding the board, appointing two Sarissa nominees to the board and not requiring a standstill from Sarissa, and the court found that the parties had reached an agreement and it enforced the oral settlement.

This case suggests that companies should be cautious about inadvertently entering into a binding agreement in settlement negotiations. To avoid this predicament, a company should make it very clear from the outset that no agreement will be deemed to have been made unless both parties have executed a definitive written agreement and should reiterate this point at key stages of the negotiation to dispel any ambiguity.

D. PROXY ACCESS AND SPECIAL MEETING / WRITTEN CONSENT PROPOSALS

In last year's Memorandum, we noted that proxy access bylaws have become mainstream at the largest U.S. companies and that they are generally favored by shareholders at any company where they are the subject of a proposal. Despite widespread adoption of proxy access bylaws and significant convergence as to key terms, the use of proxy access nominations has been limited to only one failed attempt. GAMCO Asset Management's 2016 proxy access nomination at National Fuel Gas Co, which was ultimately rejected by the company on the basis that the nomination was inappropriate due to GAMCO's control intent, remains the only attempt to use proxy access to date. Despite this almost non-existent use, there continues to be a larger number of proxy access proposals, including recent proposals arising in the context of small market cap companies. It is unclear whether activists will use proxy access bylaw provisions as a strategic tool to accomplish their objectives in future proxy seasons.

Additionally, there has been some increase in the number of shareholder proposals relating to special meetings and increased success of proposals for a shareholder right to act by written consent, although the data set is too small to suggest a trend. Nineteen proposals were called to reduce the ownership threshold necessary to call a special meeting. Although an increase of four over the related number of proposals introduced during the 2016 proxy season, only one of these proposals passed. In both 2017 and 2016, there were four proposals which requested a new right to call special meetings, three and two of which passed in 2017 and 2016, respectively. There was also a small uptick in the success of shareholder proposals requesting companies grant shareholders the right to act by written consent. Three out of fourteen (21%) of these proposals passed in 2017, representing a marginally higher pass rate than in previous proxy seasons.

E. EUROPEAN ACTIVISM

We discuss several trends that are also consistent with the activism environment in Europe. Shareholder activism levels in Europe remained high during 2017, with over 130 campaigns launched targeting European companies. While campaigns were observed throughout the European Union, they were largely concentrated in the United Kingdom and Germany.[26] This level of activist activity represents a significant increase over the activity of the past several years combined, with Europe accounting for a much larger percent of activity worldwide. Large companies were consistently the targets of European activism, consistent with the activism trends observed in the U.S—nearly 20% of such activist campaigns occurred at target companies with market capitalizations of $10 billion or more.

Much of this activity is the product of activist funds with a large presence in the United States increasing their activity in Europe. Corvex, for example, revealed a $400 million position in Danone and Third Point disclosed a record $3.5 billion position in Nestlé. This trend is the result of several factors, including increased competition among the most prominent U.S. activist funds for domestic targets.

Although the influx of U.S. activist funds in the European market has increased the tolerance for the more aggressive tactics typically utilized by U.S. activists, shareholder activism in Europe still tends to be less adversarial and more cooperative than in the U.S. Activists may approach boards and management directly and engage in private negotiations rather than launching a public campaign. For example, the Swiss firm Teleios Capital Partners has participated in discussions for change with dozens of companies since its founding in 2014 but has only made its demands public in three instances.[27]

[26] Activist Insight – The Activist Investing Annual Review – 2018.

[27] The Economist, *Investor activism is surging in continental Europe* (August 24, 2017).

European activism trends may also be impacted in the future by the European Parliament's recent adoption of a revised Shareholder Rights Directive. This revised Directive is intended to promote long-term shareholder engagement in the European Union and may lead to a more favorable regulatory environment for activism. Among other items, the directive will increase European companies' ability to obtain details about their shareholders from intermediaries and will require institutional and asset managers to develop and articulate their policies on shareholder engagement more clearly. Member states must implement the directive by mid-2019.

STEPS COMPANIES SHOULD TAKE BEFORE AN ACTIVIST EMERGES

Developing practices in shareholder engagement, in particular the greater communication between issuers and institutional investors, has led to an environment that has helped issuers anticipate and, in some cases head off, activist challenges. However, well-known activists have developed relationships with the most significant institutional investors that are likely to be at least as deep as those of any issuer. If shareholder engagement outside of activist challenge lapses into a routine exercise, it will provide a significant opportunity for activists to capitalize on their relationships. It is our experience that issuers routinely overestimate the strength of their relationships with the most significant institutional investors in advance of an activist challenge.

There is no "one size fits all" approach to activism. Every company's situation is different, and every activist is different. Small differences in circumstances can lead to substantial differences in available options and possible outcomes. Considerations may include, among others, the identity of shareholders, the timing, content and tone of recent engagements with shareholders, total shareholder return (both in absolute terms and relative to peers), the identity and track record of the activist, the nature of the activist platform, size of equity capitalization, the media profile of the company and activist, the overall governance profile of the company, and of most importance, the unity (or lack thereof) of the board. The governance profile includes not only structural defenses but also director tenure and diversity (which are becoming more significant institutional investor considerations), director expertise and compensation structures (even though these items, individually or in the aggregate, do not necessarily translate into support for the activist).

Study possible arguments and be prepared to respond. It is essential that issuer management, boards and advisors thoughtfully consider possible areas of vulnerability before being approached by an activist. These potential vulnerabilities and arguments in favor of change should be a component of ongoing discussion with institutional investors. Issuers should evaluate whether any actions that might be advocated should be implemented and, if not, develop a clear explanation for why doing so is not advisable. This process should be rigorous and fact-based and should seek to anticipate activist and investor counterarguments to the company's position. The company should also consider proactively informing investors about its analysis of options to create value, including previewing for investors why some superficially appealing actions are not advisable.

Materials (talking points, communications to shareholders, other investor or analyst presentations, etc.) should be prepared in advance of any approach and explain in clear language why pre-identified activist ideas are not advisable. Although the amount of effort devoted to preparation of materials may vary from issuer to issuer, once an activist gains traction with shareholders, it can be difficult to turn things around. Accordingly, preemption, and, if preemption is not possible, speed of response, is essential. Nonetheless, materials prepared in advance should be used as a starting point only – prepared responses, if not tailed to the particular situation, may be seen as "canned" and unresponsive.

Prepare the board of directors. Management and advisors should keep the board apprised on possible activist approaches, intended company responses, views of significant investors, issues that could be created by aggressive tactics by activist investors to gain seats on the board, and current trends in activism generally and tactics in particular. A high level of board cohesion will be essential if an activist emerges, and the response mechanics should be established in advance. Companies should also consider reviewing board policies to confirm that they suitably emphasize to directors their obligation to keep board discussions and other nonpublic information confidential, which will be important not only during an activist campaign, but also if one or more activist designees join the board.

Understand the consequences of the governance emphasis by institutional investors. Index funds have coalesced around a focus on the quality of governance as described by a prescribed set of arrangements and procedures as one way to create an environment that maximizes the overall value of public equities. The good news is that adherence may give public companies some advantage in obtaining the support of these investors. The bad news is that procuring this support can require significant adherence to a sort of "check the box" litany of governance initiatives, not all of which are appropriate or advisable for every company.

The asymmetry of access by issuers and activists to institutional investors will be difficult for issuers to overcome in any case. This hurdle will be heightened if an issuer is viewed as evidencing a disregard for investor governance initiatives. It remains to be seen, however, how much, in an activist challenge context, institutional investors will actually reward issuers that adopt these initiatives.

Regularly review corporate bylaws. Corporate bylaws can establish equitable rules for the sorts of corporate actions sometimes initiated by activists, including calling special meetings of shareholders, acting by written consent and nominating candidates for director. Market practices are continuously developing, including, for example, the addition of new director qualifications, exclusive forum bylaws, and details of advance notice and proxy access provisions. Companies should regularly review their bylaw provisions to ensure that they are consistent with current developments, but being mindful that bylaws should not be excessive in a manner that will draw criticism from activists or institutional investors.

This is particularly the case with respect to advance notice bylaw provisions. Following the rejection of activist director nominees by companies such as Xerox and HomeStreet (whom we are advising in a regulatory capacity) based on technicalities in their advance notice provisions, activists may start challenging companies' onerous advance notice provisions. On occasion, particular proxy contests highlight practical issues with bylaw provisions that can lead to drafting improvements.

FUTURE AREAS OF STUDY

As noted above, there are several steps that a company may take to prepare for an activist campaign. For many issuers, preparing for an activist campaign has become a routine corporate crisis preparedness exercise and often includes retaining an outside party to engage in mock "table top" exercises to analyze operational vulnerabilities and capital allocation strategies, board review of associated output in conjunction with annual strategic planning retreats, engaging experts to improve shareholder engagement processes, reviewing ESG characteristics, and working with financial advisors, law firms, proxy solicitors and public relations firms to prepare response playbooks.

However, even well-prepared issuers with a well-performing stock, a well-defined long-term strategy, good governance and strong shareholder engagement practices may find themselves confronting an activist and then seating the activist director designees, whether due to a loss at the polls or a settlement agreement. As described in the *Introduction*, there are multiple factors combining to tip the balance in favor of activists once they take a position, including the concentration of ownership among passive funds, the application of increasingly uniform governance metrics and ISS's approach to voting recommendations in activism situations. Moreover, for most issuers, once an activist emerges, there are very few structural defenses that are effective to fend off the attack.

In our experience, even issuers with well-formulated preparedness plans may not be fully prepared to have an activist join their board. Below, we discuss considerations for a company if an activist nominee is seated on the board. As noted above, this year's study confirmed our anecdotal experience that activists remain on boards for extended periods, emphasizing the importance of issuers being prepared to manage their interactions with the activist over a period of years. Going forward, we will continue to incorporate to the extent possible data about what happens after the initial activity stimulated by an activist campaign. We expect that our anecdotal experience regarding increased management turn-over following seating an activist director also will be confirmed.

ISSUES COMPANIES SHOULD CONSIDER IF AN ACTIVIST DESIGNEE JOINS THEIR BOARD

Given that adding an activist nominee to the board is a common means of settling a campaign, and is a necessary step following a loss in a proxy contest, boards should give thought to developing guidelines for working as effectively as possible with an activist director. Below is a checklist of considerations companies should anticipate to ensure integration of an activist designee onto the board, including:

- Understanding what rights and restrictions will apply to the activist designee's and the activist fund's ability to access and use financial and other information of the issuer, such as developing a policy that any information provided to the activist designee also must be made available to all other directors
- Understanding how to apply existing compliance policies (e.g., insider trading) and corporate governance policies (e.g., code of conduct and related-party transactions) to an activist insider
- Considering whether to permit an activist insider to transfer director compensation to the activist fund
- Understanding the activist fund's and activist designee's SEC filing obligations (e.g., Section 16 filings)
- Considering the effect of the presence of an activist designee on shareholder engagement activities
- Understanding the applicability of Rule 144 sell-down restrictions to the activist fund's investment
- Evaluating to what extent retention arrangements or alternative compensation arrangements may be necessary for key members of the executive management team
- Continuing pre-emergence preparedness exercises in view of the risk that an additional activist may emerge or that the existing activist investor will engage in additional activist activities despite having been designated a director
- Ensuring that interactions between the activist designee, the incumbent directors and the senior management team remain cordial and constructive

The 2017 activism landscape, which has been highlighted by several high-profile campaigns, increased engagement by the most prominent institutional investors, and the continued success of activist nominees gaining seats on company boards suggests that activism will continue to be an important consideration for companies in 2018. Many additional topics of activist and institutional investor focus, such as ESG and governance-related shareholder proposals, will be revisited in our 2018 Proxy Season Review.

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ABOUT SULLIVAN & CROMWELL LLP

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